

← Jamaicans and their English-speaking Caribbean counterparts. Arguably, it is a moral affront to the dignity of these peoples to be denied legal ‘access’ to content which is ‘available’ in the territorial space, since it infringes on their fundamental human right to partake of and participate in the circulation of culture.

Furthermore, it is socially repugnant for there to be a heavy-handed, one-sided barricade. We say this because at a recent conference in Jamaica, the Future of Media and Regulation, Brian Schmidt, the marketing director of Jamaica’s leading reggae radio station, IRIE FM, complained about globally operating pirates “from Florida and the tri-states area of the US, Japan, Africa and elsewhere” who are involved in widespread piracy of IRIE FM’s content online (Jackson 2014).

His complaint may be about what some argue as the reality of the times, but in any event it is very unlikely that foreign regulators will be expending any or significant resources to protect IRIE FM from such leakages or theft of content. We therefore agree with Neil Lemlein, member of the Academy of Motion Picture Arts and Sciences, former top executive at some of the world’s leading media entities, and president of Around the Bend Media, who opined at the Future of Media and Regulation conference that: “It certainly seems unfair for Jamaican consumers not to have legitimate access to US satellite programming especially since access to the signal is actually already available 24/7. Reasonable reconciliation needs to take place – if rights holders only authorise continental US and territorial broadcast, yet allow transmission to filter into Jamaica, then by all means revisit, revise and allow rights acquisition. I think all anyone asks for here is a new and reasonable framework based on reality and fairness” (Lemlein 2014).

The Bahamas, not unlike what the US authorities themselves authorised many years prior, legislated the compulsory licensing of television content including encrypted cable channels. The legislation allowed for an imposition of liability on subscription TV (STV) operators to pay over to the government all copyright fees, towards eventually compensating the rights holders. This sparked complaints from the Motion Pictures Association and the Television Association of Programmers, on whose behalf the US government entered into negotiations with the Bahamian government towards a resolution. Appeals to international IPR conventions and specifically to the Berne Convention, forced the Bahamian government to rescind and rescope its legislation, but not before the US government was invited to assist in brokering commercial arrangements between rights holders in the US and STV operators in the Bahamas.

Remarkably, the underlying implication here is that these global treaties on copyright appear to appeal to, or rather are concerned primarily with, the economic/financial interests of rights holders – interests that are subordinate to the ultimate rationale of copyright: the circulation of culture (Favale 2012).

This is a concern that Jamaican authorities have raised with the US Trade Representative, but very little has come of those efforts, despite the actions of regulators such as the Broadcasting Commission in protecting copyright holders’ interests in Jamaica and the broader Caribbean. In fact, the US and Jamaica signed a bilateral intellectual property rights agreement in March 1994, in which Jamaica offered a higher standard of protection than any other country in the Caribbean region. Since then, the Broadcasting Commission has been relentless in helping to secure the property rights of all materials broadcast by STV operators. These efforts by the

Commission are expensive, and are borne entirely by Jamaican cable operators. Yet, there is an unwillingness of US rights holders to make their programming available legally for individuals who have both the willingness and ability to pay for such content. Clearly, that this problem persists, despite dialogue and interventions in the US, implicates existing IPR regimes in what is an unfair and patently egregious abuse of copyright holder status. And even further, it represents the continued beleaguering of the moral dignity of Jamaican and Caribbean people. Absent purely self-serving economic and commercial interests, what basis supports US rights holders’ reluctance to license content to Jamaican and Caribbean people?

CONCLUSION

Globally, the number of internet protocol networks are increasing, and so too is traditional broadcasting media transitioning apace to being full digital networks. One significant upshot is that content producers are trying desperately to exert industrial age type control over individuals’ access and use of digital content. Current notions of copyright protection prioritise, almost exclusively, the rights of owners, in contrast to the rights and interests of users, including prosumers.

