IS ACCESS TO CONTENT REALLY THE NEW BOTTLENECK?

OR SHOULD WE BE CONTENT ABOUT CONTENT?

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Exclusive rights to premium content, and other content-related factors, are identified in the Convergence Review Report as potentially powerful impediments to competition in the rapidly converging telecommunications and media sectors. Substantial revisions to existing regulatory arrangements are recommended in the Report to address this threat. However, it is not apparent that these concerns are justified, or that the dramatic institutional changes proposed are warranted.

Rather, a number of convergence-related developments in premium content demand, availability, and distribution suggest that any market power bestowed by exclusive access rights in the past may be eroding. This paper highlights these developments. It is concluded that, that taken together, they do indeed have the scope to weaken the threat to competition seen in exclusive content rights. Caution is counselled in proclaiming the prospect of emerging content-related threats to competition, and instituting changes to the regulation of communications competition in Australia, until market evidence is examined more closely.

INTRODUCTION

The Convergence Review Report advises that the prospect of significant content-related competition issues in the emerging converged environment warrants revised regulatory arrangements. It is reasoned that, as market developments are occurring rapidly, a regulatory framework is required that would allow a rapid response if competition problems emerged. It is recommended that, in conjunction with the Australian Competition and Consumer Commission (ACCC), such competition issues be addressed by the proposed new communications regulator—which notably would have rule-making powers.

Exclusive rights to premium content—live sport and blockbuster movies—head the list of competition issues discussed in the Report. The authors are not alone in this regard. Similar views have been expressed by the chairman of the ACCC, most recently in the context of the Foxtel-Austar merger where Mr Sims signalled ongoing ACCC disquiet about exclusive broadcasting rights for live sport.

The Foxtel undertakings limit the number of major movie studios and distributors with whom Foxtel can hold exclusive access rights, allowing entrant pay TV and content-on-demand operators access to this type of content. Notwithstanding its ongoing concerns about exclusive sports rights, the ACCC did not demand this issue be addressed in the undertakings on the basis that the competition implications of exclusive rights to sports content would not be impacted by the proposed merger. Interestingly, the ACCC indicated that access to some Hollywood movies, and other non-premium-sport material, would in its view be sufficient for new entrants to establish a customer base (Masters 2012: 7).

In the same vein, Ofcom and the Competition Commission in the United Kingdom have been active in pursuing competition concerns relating to exclusive audio-visual rights to Hollywood movies and live broadcasts of high profile sport.

While it is obvious that things are changing fast in the audio-visual content area, it is not apparent there will be significant restrictions to competition from exclusive content rights. Rather, a number of convergence-driven developments in premium content demand, availability, and distribution give rise to the prospect that any market power bestowed by exclusive access rights in the past may be eroded in the near future—if this has not already happened. This suggests the Convergence Review recommendation that the new communications regulator include content-related competition issues in its mandate may be premature and unduly bold, given the financial and broader efficiency costs that would ensue from this major change.

In this paper, recent developments in audio-visual content supply, demand, and distribution that have the potential to strengthen competition in the market for premium audio-visual content are considered. The aim is to shed some fact-based light on the thesis that convergence, and the associated market responses, are in fact resulting in a lessening of any anti-competitive potency of exclusive rights to premium content.

As such, the paper focusses on one side of the ledger only. It does not address developments that may suggest a contrary view, such as the mooted rising value assigned to the broadcast rights to National Rugby League (NRL) football in Australia (Chessell 2012d: 3). Rather, it's more modest purpose is to caution against pre-judgement on the competition-limiting influence of exclusive content rights in a converged world and premature changes to the regulation of communication competition in Australia, before the facts unfold.

In the following section a broad overview of the key convergence drivers of change in the audio-visual content area is given, followed by sections addressing developments in content supply, demand, and distribution. The paper concludes with a discussion of the competition implications of these observations.

WHAT IS HAPPENING OUT THERE?

Two principle consumer experience manifestations of convergence are platform diversity and viewing time flexibility. These lie at the heart of the market developments that are arguably reducing the competition significance of exclusive content rights.

Audio-visual content has traditionally been available to consumers in cinemas and on home television screens via free-to-air (FTA) broadcasts. However, technological changes over the past two to three decades have widened the range of viewing platforms—first to cable- and satellite-connected TV screens (via encryption-decoding set top boxes for paying subscribers) and then to Internet-connected fixed and mobile devices such as personal computers (PCs), smart phones, tablets and Internet-enabled televisions.

