



**Broadcasting Policy:**

***The Perfect Storm***  
**A Review of Broadcasting**  
**Policies in Selected Countries**

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**Broadcasting Policy: *The Perfect Storm***  
**A Review of Broadcasting Policies in Selected Countries**

Around the world, new technologies are changing broadcasting and telecommunications. As consumers integrate these technologies into their lives, some governments have begun to adapt their Broadcasting and Telecommunications regulations; others recognize the current legislative framework is outdated, but have not yet developed a new regulatory structure. Thus, regulatory regimes for the Broadcasting and the Telecommunications sectors are in a state of flux. The European Commission and Australia's Department of Communications, Information Technology and the Arts, have launched processes to incorporate the Internet into their legislation and to relax limits on foreign and cross-media ownership. With the increasingly global nature of these sectors, other countries, including Canada, may need to follow the lead of these major trading partners.

**European Developments**

The European Commission has proposed to adapt the regulatory framework of the broadcasting sector by amending the *Television without Frontiers Directive*, which will now extend to new technological services including the Internet, and on-demand content providers.<sup>1</sup> The new *Audiovisual Media Services Directive* (also known as *Audiovisual without Frontiers Directive*,

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1 Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, COM (2005) 646 Final* (Brussels, 13 December 2005), at 3, online: European Commission <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0646en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0646en01.pdf)>.

hereinafter the *new Directive*),<sup>2</sup> has been adopted by the Commission and by the European Parliament and are expected to come into effect before the end of 2007. Each member state will then have two years to implement the new regulatory scheme into national legislation which will fully apply in 2009.<sup>3</sup> The amendments are designed to respond to increased competition in the new technological market and to continue to protect European culture.<sup>4</sup>

### **Linear and Non-Linear Audiovisual Media Services**

The European Commission has extended the reach of the new Directive to encompass the Internet and on-demand services by creating two classifications of audiovisual media output: “linear” and “non-linear”. The former includes “scheduled broadcasting via traditional TV, the Internet, mobile phones,” and the latter includes “on-demand films or news”.<sup>5</sup> The new Directive distinguishes the two types based on the push/pull dichotomy, where linear “pushes

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- 2 Commission of the European Communities, *Draft Audiovisual Media Services Directive (AVMS): Non Binding Working Document rev.3* (Brussels, April 2007), (hereinafter *Working Document*) online: European Commission <[http://ec.europa.eu/avpolicy/docs/reg/modernisation/proposal\\_2005/avmsd\\_cons\\_amend\\_0307\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/proposal_2005/avmsd_cons_amend_0307_en.pdf)>. See also: Commission of the European Communities, *Amended proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, COM (2007) 170 Final* (Brussels, 29 March 2007), at 1-15, (hereinafter *COM(2007) 170 Final*) online: European Commission <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007\\_0170en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0170en01.pdf)>.
  - 3 *Ibid.* *COM(2007) 170 Final* at Amendment 151 (Article 3 of the amending Directive). See also: Commission of the European Communities, *Press Release: Boosting Diversity of European TV – and On-Demand services: Commission paves the way for the new Directive “Audiovisual without Frontiers”* (Brussels, 9 March 2007) 1P/07/311, (hereinafter *1P/07/311*), online: European Commission <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/311&format=HTML&aged=0&language=EN&guiLanguage=en>>.
  - 4 *Ibid.* *COM(2007) 170 Final* at Amendment 1 (Recital 1).
  - 5 Commission of the European Communities, *Press Release: The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions* (Brussels, 18 May 2006), MEMO/06/208, (hereinafter *MEMO/06/208*), online: European Commission <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/208&format=HTML&aged=0&language=EN&guiLanguage=fr>>. See also: *Supra* note 1, *COM (2005) 646 Final* at Article 1(c) & (e).

content to viewers,” by implementing a fixed schedule for the content and the non-linear is defined as content that is pulled by the user who decides which content to watch based on a “catalogue” of options.<sup>6</sup> The Commission intends to limit the regulation to media services in “competition with television broadcasting;” therefore, content produced by private individuals, who do not have an economic purpose, including private websites, is excluded.<sup>7</sup> The new Directive aims to be technology neutral and thus does not define what current services fall under non-linear.

