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**(These views are not necessarily those of the
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“Analogue Regulation in the Digital Age?”

Analogue regulation in a digital world?

A Digital or Analogue response?

The response to this question will not follow a digital-binary logic of true/false and good/bad. An analogue approach is more helpful because of the range of legal, sociological and economic issues involved.

The central premise is that changes being brought about by digitalisation are progressions along a technological continuum, and can therefore be framed in the mode of continuity rather than change, per se.

If we proceed without considering this perspective our findings will be deficient because of a conceptual vacuum. The further consequence would be policy vacuums.

If we view digitalization as technological continuity, it becomes easier to see the similarities between some of the issues which framed analogue regulation and some of those which are emerging in the digital space. Retentions and

confluences are evident when we examine areas such as freedom of speech, the social impact and importance of media, the public interest in access to and free flow of information, and choice of regulatory approaches.

Protection of Freedom of Speech and new digital rights

The Internet is a public space, not simply in the sense of being "used by the public" but more significantly as the central and indispensable node for continuing social and cultural transformation of communities, at the national and global levels. So, although its networks are privately owned there is a public interest in their operation free of bottlenecks, unjustifiable discrimination and with unfettered access. These objectives do not necessarily coincide, or at all times, with private commercial imperatives.

There is a compelling reason for us look again at freedom of speech, probably through a different prism. This is because digitalization is not just about an exponential leap in dispersion of power to ordinary people but also the concentration of tremendous power in the hands of those who control

the organizing, sorting, filtering, and facilitation of access to portals of information, power which far surpasses that of analogue media. On this singular basis rests a justification for continued regulatory mediation of old and newer tensions between private ownership rights, on the one hand and the public interest, on the other.

There is a clear and present danger were there to be unfettered consolidation of control over access and content across networks and platforms. One concern is the cultivation of "walled gardens" whereby content providers who also have control over access treat the distribution of their content more favourably than others. The ACLU puts it in these terms: "this is like the phone company being allowed to own restaurants and then provide good service and clear signals to customers who call Dominos and frequent busy signals, disconnections and static for those calling Pizza Hut".

It follows, that tensions around ownership and control will arise and these must be mediated through pragmatic regulations which balance the imperative of economies of scope and scale(the

usual rationale for consolidation) and the free and viral flow of information over networks.

A better and likely different legal framework is required, designed to ensure that the technological infrastructure is one which protects the system of free expression whilst securing widespread democratic participation. Such a design must therefore be predicated on an expansion of analogue-type values such as broad popular participation, equality of access to information and communications technology; and newer values such as interactivity, interoperability and the facilitation of ordinary people in their practical ability to "route around, glom on, and transform" (Balkin).

At the level of the regulatory superstructure we may need a new and/or different framework for the protection of rights. In the old world, the citizen could rely on the UN Declaration of Human Rights (1948) as a certain basis on which to demand that rights to freedom of liberty, expression and conscience be upheld. However, those rights were never contemplated for the "virtual person", a phenomenon made possible by the Internet. The

central question is whether the "digital" "e-citizen" can insist on those rights across "new electronic borders" and via legal and regulatory systems that were intended for localised solutions.

What is the 'nature' of the e-citizen, his e-rights and the jurisdiction to which e-government and e-regulation will be applied? Is it important that electronic persona be protected across the reach of digital media and for the e-citizen to have a fundamental right to control his "electronic persona"?

There are yet no certain answers to these questions. So, therefore, great care must be taken to engage on the issues before plunging further into the 'digital technological abyss' on a faulty assumption that the 'analogue' bases for regulation have all been eroded.

Traditional Mass Media remain important, if not dominant

The mass media remain significant and durable in the digital age, despite expectations by some pundits that they would have been displaced by the the Internet. This is due primarily to the following factors:

- they provide a counter-balance to the digital effect of dispersion and fragmented audiences by providing a focal point for audience attention. This is why many people continue to pay more attention to the relatively small number of traditional mass media speakers than they do to almost any of the large number of speakers on the Internet who dilute audience share and fragments audience attention for any single website;
- they remain a dominant source for entertainment and will continue to do so for as long as there are economies of scale in production costs, which outweigh the entertainment value and quality of content that most individuals can produce;

- although digital technologies create a new elitism of the commons, traditional mass media continue to play an integral role in agenda setting because they still provide the lion's share of news and information to most people, thereby influencing the information flowing over the Internet; and
- much of the information generated by the Internet commons, including citizen journalism, is opinionated, with no requirement for standards such as source verification, balance, objectivity and fair-play. These values continue to be of relevance to a democratic society. (Balkin)

The Internet has therefore been aptly described as " an additional layer of communication that rests atop the mass media, draws from it, and in turn influences it" (Balkin). For as long as this remains the case, traditional mass media will be important gatekeepers of content and quality, albeit not the only ones.