We have argued that this tension will become volatile as many more millions of people become digital consumers and ‘global citizens’ whose physical distance is proxied and eroded by integrated digital technologies. In this context, it will become increasingly impracticable, if not morally reprehensible and culturally repugnant, for exclusive rights holders to continue to license content to one geographical segment of the global population, while restricting or denying others, when in fact there are no fundamental distinctions other than nationality, especially where taste and language are the same and physical inter-travel is the norm. And as we have also argued, those types of geographic licensing, in the context of globally binding IPR treaties, serve only to inflate the cost of regulatory enforcement in jurisdictions such as Jamaica, which can least afford such pecuniary burdens.

Finally, we adapt Favale’s point that normative action and statutory protection should guarantee to both owners and users of copyright works an access right, consistent with the ultimate rationale of copyright: the circulation of culture.

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READING DIGEST

A selection of recent publications across the TMT spectrum

BIG DATA – A PRESIDENTIAL REPORT

A major report written for US President Barack Obama is 'Big data: seizing opportunities, preserving values'. Prepared in just three months, it is a wide-ranging review of big data and privacy, and describes many benefits of the data explosion, but also addresses concerns: "One significant finding of our review is the potential for big data analytics to lead to discriminatory outcomes and to circumvent long-standing civil rights protections in housing, employment, credit and the consumer marketplace." The report makes a number of policy recommendations, including advancing a consumer bill of rights, passing national data breach legislation, extending privacy protections to non-US citizens, expanding technical expertise to stop discrimination (so-called 'digital redlining'), and amending the US electronic communications privacy act, which is long past its sell-by date. Download: 1.usa.gov/1hqgibM

MOBILE BROADBAND: ON THE MONEY

The Australian Communications and Media Authority (ACMA) has published 'The economic impacts of mobile broadband on the Australian economy, from 2006 to 2013'. It is a research report prepared by the Centre for International Economics and the headline finding is that mobile broadband is estimated to have increased the growth rate of the Australian economy by 0.28% each year from 2007 to 2013. The actual growth over this period was 2.9% a year, indicating that mobile broadband contributed a substantial part of Australia's economic growth through productivity improvements. Given that mobile communications, of which mobile broadband is a part, is a small component of the Australian economy, accounting for only 0.2% of employment and 0.5% of economic activity, "its small size belies its impact", and the report details benefits to businesses in particular. The ACMA has also produced an infographic that sets out the benefits. Download: bit.ly/1mubSUD



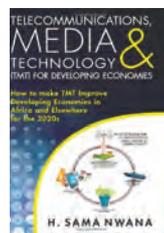
MOBILES – A FORCE FOR LITERACY?

'Reading in the mobile era: a study of mobile reading in developing countries' is a UNESCO report that considers that limited access to text has been a barrier to literacy – but "this barrier is receding thanks to the spread of inexpensive mobile technology". While UNESCO research indicates that hundreds of thousands of people in countries like Ethiopia, Nigeria and Pakistan are reading on mobile devices, very little is known

about these readers. Drawing on findings from a year-long study, this report explains the habits, preferences and demographic profiles of mobile readers in seven developing countries. The report was created through an ongoing partnership between UNESCO, Nokia and Worldreader and is part of a two-paper series on mobile reading. The other publication, 'Reading without books', reviews mobile reading initiatives around the world. Download: bit.ly/1f12U9

CONVERGENCE IN THAILAND

'Towards convergence: Thailand's telecom and broadcasting policy', by Natchaya Taweewitchakreeya and Roswan Sangsprasert, is an Amazon Kindle download about Thai policy development in a country where mobiles have increased dramatically but fixed line penetration remains low at 10%. A converged regulator, the NBTC, was set up in 2010. Download: amzn.to/1rUAs2o



TMT FOR DEVELOPING ECONOMIES

This book, 'Telecommunications, media and technology (TMT) for developing economies: how to make TMT improve developing economies in Africa and elsewhere for the 2020s', promises 'hundreds of critical recommendations across contemporary TMT areas' while arguing forcefully for TMT as the nerve centre for economies. It is written by H Sama Nwana, CEO of a consultancy but who was a group director at Ofcom where he led the 4G spectrum auction. See amzn.to/1muq8g3