### **European Content Rules**

With respect to traditional television, the new Directive retains the requirement for European productions to account for at least one-half of all broadcasts, where practicable, and for independent European producers to have at least 10% of the broadcast time. Non-linear services are subject to fewer regulatory measures. The Commission states that non-linear services will be subject to regulations to “safeguard essential public interests such as protecting minors and preventing incitement to hatred”.<sup>8</sup> In addition, the new Directive leaves open the possibility that non-linear services will be subject to additional regulations by giving broad discretion to Member States to ensure that European content is available.<sup>9</sup>

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6 *Ibid.* MEMO/06/208.

7 *Supra* note 2, COM(2007) 170 Final at Amendment 18 (Recital 13).

8 *Supra* note 6, MEMO/06/208.

9 Department for Culture, Media and Sport, *Issue Grid – changes to the regulation of audiovisual services* (London, June 2006), (hereinafter Issue Grid), at European Works, online: Department of Culture, Media and Sport <[http://www.culture.gov.uk/Reference\\_library/Consultations/2006\\_closed\\_consultations/tv\\_frontiers.htm](http://www.culture.gov.uk/Reference_library/Consultations/2006_closed_consultations/tv_frontiers.htm)>. See also: *Supra* note 2 at Articles 4(1) & 5.

Despite defining the Internet as a linear service, at least with respect to the delivery of scheduled broadcasting, the Commission also stresses that it will not be subject to content quotas since the online delivery means that the user decides which content to consume.<sup>10</sup> Thus, the situation of content quotas with respect to broadcasting services delivered via the Internet is unclear.

### **Country of Origin Principle**

The new Directive maintains an essential element of the former *Television without Frontiers* Directive, the *country of origin* principle, which:

...would allow audiovisual media service providers to offer audiovisual content complying with the laws of their own Member State for reception in other Member States, without having to vary this content to comply with the laws of each Member State concerned.<sup>11</sup>

This principle applies both to linear and non-linear services.<sup>12</sup>

This is significant because Member States would have broad latitude to implement the requirements of the new Directive in their domestic legislation and regulations. For example, Member States would determine how to ensure “media pluralism” in their own jurisdiction, as required by the new Directive,<sup>13</sup> and different rules could exist concerning the availability of programming. It is important to note that all measures adopted by Member States must conform to the Treaty establishing the European Community and comply with rules adopted by the

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10 *Ibid.*

11 *Supra* note 6, *MEMO/06/208*.

12 *Supra* note 10, *Issue Grid* at Derogation from Country of Origin (CoO) principle. See also: *Supra* note 2 *Working Document* at Article 2(1) & (2)(a).

13 *Supra* note 2, *COM(2007) 170 Final* at Amendment 10 (Recital 6b).

European Parliament.<sup>14</sup>

The new Directive also applies to non-Member States “if their broadcasts can be received in Europe and if they use either a European satellite system or an up-link situated in one Member State”.<sup>15</sup> Governments in other countries may have to follow the European initiatives if they want to maintain access to the European market.

### **Advertising and the Protection of Minors**

The new Directive has restrictions concerning harmful content which apply both to linear and non-linear media services. It maintains the substantive elements of Article 22 of the previous Directive and applies them to all media, both linear and non-linear:

Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence....

In the new Directive, *Article 3e* prevents content that contains “any incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability age or sexual orientation,” a broader list of prohibited materials than in the previous Directive.<sup>16</sup> Although some might question the way in which content will be controlled to respect these rules, the new Directive expects that all media services will provide their contact information to ensure that they are meeting the

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<sup>14</sup> *Ibid.* at Amendment 35 (Recital 24).

<sup>15</sup> *Supra* note 6, *MEMO/06/208*.

<sup>16</sup> *Supra* note 1 *COM(2005) 646 Final* at Article 3e.

standards required.<sup>17</sup>

There are some restrictions on advertising which apply to linear services. Television advertising breaks in movies, news and children’s programs can occur no more frequently than every 30 minutes.<sup>18</sup> The maximum amount of advertising for all television programming remains at 12 minutes per hour.