This raises two questions for consideration. Can analogue-type regulation of mass media continue to be justified on the principle that regulatory

controls should be proportionate to the pervasiveness and impact of the service? If not, can the Internet adequately compensate for any loss in media diversity that might come from de-regulation?

Converged Services = Converged regulation?

One of OFCOM's success factors, according to Tim Souter, is that "...[we] have one single main building, with all our headquarters and quite a lot of operations people all in one place." This might be an effective model for a particular jurisdiction or for a time. Another view is that we need a regulatory structure, probably layered and holonic, which is virtual (in the sense of being highly automated) and viral - and therefore conducive to the networked, virtual and digital world. This "digital-age" approach would be modelled very differently from a silo co-operative type regulator, and more akin to an amoebic organisation (small, lithe, agile, highly networked, dispersed, decentralised and improvisational).

The fact is regulatory activities need not be carried out by a single institution to be effective

or efficient. They could flow across digital platforms in the manner of information packets, originating from different sources (the two most distinct being content and infrastructure regulators) but in a converged manner through the use of common protocols or regulatory values such as those which govern all Internet related innovations.

Institutional convergence does not therefore flow necessarily from converged services, although it can be convenient to make that claim.

Convergence = Self Regulation?

A market-based argument which predates the Internet is that people who own media should be unregulated, as that would be the ultimate measure of freedom of expression. Digitisation, it is argued, strengthens that position particularly as the Internet and spectrum compression have brought an end to scarcity in channels of communication and people do not need to access mass media in order to speak - thereby eliminating one of government's greatest justifications for communications regulation. Moreover, it is argued, if there is to be any regulation, assuming it is possible to do so in the

borderless digital jurisdiction, it should be self-regulation.

It has already been demonstrated that there are old and new values which justify regulation. The pertinent question is whether self-regulation is the inevitable or only desirable mode.

Industry self-regulation, by logic, is more akin to self interest than public interest. Otherwise, the self-regulatory system would need to safeguard against information asymmetry which favours industry and be predicated on a high level of public awareness, which currently does not exist.

There is also reason to doubt that self regulation could be an appropriate mechanism for protecting vulnerable persons in matters such as trade in private information which is a highly valued commodity in the extremely competitive marketplace for consumer merchandising and services.

Another concern is that self-regulation could stymie innovation if existing players were to collude against the emergence of competitive and destructive innovation from outside the established network.

None of this is to say that state regulation is not fraught with dangers, particularly the risk of overreach, in which case a co-regulatory arrangement might be most effective.

The Nascent and possible face of future regulation

1. A different type of regulator will emerge - One which understands technology no less than the drivers of technological innovation and therefore capable of designing regulatory solutions that promote technological innovation and the value of free expression.
2. The perimeter of communications sector surveillance will be expanded to a wider range of markets and activities, with differentiated regulatory approaches that are determined by the level of systemic risk.
3. Progress will be needed in tackling political and legal impediments to the regulation and resolution of cross-border operations, including the development of harmonized access and privacy protocols that are nimble,

flexible, and responsive to national issues, but within a global frame.

4. The "Analogue Regulator" will give way to the "Digital Facilitator" with responsibility for:

- facilitating new business models, solutions and innovations;
- ensuring public access to high capacity networks (including Broadband);
- managing the discontinuation of analogue outputs and transition to digital.
- ensuring the availability of free-to-access (FTA) services providing high-value content, particularly HD content, as an alternative to pay for access digital services;
- licensing new services, as differentiation becomes the currency for commercial viability in the digital world of "many".
Differentiation will be based on service levels and quality guarantees, which might have greater value if backed up by an independent regulator; and

- conducting research and calibrating regulations proportional to systemic risks.

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