Viewing time flexibility for home consumption of audio-visual content has traditionally been provided by videocassette recorders (VCRs) and digital video discs (DVDs). Two Internet-related technological and commercial developments have extended the scope for viewing time flexibility: video-on-demand (VoD) and cloud-based time-shifting of linear (that is, programmed) content.

These developments are relevant to competition in two main ways. First, they have the capacity to broaden the scope of the markets in which premium content is supplied. For example, pay TV, FTA TV, and online distribution platforms have traditionally been considered by regulators to be separate markets. Convergence threatens this traditional view. Secondly, these developments have the capacity to heighten the scope for robust competition within markets.

CONTENT SUPPLY CHANGES

There are a number of market developments in the way premium audio-visual content is supplied to distributors and consumers that are opening up the availability of premium content, potentially eroding the customer-attraction potency of exclusive broadcasting rights. There have also been dramatic changes in the type of audio-visual content available to consumers, again with the potential to weaken any anti-competitive power of exclusive rights.

LIVE SPORT

Coverage of major sporting events holds a special place in Australian society. This is reflected in the 'anti-siphoning' rules introduced by the Parliament in 1992 in response to concerns that television FTA coverage of major sports would be 'siphoned off' to pay TV and not available for free anymore. These rules, which are still in place today, allow the FTA broadcasters to bid for the rights to the listed sporting events without competition from pay television operators up until a short time before the event—usually 12 weeks. While these arrangements are often seen as tilting the competitive arena in favour of the FTAs, regulator concerns have focussed in particular on the live sport exclusive access deals struck by pay TV networks (as described above).

There are, however, three key developments in the supply of live sport content with the potential dissipate concerns regarding market power imbued by exclusive access rights. These are the fragmentation of rights, rights being extended to a time-shifted as well as a real time basis, and the distribution of content directly to customers by the content owner. While examples are drawn from Australia and overseas, the content rights focussed on in particular are those to Australian Football League (AFL) and National Rugby League (NRL) live games, as these have traditionally been considered prime drivers of FTA and subscription television viewership in Australia.

Fragmentation of rights

Fragmentation of rights—the selling of exclusive rights to smaller parcels of content, such as in-season games, finals and grand finals, special games (for example, NRL State of Origin and international games)—provides the opportunity for a wider range of parties to buy rights to this highly prized content. The motivation for the content owners to fragment rights are twofold: to maximise revenue from the rights, and (possibly more significant from a fragmentation perspective) to maximise exposure for the code to achieve an increased following and ensure stronger game attendance, merchandise sales, and advertising revenues.

For both the AFL and NRL, there is already some fragmentation of rights occurring. For example, the current arrangements involve the sharing of rights to in-season games between the FTA and pay TV distributors Nine Network and Foxtel (Stensholt 2012a: 44; Chessell 2012c: 46). The current bidding process for rights to NRL content for the next five years gives a useful insight of future fragmentation possibilities, with a range of fragmented as well as lumpier options being mooted (Masters 2012: 7; Chessell 2012d: 3; Read & Honeysett 2012: 40).

Adding to the opportunities for fragmentation of rights is the scope to sell the rights for different competing platforms (devices), in particular the online rights that allow viewing on PCs, smart phones and tablets (mobile), and Internet-capable TVs. This is already occurring, and will continue.

Time-shifting

Time-shifting is another dimension of rights fragmentation. The recent Optus TV Now copyright case is instructive in this regard. Putting aside the disputed legally or otherwise of the service, its provision demonstrates the technical capability and commercial viability of providing an easy-to-use means of time-shifting live events. Furthermore, Optus' stout legal defence of its right under copyright law to provide this time-shift service, which allows consumers to view games online on a range of online devices as soon as two minutes after the live broadcast, suggests there is significant demand for this delayed material (Edwards 2012: 4).

The FTA television networks are now providing a time-shifting of linear content on their digital channels, reflecting significant demand for time-shifted linear content. For example, the Ten Network has been distributing its digital programs on smart phones for the past 18 months, with around 1 million catch-up TV mobile application downloads and 1.5-2 million catch-up views per month (Holgate 2012b: 47).

Direct supply to consumers by content producers

Both the AFL administrators and the Collingwood club have signalled interest in the future possibility of selling AFL content directly to customers via their own channels. There is significant overseas precedent for this (Stensholt 2012b: 45; Stensholt 2012c: 50).