The most interesting requirement may be the protection of minors in the non-linear media services. In a report commissioned by the Office of Communications in the United Kingdom (*Ofcom*), RAND Europe concludes that the European Commission is overstepping its legal boundaries.<sup>19</sup> The report argues the new Directive exceeds its jurisdiction by making a self-regulated scheme into a co-regulatory one, as the “*E-Commerce Directive and Annex to the 1998 Recommendation on the Protection of Minors and Human Dignity* already apply to non-broadcast services.”<sup>20</sup> The significance is that the new Directive leaves open the possibility of different degrees of regulation within each Member State. RAND Europe states that the definition of “audiovisual media service” in the new Directive does not ensure a consistent process to obtain the results required, but expects that certain outcomes will be consistent across

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17 *Supra* note 10, Issue Grid at General requirements on all AVMS providers. See also: *Supra* note 1 *COM(2005) 646 Final* at Article 3c.

18 *Supra* note 10, Issue Grid at Quantitative advertising rules for particular types of programme. See also: *Supra* note 1 *COM(2005) 646 Final* at Article 11.

19 RAND Europe, *Assessing Indirect Impacts of the EC Proposals for Video Regulation: Executive Summary for Technical Report* (31<sup>st</sup> August 2006), (hereinafter *RAND*), online: Office of Communications <[www.ofcom.org.uk/research/tv/reports/videoregulation](http://www.ofcom.org.uk/research/tv/reports/videoregulation)>.

20 *Ibid.* at v.

the Member States.<sup>21</sup> But if this is the case, then some may wonder why the report commissioned by *Ofcom* would be critical of the regulatory scheme. If the process is left open to the discretion of each Member State, then the initiatives already implemented to regulate non-broadcast services, such as the *E-Commerce Directive*, might not hinder the process whatsoever. Member States may abide by the already existing initiatives to implement a process that would result in the outcomes required by the new *Audiovisual Media Services Directive*.

Another instrument, the *European Framework on Safer Mobile Use by Younger Teenagers and Children*, has been initiated by the European Commission to ensure a self-regulatory scheme for mobile providers to be implemented by February 2008.<sup>22</sup> This will help protect minors by ensuring a “classification of commercial content according to national standards of decency and appropriateness”,<sup>23</sup> by promoting educational awareness campaigns, and billing protocols which enable parents to limit the content available. As it is deemed to be a self-regulatory approach, the European Commission, as previously suggested by RAND Europe, may have yet again overstepped its boundaries. Considering that the new Audiovisual Media Services Directive applies to linear services, which may encompass mobile phones, it leaves the possibility that a

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21 *Ibid.* at v.

22 Commission of the European Communities, *Press Release: Mobile operators agree on how to safeguard children using mobile phones* (Brussels, 6 February 2007), IP/07/139, (hereinafter *IP/07/139*), online: European Commission <<http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/139&format=HTML&aged=0&language=EN&guiLanguage=en>>. See also: Commission of the European Communities, *Summary of the results of the public consultation “Child safety and mobile phone services”* (Brussels, February 2007), (hereinafter *Safer Mobile*), online: European Commission <[http://ec.europa.eu/information\\_society/newsroom/cf/itemlongdetail.cfm?item\\_id=3153](http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3153)>.

23 *Ibid.* IP/07/139.



co-regulatory approach would be likely to exist, and would derogate from the self-regulatory measure that the new Directive may be intended to achieve.

### **Australian Developments**

The Australian government is further ahead in relation to regulation of new technologies. The *Broadcasting Services Act 1992*<sup>24</sup> established regulatory measures which cover the Internet. The *Australian Communications and Media Authority* (hereinafter *ACMA*), formerly known as the *Australian Broadcast Authority*, developed codes of practice for Internet service providers and Internet content hosts<sup>25</sup> to protect against child pornography content. The codes also apply temporary measures to “mobile content.”<sup>26</sup>

### **Prohibition of Offensive Content**

Schedule 5 of the *Broadcasting Services Act 1992* restricts Internet content that “is likely to offend reasonable adults and to protect children.”<sup>27</sup> Public complaints concerning content that may be “prohibited by law” are directed to the *Australian Communications and Media Authority*

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24 Australia, *Broadcasting Services Act 1992*, Schedule 5 – Online Services (Australia, 1 January 1992), at section 216B, online: Australasian Legal Information Institute <[http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/consol\\_act/bsa1992214/sch5.html?query=section%20216B](http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/consol_act/bsa1992214/sch5.html?query=section%20216B)>.

