



Do's and Don'ts for Global Media Regulation: Empowering Expression, Consumers and Innovation

By Patrick Ross *

We have seen in the 109th U.S. Congress a consistent inclination to reduce free expression through the regulation of media content and distribution. Some legislators have sought to extend broadcast indecency regulations to cable and satellite platforms,¹ despite First Amendment experts questioning the constitutionality of such an approach.² Other legislation has attempted to force multi-channel video providers to adopt government-mandated content-distribution models in the name of promoting children's programming, ignoring the legal challenges of such an approach as well as the ability of markets and parents to address the problems cited by the sponsors.³ And as they have done in the past, legislators are eyeing the Internet, in particular seeking to regulate social-networking web sites.⁴

But U.S. policymakers are not alone in their desire to regulate media and thus restrict free expression. There is, naturally, heavy regulation, often to the point of censorship, in totalitarian states. But other democracies around the world are demonstrating a desire to impose restrictions on the nature and distribution of online content.

In most every case, global policymakers cite one or both of the following justifications in seeking to impose new regulations: 1) Regulations between the offline and online world should be harmonized. 2) Potential victims – children, minority or religious groups – need to be protected from harmful content.

Let's examine these individually. It's true that in order to have a fully competitive market, one that offers consumers the widest choice at the lowest prices, one can't

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¹ Adam Thierer, "Thinking Seriously About Cable & Satellite Censorship: An Informal Analysis of S-616, the Hutchison-Rockefeller Bill," Progress & Freedom Foundation *Progress on Point* 12.6, April 2005 (<http://www.pff.org/issues-pubs/pops/pop12.6cablecensorship.pdf>).

² Robert Corn-Revere, "Can Broadcast Indecency Regulations be Extended to Cable Television and Satellite Radio?" Progress & Freedom Foundation *Progress on Point* 12.8, May 2005 (<http://www.pff.org/issues-pubs/pops/pop12.8indecency.pdf>).

³ Thierer, "'Kid-Friendly' Tiering Mandates: More Government Nannyism for Cable TV," Progress & Freedom Foundation *Progress Snapshot* 1.2, May 2005 (<http://www.pff.org/issues-pubs/ps/ps1.2familyfriendlytiering.pdf>).

⁴ Thierer, "Is MySpace the Government's Space?" Progress & Freedom Foundation *Progress Snapshot* 2.16, June 2006 (http://www.pff.org/issues-pubs/ps/2006/ps_2.16_myspace.pdf).

have certain competitors enjoying a regulatory edge over others. A broadcaster bound by numerous regulations defining everything from the type of content it can air at certain hours to the amount or nature of advertising it can run during certain programs will be at a disadvantage when compared to a video aggregation web site. Each competitor will have other advantages and disadvantages, which are natural in a market, but policymakers should aim to avoid competitive advantage through regulation. That does not mean, of course, that regulations on “old” providers should be transferred to “new” ones.

A strong case can also be made for certain types of content regulation. For example, most industrialized societies have decided that child pornography is unacceptable, and that is true even in the United States where the Constitution guarantees free speech. Few object when lawmakers create statutes outlawing the creation or dissemination of such content. That does not, however, serve as justification for new laws every time a new technology debuts.⁵

Policymakers in Europe, Australia and Canada are wrestling with an ever-widening array of new media technologies, and are eyeing them through the prism of these two principles of level playing fields and child protection. As we will see, there are some glimpses of enlightened policymaking, but just as often there is a lack of recognition that regulations which seem sound in principle can in fact be harmful to freedom of expression, consumers and innovation in practice.

Freedom of expression is central to the growth and development of democracies, a point that is increasingly being recognized worldwide. Any media regulation endangers free expression. But there are other risks involved with media regulation.

Consumers are demanding innovation in media delivery methods, so we want a regulatory environment that allows capital to flow into such innovations. Innovation, and thus consumer enjoyment, is harmed in an uncertain regulatory environment, or worse when burdensome regulations are in place and potentially block or discourage new technologies. Rather than continually ramp up the regulatory bureaucracy every time a new method of media delivery is unveiled or even proposed, it would be far better if global policymakers operated by a few simple rules that were pro-innovation and pro-consumer. Under these rules, all new technologies and services could enter the market and compete for customers, and freedom of expression would be ensured.

Europe

The European Commission’s Information Society and Media Commissioner, Viviane Reding, said at a recent event in Brussels co-hosted by The Progress & Freedom Foundation that her plan to update Europe’s Television without Frontiers Directive was harmless. “There will be no regulation of the Internet,” she said. “I’m not

⁵ Thierer, “Social Networking Sites and Child Protection: Toward a Rational Dialogue,” Progress & Freedom Foundation *Progress on Point* 2.17, June 2006 (http://www.pff.org/issues-pubs/ps/2006/ps_2.17_socialnet.pdf).

going to intervene in business – I’m technology neutral.”⁶ Instead, Reding is proposing two tiers of regulations, one for existing “push” or “linear” services such as broadcasting and a lighter one for “pull” or “non-linear” services like online video services.