HOLLYWOOD MOVIES

There are two potentially competition-enhancing developments in the supply of blockbuster movies: changes in move release windows and the direct sale of movies to customers.

Movie release windows

A general shortening of movie release windows (the period of time in which a distribution channel can publicly screen the movie), and the addition of new windows, enhances the scope for competition by allowing movies to be more freely available early in their life, and permitting some new distribution means early in a movie's release life. For example, shortened release windows are evidenced in *Netflix messes up* (The Economist 2011b: 81). Additional windows include the recent insertion of a video-on-demand window ahead of access by subscription television (Communications Day 2011c, 4), and Apple's recently negotiated access to Hollywood movies on any Apple device via its iCloud service (Vascellaro & Orden 2012: 24).

Direct distriibution by studios

A number of Hollywood studios have joined forces to release their movies through UltraViolet (Vascellaro & Orden 2012: 24). This breaks the power of those parties that have access to movies early in their release cycle, by providing customers with an online alternative to traditional outlets.

OTHER CONTENT

Another important development is the proliferation of highly desirable content. This provides an alternative source of content for market entrants that do not have the customer base to warrant (and finance) the acquisition of major rights. This alternative content is proving to be sufficiently attractive to sustain market entry, diminishing the traditional supremacy of Hollywood studio movie and live sport content. Four types of content are potentially important in this regard, some emerging only in recent years. They are: blockbuster TV-like content such as high quality mini-series and 'soapies', documentaries, amateur videos, and interactive games.

Blockbuster TV-like material

In the United States, some content subscription TV networks have been producing their own highly attractive content to ensure that, if there are ongoing limitations to access to Hollywood movies early in their life, they can offer content that will attract customers to their channels. For example, HBO has engaged top script-writers and producers to develop top rated shows such as *Sex and the City* and *The Sopranos* (The Economist 2011a: 58—60). Google has indicated it is in the process of creating more than 100 channels of content (Kermond & Dick 2011: 9).

In Australia, News Limited is reported to be in discussions with the related content producer Shine regarding access to attractive content to compete with prime content to which they do not have access (McIntyre 2012b: 46). Furthermore, Shine has also indicated it is likely to commence selling its content directly to customers in the next 5 years, presumably through its own subscription TV channels or online services (McIntyre 2012b: 46), as well as selling through its traditional wholesale avenues.

More broadly, the major Hollywood studios also produce and actively market high quality television material as well as movies, such as drama and comedy series comprising of standard half-hour episodes (Holgate 2012d: 5).

Amateur videos and interactive games

The recent huge popularity of amateur videos has the potential to undermine the real or perceived primacy of traditional premium content in driving demand for audio-visual outlets. This is typified by consumer-produced YouTube videos. Coupled with growing predominance of consumers born into, and inherently at ease and familiar with, an online world, this material has the very real potential to be a viable alternative to traditional premium content for market entrants.

Interactive games also have the potential to attract serious ‘eye-ball time’. This also diminishes the importance of tradition prime content in attracting ‘eye-ball time’. Significantly, the interactive game *Call of Duty: Modern Warfare 3* generated greater revenue in the first weeks of its release than *Avatar*, the biggest-selling movie of recent times (Corrigan 2011: 11).

CONTENT DEMAND CHANGES

There are also a number of actual and emerging demand changes that have the potential to lessen any existing content-related competition constraints. These developments (and the content distribution developments described in the following section) are likely to be given particular potency by the changing population make-up, as the children and grandchildren of the baby-boomer generation begin to replace earlier generations as the key audiences. These later population cohorts are likely to have substantially different viewing tastes and patterns to baby-boomers. For example, they may have less of an interest in live sports, and the start-to-finish consumption of 90-120 minute movies, with a greater preference for consuming audio-visual content in short bursts, often while on the move.

LIVE SPORT

Key demand developments with competition implications are the apparent increase in consumers’ appetite for time-shifted live sport content, and the emergence of, and demand for, news-style presentation of live sport in a way that, in effect, circumvents exclusive access arrangements.

Fairfax Digital online news service provides an alternative to live sport coverage in the form of frequent ‘news’ bulletins before, during, and after major games. This allows customers on the move, or doing other things, to tune into the pre-game hype, get quick updates on the game as it progresses (such as the score, which players have scored, who is on the field, the number of penalty decisions against each team), and get the wrap-up at the end. This provides a ‘quasi-live’ form of live sport coverage with the potential to substitute for traditional live sport coverage for some fans.