25 Australia, Minister for Communications, Information Technology and the Arts, *Six-Month Report on the Online Content Co-Regulatory Scheme: Reporting Period 12: July to December 2005* (Australia, March 2006), at 2.2 Internet industry codes of practice, (hereinafter *Six-Month*), online: Department of Communications, Information Technology and the Arts <[http://www.dcita.gov.au/media\\_broadcasting/publications\\_and\\_reports/recent/reports\\_on\\_the\\_online\\_content\\_co\\_regulatory\\_scheme](http://www.dcita.gov.au/media_broadcasting/publications_and_reports/recent/reports_on_the_online_content_co_regulatory_scheme)>.

26 *Ibid.*

27 Australia, Department of Communications, Information Technology and the Arts, *Online Content Regulation: Document ID: 8681* (Australia, 6 November 2006), online: Department of Communications, Information Technology and the Arts <[http://www.dcita.gov.au/communications\\_for\\_consumers/internet/online\\_content\\_regulation](http://www.dcita.gov.au/communications_for_consumers/internet/online_content_regulation)>.

for investigation.<sup>28</sup> The result of complaints could be a take-down notice issued to the content host requiring the host to provide a filter to prohibit Australians from having access to the content.<sup>29</sup> The provisions of Schedule 5 do not cover content producers, or individuals who access this content.<sup>30</sup>

A fine of up to \$27,500 per day can be imposed if an Internet service provider does not abide by the codes.<sup>31</sup> The *Australian Communications and Media Authority* has the power to enforce the codes and impose penalties for non-compliance.<sup>32</sup>

### **Foreign and Cross-Media Ownership**

The Australian government has also initiated measures to relax current rules which restrict foreign ownership in broadcasting and to amend rules that limit cross-media ownership. The government believes that in moving from analogue broadcasting to digital broadcasting, the relaxation of foreign and cross-media ownership will maintain and improve competition within the market.<sup>33</sup>

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28 *Supra* note 29 at 2.3 Complaints.

29 *Supra* note 31.

30 *Supra* note 28 at Part 1-Introduction, Clause 1(2).

31 *Supra* note 29 at 2.2 Internet industry codes of practice.

32 *Ibid.*

33 Australia, Australian Government, *Meeting the Digital Challenge: Reforming Australia's media in the digital age: Discussion Paper on Media Reform Options* (Australia, March 2006), at 4, online: Department of Communications, Information Technology and the Arts <[http://www.dcita.gov.au/media\\_broadcasting/consultation\\_and\\_submissions/media\\_reform\\_discussion\\_papers\\_submissions\\_closed](http://www.dcita.gov.au/media_broadcasting/consultation_and_submissions/media_reform_discussion_papers_submissions_closed)>.

Under the government’s proposal, the “current media-specific foreign ownership rules in the *Broadcasting Services Act 1992* would be removed” and the rules concerning the limitation of cross-media licenses for broadcasting would be maintained.<sup>34</sup> The latter rules include “a maximum of two commercial radio licenses in a radio license area; one television license in a television license area and; no more than 75 per cent national television reach”.<sup>35</sup>

For cross-media ownership, the legislation currently restricts “a person from being in a position to exercise control of, or from being a director of, any combination of a commercial television license, commercial radio license or an associated newspaper in the same license area.”<sup>36</sup> The government is looking to amend this as long as a minimum number of media groups exist in certain areas, including “four in the regional market, five in mainland state capitals”.<sup>37</sup> With this, access to certain services would be required, such as to community television, the Internet and a minimum number of national broadcasters.<sup>38</sup> For regional markets, the approach would be different. The rules would provide for limitations on cross-media ownership and the transition would take place only if the current regional operators provide access to external suppliers with no existing presence in that regional market.<sup>39</sup> The government sees these changes as being necessary to meet the competitive demands of the industry.<sup>40</sup> In the meantime, the government reserves the right to prevent future media deals in any market it considers to be in an

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34 *Ibid.* at Key Provisions: 2.2 and 2.3, at 10-12.

35 *Ibid.* at Key Provisions: 2.3, at 11-12.

36 *Ibid.* at 2.3) Media Ownership and Control, at 38-39.

37 *Ibid.* at 2.3) Media Ownership and Control, at 41.

38 *Ibid.*

39 *Ibid.* at 2.3) Media Ownership and Control, at 42.

40 *Ibid.* at 2.3) Media Ownership and Control, at 38.

unacceptable ownership situation as defined by the five owners, or four in a non-metropolitan market; or in cases where any single person owns a television station, radio station and newspaper in the same market.