BRAZIL AND THE INTERNET

'The internet in Brazil: origins, strategy, development and governance' is a Kindle edition book on Amazon that was published in advance of the NETmundial conference and describes the Brazilian model of internet governance and how it is evolving. Download: amzn.to/1ndRSJL

GLOBAL INTERNET GOVERNANCE WARS

'The global war for internet governance' by Laura DeNardis was published earlier this year and focuses on 'the conflicts surrounding internet governance – the new spaces where political and economic power is unfolding in the twenty-first century'. William Dutton, professor of internet studies, University of Oxford, says: "There is no better book to prepare students and policymakers alike for the global debates arising over internet governance." One problem with books on the internet, however, is that they can go out of date fast. It's available as a Kindle download at: amzn.to/1ndTeEe

WHAT'S REALLY ON EUROPE'S AGENDA

Telecoms lawyer **DAVID CANTOR** gives his views on where European regulation should move to meet the digital agenda

The most fundamental objectives of the EU Digital Agenda – robust competition, removal of impediments to cross-border commerce throughout the single market, stimulation of new infrastructure investment and high-tech innovation – are not controversial. Yet seemingly intractable controversy persists around any current consensus for how best to realise these overarching objectives. A specific vision of the intended result remains clouded by widespread confusion. How did we get here?

One must begin by recognising the basic technological and commercial assumptions that were operative 25 years ago, when Europe's current approach to ensuring robust competition in electronic communication markets was first conceived. At the time, provision of public telecoms services of all sorts was generally the exclusive province of incumbent national public utilities. GSM was just coming on line. The internet was a project in its early stages of gestation.

European telecoms market liberalisation began with a famously political compromise, with primary responsibility for administering and enforcing telecoms policy assigned to national level. The challenge at the time was indeed to open up distinct, national fixed and mobile telecoms markets to meaningful competition. But in parallel with a fairly stunning record of EU success in achieving that goal in progressive stages over the following two decades, the larger world has moved on.

We are now living through an unprecedented era of technological, commercial and market transformation. In the new digital universe, economic value has shifted away from vertically integrated 'telcos' boasting diversified service portfolios. The lion's share of this value is instead now being captured by internet-based service providers, smartphone operating systems and all sorts of new-fangled apps. A fast-paced, global arena of digital innovation and commercial disruption is now wide open, and it pays no heed whatsoever to national borders.

Against this current backdrop, the recent EU legislative initiative known as the Digital Single Market (or the Connected Continent) has reflected yet

another moment of political compromise among important European stakeholders, each bringing to bear what seem to be quite legitimate but often conflicting interests. This time, however, we have reached the point where incessant debate around highly detailed, multilayered regulatory policies and practices undermines real progress. It is an effort to 'tweak' a received model which remains grounded in anachronistic conceptions of operative market and technology realities. To put it bluntly, this is a 20th century argument about a 21st century problem. The established, sector-specific EU regulatory framework has become obsolete.

In the new digital marketplace, clever ways of disrupting conventional telecoms services abound. And lest there be any doubt whether the most relevant geographic market for mass communications services is increasingly global, consider the combined market position of Facebook and its pending affiliate WhatsApp in consumer messaging and adjacent, internet-based social media: on the order of 1.5 billion users as from day one, growing by leaps and bounds daily, with worldwide voice services (similarly offered free to users) also expected to come online very soon.

At the same time, it must not be overlooked that provision of internet access – which is essential to the new digital communications ecosystem – remains, and will likely continue to remain for the foreseeable future, more local in nature. Indeed one might argue that the only 'basic telecoms' service left to be served by providers of core telecoms network infrastructure is fast becoming provision of internet access as such. In this context it is vital to note that local telecoms infrastructure investment, supporting mass consumer access to ever more data-intensive broadband applications, is by its very nature extremely capital intensive; and that, in stark contrast, a transformative global communications innovation such as WhatsApp requires relatively little capital investment at all.