Time-shifted material, which has already been discussed, is also proving to be popular.

CONTENT + SOCIAL INTERACTION

Distributors providing the means for mass social interaction during the broadcasting of linear content, on social platforms such as twitter and Facebook, have the potential to diminish any overall advantage of platforms with exclusive access to premium content (Kermond & Dick 2011: 9).

CONTENT DISTRIBUTION CHANGES

Convergence is changing the platforms over which audio-visual content is made available to consumers, the distributors of this content, and the ease with which content can be accessed by consumers. These developments underpin the competitive forces outlined above that can weaken the position of exclusive rights to premium content.

PLATFORM CHANGES

Convergence has been driven by, and has in turn stimulated, substantial changes in audio-visual content distribution platforms. This involves changes to the traditional platforms of FTA and cable- and satellite-based broadcasting. New platforms are primarily fixed and mobile broadband for delivery of content over the Internet, including content from the new digital channels of the FTA television networks which have become multi-channel providers. There are also a number of developments that facilitate distributor use of, and customer access to, these various platforms. This change in the functionality of traditional platforms, and the entry of new platforms, has the scope to significantly strengthen the competitive landscape.

Both FTAs and pay TV bid hard for AFL and NRL rights, as reported in Canning's article (2012b: 28). However, it is anticipated by some commentators the current sale of NRL content rights will be the last time the bidding will be dominated by the FTA networks and Foxtel. They suggest that Internet-based platforms will be much more active and important the next time round (Chessell 2012b: 56).

Many commentators believe take-up of the NBN will in large part be driven by demand for audio-visual content, as most Australians already have an excellent fixed line phone service and adequate Internet access service for current uses (email, web browsing, online transactions, and limited audio-visual downloads) (Duling 2012: 18). An interesting aspect of the NBN is that it expands the number of content delivery channels to the home. At present, there is in general just one fixed broadband 'pipe' to each home—a DSL service or, less frequently, an HFC connection. This means one network controls the access 'pipe', and the content in effect 'sits on top' of that platform. However, the NBN will have four data ports into each home meaning that, subject to cost, a customer can subscribe separately to a pay TV service, an IPTV service, and a broadband service with over-the-top (OTT) content through different ports. That is, access will not be controlled by any one network

DISTRIBUTOR CHANGES

Additions to the list of parties distributing content also have scope to increase the level of content-related competition and weaken the market influence of premium content exclusive rights arrangements. These new distributors are the traditional telecommunications service providers, over-the-top content providers, communications eco-systems such as Apple and Google and various social network platforms, and news outlets. Illegal dissemination of content from piracy and file-sharing also provide an 'off-market' discipline on commercial content distributors holding exclusive rights to premium content.

Telcos

Traditional telecommunications carriage service providers such as Telstra, Optus and Vodafone, and ISPs, have all expressed keen interest in becoming content distributors in their own right, as carriage alone is no longer lucrative. This has added to the number of distributors vying for access to traditional premium content, and sourcing and providing other strongly attractive content that has the potential to dilute the customer attraction potency of premium content.

The recent ACCC declaration of the copper-based (ADSL) Layer 2 wholesale bitstream service provided on Telstra's network is significant in this regard. The Standard Access Obligations associated with this declaration, and Telstra's Structural Separation Undertaking, assure that Telstra and entrant telcos and ISPs, and OTT operators, can all access customers on an equivalent basis.

Furthermore, established telecommunications service providers are in a position to leverage their existing product set, and network and platform assets, in providing high quality service. For example, Optus signalled its approach as offering '… better services, better innovation and giving people an overall better experience' (Battersby 2012: 3). Optus has also signalled its direct content provision ambitions in pushing into the 'live' sports area with its (currently-suspended and strongly contested) TV Now time-shift service. However, the advantages of bundling in this way is qualified to the extent that bundling of content and telecommunications services is less successful than bundling of fixed services and mobile services.

Reflecting the range of devices to which telecommunications service providers now deliver services (including content services), there is reported to be particularly strong interest from them in emerging 'transmedia' content formatted several ways so that it runs effectively on a range of devices without further processing (McIntyre 2012d: 44).

Over-the top operators

Over-the-top operators (OTTs), who provide content over telecommunications networks, are widely seen as a threat to both traditional and newer content distributors. The vertically separated structure of the NBN is designed to promote service provider competition, including from OTTs (and the underlying retail broadband providers).