For foreign media ownership, the industry is deemed as a “sensitive sector” and therefore, the Treasurer must issue licenses with respect to the *Foreign Investment Policy* and the *Foreign Acquisitions and Takeovers Act 1975*.<sup>41</sup> Since the “sensitive sector” category continues to exist, the government believes there is sufficient protection for domestic media services and thus can safely eliminate the media specific rules in the *Broadcasting Services Act 1992*.<sup>42</sup>

The Australian government confirmed that these changes would take place some time in 2007.<sup>43</sup> The government contends these amendments would improve competition in Australian media services, encourage democratic discourse and be beneficial to consumers.<sup>44</sup>

### **Developments in Other Countries**

As Australia and the European Commission move to change the existing regulatory framework,

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41 *Ibid.*

42 *Ibid.*

43 Australia, Senator The Hon Helen Coonan, Minister for Communication, Information Technology and the Arts, Deputy Leader of the Government in the Senate, *Media Release 068/06: New Media Framework for Australia* (Australia, 13 July 2006), online: Minister for Communication, Information Technology and the Arts, Department of Communications, Information Technology and the Arts <[http://www.minister.dcita.gov.au/media/media\\_releases/new\\_media\\_framework\\_for\\_australia](http://www.minister.dcita.gov.au/media/media_releases/new_media_framework_for_australia)>.

44 Kim Jackson, “Media Ownership Regulation in Australia” at *Parliament of Australia: Parliamentary Library* (Commonwealth of Australia, 2006), online: Parliament of Australia: Parliamentary Library <[http://www.aph.gov.au/library/intguide/SP/media\\_regulations.htm](http://www.aph.gov.au/library/intguide/SP/media_regulations.htm)>.

many other countries could follow. With respect to foreign media ownership, the rules existing in 2006 in the United Kingdom and the United States were different. The United Kingdom does not have “sector-specific restrictions on foreign investment in broadcasting or print,”<sup>45</sup> whereas the United States restricts foreign investment to 20 or 25 per cent in a broadcasting station license, depending on whether the investment is direct or indirect. In France, there is a 20 per cent investment limit with respect to voting interest.<sup>46</sup>

With respect to cross-media ownership, while there were efforts in 2005 to change these, the U.S. does have restrictions on cross-media ownership in local markets.

While the United States does not currently regulate the Internet,<sup>47</sup> the *Communications Opportunity, Promotion, and Enhancement Act* (COPA) passed in 2006 seeks to ensure Net Neutrality, by prohibiting Internet service providers from giving preference to any individual website (including those with which they are affiliated): all Internet sites are considered equal and must be treated fairly.<sup>48</sup> Some commentators believe this Act could constrain investment.<sup>49</sup>

The trend seems to be for countries to amend their Telecommunications and Broadcasting

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45 *Supra* note 37 at 2.3) Media Ownership and Control, at 39.

46 *Ibid.*

47 U.S.A., Federal Communications Commission, *Internet FAQs* (Washington, D.C. 2 May 2007), online: Federal Communications Commission <<http://www.fcc.gov/cgb/internet.html>>.

48 Michael J. Tonsing, “The Internet as You Knew It May Have Died Last Month, and You Didn’t Even Know It” in *The Federal Lawyer* (56 July 2006 6) at 12-13, online: Index to Legal Periodicals Full Text <[http://proxy.bib.uottawa.ca:2174/hww/shared/shared\\_main.jhtml?requestid=184170](http://proxy.bib.uottawa.ca:2174/hww/shared/shared_main.jhtml?requestid=184170)>.

49 *Ibid.*

regulations in order to remain competitive and to ensure economic stability, and to regulate the Internet to protect children and minorities. There are also pressures to relax foreign and cross-media ownership restrictions.

In Canada, there have been some studies and parliamentary reviews about existing limitations on foreign ownership of telecommunications, cable and broadcasting companies. The CRTC is in the midst of a public process concerning how to ensure a diversity of voices in the broadcasting system and has raised issues of cross-media ownership in that process. While there has been little public debate in Canada on these issues, the Canadian government may believe it is necessary to follow the lead of Australia and the European Commission in order to maintain a consistent regulatory approach in what it believes is an increasingly globalized sector.

*May 2007*

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