The upside for core, infrastructure-based network operators is ever-expanding consumer demand for mind-boggling quantities of data delivered ubiquitously, at faster and faster speeds. So the looming issue for today's telcos may be whether to embrace a more contemporary business case, essentially ceding all but the internet access segment to so-called over-the-top (OTT) players. In terms of EU regulatory policy, the point is to distinguish internet access provision from other electronic communications segments – since internet access



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may be subject both to local competitive bottlenecks and to troubling investment shortfalls.

Taking into account the most central technological and market trends of the new digital era, the exceedingly elaborate framework of sector-specific regulation which currently prevails throughout the EU is, in all events, plainly outdated and overbroad. Mass consumer communications services other than basic internet access should no longer warrant much in the way of national market analysis, or for that matter ex-ante regulation at any level. That said, and depending on the extent of infrastructure-based competition manifested at national or local level, markets for provision of internet access may warrant an appropriate measure of continuing vigilance.

Fixed telco and cable platforms are increasingly interchangeable substitutes for provision of fixed broadband access, and both are present in most EU markets. Wireless broadband access is generally available over at least three or four competing mobile networks in all EU countries. And some see an emergent 4G/5G wireless world in which fixed and mobile broadband access become functional substitutes for most intents and purposes.

Looking forward to the developing competitive landscape which all this implies, rather than backward to the old regime of monopoly European national telcos, the question becomes what – if any – sector-specific regulatory regime may be required. A corollary question is what, if any, compelling public interest is actually served at this point by the utter complexity, massive expense and sheer weight of the existing regulatory framework.

The new priority should be elimination of all but the most clearly indispensable regulatory intervention. Sector-specific, ex-ante regulation should generally become subject to rapid sunset, consistent with contemporary market realities and in line with long-declared intentions articulated in the cornerstone EU directives. With a view to cultivating deployment of new-age infrastructure both within and across internal EU borders, the guiding aim should be an essentially unregulated marketplace geared to emboldening investment and innovation, as well as pan-European industrial consolidation affording world-class scope and scale.

For the most part, sector-specific national regulatory authorities should become a thing of the past. Specific competitive bottlenecks at the level of core transmission over ‘essential facilities’ should be subject to case-by-case review and policing (ex-post) by competent competition authorities. So long as spectrum allocation and assignment remain vested at sovereign national level, in whole or in part, it is impossible to imagine national telecoms regulators being eliminated altogether. Apart from spectrum issues, however, it is by no means obvious that any sector-specific telecoms regulator would be required at either national or EU level.

In parallel with scaling back and eventually eliminating the vast majority of sector-specific regulation, the EU needs to modernise its competition policy to take adequate stock of the new technological and commercial realities of the digital era. Insofar as spectrum management remains



Helga Trüpel, one of the Greens in the European Parliament, makes her views clear. But is the EU ready for the burgeoning OTT world?

substantially a national function, national markets can be expected to remain subject to thorny competition issues, including the minimum number of spectrum licences (and hence mobile network operators) deemed acceptable. But devoting untold time and resource to highly repetitive competition analysis of every national mobile merger, while little or none to scrutinising world-changing digital communications combinations in the OTT space (such as Facebook–WhatsApp), makes no sense.

A generation ago, the genius of the EU’s project for sweeping telecoms market liberalisation was the coalescence it achieved between a well-targeted competition policy and a winning industrial strategy, each suited to that era. By unleashing the intrinsic efficiencies of unfettered market dynamics, the original paradigm of EU telecoms sector liberalisation stimulated unprecedented investment in new fixed and wireless infrastructure, side-by-side with world-beating technological innovation across the mobile space in particular.

Today’s policymakers face a similar challenge. Europe presently confronts an entirely different set of new, but equally daunting, realities – once again arising amid the cross-currents of obsolescent market structure and rapid technological change. What is not new is the need for an unabashedly fresh approach to tackling the central issues. Europe must once again reboot its competition and broader regulatory policies, to take proper stock of emergent digital communications markets that routinely transcend national borders and which are so far dominated by non-European players, while at the same time advancing Europe’s industrial position throughout the new global ecosystem.

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