Eco-systems

In parallel with the shortening and proliferation of movie release windows, Apple has successfully negotiated the rights to distribute block-buster movies from the major Hollywood studios for block-buster movies (Vascellaro & Orden 2012: 24).

Social network and serach platforms

Google has entered the content provision game, increasing the number of distributors that can bid effectively for premium content. Google is also adding to the range and volume of desirable content. Google has been quoted as saying that it is creating more than 100 new channels, which are embedded with social interactive capability (Kermond & Dick 2011: 9). Google is also reported as investigating the acquisition of the international rights to V8 Supercars sports content, potentially disciplining the holders of any Australian rights to this top-four sports content (McIntyre 2012a: 42). This weakens the significance of premium content as a key customer attraction element of distributors' content offerings.

News outlets

Some news outlets have responded to the opportunities and threats posed by conversion by developing products that have the potential to be substitutes for some premium content. For example, the online Fairfax portal offers 'news' coverage of key NRL and AFL games by rapid-fire bulletins on events and developments occurring before and during the game, and a commentary after the game.

Overseas sources of content

There is also a geographic dimension to the rights issues and OTT applications. At present some content distributors (such as the BBC) do not allow users outside their country's borders to access content. However, market forces and the cost recovery needs of public broadcasters such as the BBC, mean it is likely this will change over time. Furthermore, there are other overseas service providers—such as the US cable television networks—who provide access to their content for customers in other countries. In a small market such as Australia with limited local content, this ‘imported’ competition could have a significant impact.

Illegal access

Illegal access to content from piracy and file-sharing raises substantial concerns from a copyright law and a content supply and innovation perspective. Nonetheless the demonstrated scope for piracy and file-sharing of premium audio-visual content, such as new release movies, imposes a significant price discipline (as well as an incentive to simplify access to the material) on holders of exclusive rights.

IMPLICATIONS

What are the implications of these various established, nascent, and in some cases merely potential market developments for content-related competition issues? Taken together, they would appear to reflect a potentially powerful force in favour of enhanced competition. This could occur, for example, in the following ways.

On the one hand, the matching trends of fragmentation of rights and multiplication of platforms could mean that, while premium content remains premium, competition problems have been ameliorated as there are now a number of different channels through which to view the content. That is, the environment is changing from one of pervasive exclusivity of content to exclusivity of content only on a particular platform.

On the other hand, it could be seen that, because of the developments discussed above, traditional premium content is no longer premium in so far as it is possible to enter consumer markets for the supply of quality audio-visual content armed with material that does not include the traditional premium content—Hollywood movies and live sport.

Realistically, however, the jury is still out, on two counts. First, these market developments need to be examined more carefully than this initial, precursory cataloguing of unfolding changes allows—in terms of both their economic significance in diminishing the market potency of exclusive access rights for premium content, and their likely evolution as convergence continues to play out.

Secondly, these developments represent only one side of the story. This paper has not examined current and potential convergence-related developments that have the potential to strengthen any market advantage accruing to exclusive access to premium content. Nor has it considered the relevance of some indications that, in some areas at least, the holding of exclusive rights to premium content is now more valuable than in the past.

For example, the NRL code administrators reportedly expect (or is it hope?) that the rights to NRL live broadcasts will net up to 50 per cent more than last time the rights were sold 5 years ago (Stensholt 2012a: 44; Stensholt 2012b: 45). If this ambition is realised, it could indeed reflect the contrary position that premium content is becoming more important in ‘eye-ball’ attraction. On the other hand, however, it might also—or alternatively—reflect the code administrators exercising greater skill in extracting a larger share of the (possibly declining) intellectual property value of the content.

Nonetheless the material presented in this paper does warrant a careful, measured approach to considering changes to the regulatory framework for content-related competition. The need for a carefully considered approach is heightened by the potential for the mooted changes to impose large pecuniary and broader economic efficiency costs on taxpayers, the telecommunications and media sectors, and customers.

CONCLUSIONS

While many of the developments described in the paper are recent, nascent, or still speculative, others are more established. All of these demonstrate the real or potential forces for the lessening of content-related competition constraints. Their significance in this regard will play out over the coming years, and needs to be watched carefully. However, their potential to quite dramatically change the competitive landscape means that judgement in this area must remain suspended. Actions to put in place new competition regulation arrangements should only be taken on the basis of robust, market-based evidence.

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