But business groups in several industrialized European nations argue that the initiative is paternalistic, introduces legislation where it isn’t needed, and could cause significant damage because of the difficulty in interpreting what service should be regulated in what way. “This is telephone age thinking in an Internet age,” said Confederation of British Industries E-Business Director Jeremy Beales, arguing the proposed directive is “a catch-all piece of legislation that could affect huge numbers of websites because of a badly phrased piece of legislation.”⁷

There was resistance to Reding’s proposed rewrite from early on in discussions of the subject last year.⁸ That opposition increased after the proposed rules were introduced late in 2005.⁹ Reding isn’t likely to ameliorate many of her opponents, because they are opposed to any form of new regulations at all, fearing that either through poor interpretation of the new directive or with that new directive being the basis for still more regulations, that those seeking to do business online in Europe could face the same regulatory nightmares known to their offline competitors.

Much of the confusion is being driven by the increasingly blurry line between traditional broadcasting and online video. BBC, seeking in part to justify to viewers the TV tax paid by British consumers, is increasingly offering a robust selection of video online tied directly to its broadcasting, and sees the traditional TV grid with which TV viewers are accustomed as a concept that is nearing its end.¹⁰ Thus, the distinction between “linear” and “nonlinear” is breaking down in every U.K. household.

Australia

That blurring is not only occurring in the U.K. Australian TV viewers could watch that nation’s version of *Big Brother* once a week on Channel Ten, but could also watch live footage from the reality-show household on the Internet and mobile phones. As it happened, those watching the live footage earlier this year saw a male housemate sexually harass a female housemate with the assistance of another male house resident.

⁶ Tom Espiner, “Europe defends online broadcasting plans,” ZDNet UK, June 15, 2006 (<http://news.zdnet.co.uk/internet/0,39020369,39275180,,00.htm>).

⁷ Peter Warren, “It’s TV, but not as we know it,” *The Guardian*, July 6, 2006 (<http://technology.guardian.co.uk/weekly/story/0,,1813097,00.html>).

⁸ Patrick Ross, “Regulation Without Frontiers: Europe Shows U.S. Policymakers How Not to Embrace Convergence,” The Progress & Freedom Foundation *Progress Snapshot* 1.15, September 2005 (<http://www.pff.org/issues-pubs/ps/ps1.15frontiers.html>).

⁹ Ross, “Content Regulation Without Frontiers: Why the EU is Indeed Regulating the Internet,” The Progress & Freedom Foundation *Progress Snapshot* 1.24, December 2005 (<http://www.pff.org/issues-pubs/ps/ps1.24eu.pdf>).

¹⁰ Kerry Capell, “BBC: Step Right Into the Telly,” *Business Week*, July 24, 2006 (http://www.businessweek.com/magazine/content/06_30/b3994070.htm?chan=search).

This footage never aired on any *Big Brother* TV episode, and thus under Australian law the Australian Communications and Media Authority (ACMA) was unable to act. But now Parliament plans to move legislation to extend the Authority's reach.

Said Communications Minister Helen Coonan, "[t]his matter has reinforced the need for changes to the Act to ensure that these new services being offered over the Internet and mobile devices are subject to the same content restrictions that apply to television broadcasts." Coonan, who in Australia's parliamentary system is also a senator, said regulations could be stiffened for broadcasters as well, as "it would appear the codes applying to television program classifications may also be out of step with community standards."¹¹

The first step in this regulatory expansion has been to assign new powers to the ACMA. Created about a year ago to merge the regulation of media and communications into one agency, the ACMA has under Coonan been given increased authority after the *Big Brother* incident. ACMA Director Chris Chapman told *The Australian* that the quickening pace of convergence in media means his 500-person agency has to "work smarter."¹² Still unclear is exactly how ACMA intends to begin policing Internet content.

Canada

Not all democracies have been eager to regulate new media. In late 1999, the Canadian Radio-television and Telecommunications Commission (CRTC) exempted any "new media broadcast undertaking" from traditional broadcast regulations:

The Commission is issuing an order that exempts from regulation, without terms and conditions, all new media broadcasting undertakings that operate in whole or in part in Canada. New media broadcasting undertakings are those undertakings that provide broadcasting services delivered and accessed over the Internet.

This means that new media broadcasting undertakings are not subject to licensing by the Commission. The Commission wishes to emphasize that the exemption order does not apply to the licensed broadcasting activities (e.g. over-the-air radio and television broadcasting) of a company that operates a new media broadcasting undertaking.¹³

For several years this exemption order went largely unchallenged, but recently the CRTC was faced with the dilemma of determining how to treat mobile video services, such as those viewed through a wireless handset. The CRTC was faced with a narrow question: do the mobile video services of LOOK Communications, Bell

¹¹ Ben Doherty and Daniel Ziffer, "AUSTRALIA: Watchdog to vet Internet content," *The Age*, July 6, 2006 (<http://www.asiamedia.ucla.edu/article-pacificislands.asp?parentid=48595>).

¹² John Lehmann, "Watchdog vows to get up to speed," *The Australian*, July 20, 2006.

¹³ CRTC Public Notice 1999-197, "Exemption order for new media broadcast undertakings," Ottawa, Dec. 17, 1999 (<http://www.crtc.gc.ca/archive/ENG/Notices/1999/PB99-197.HTM>).

Mobility, Rogers Wireless and TELUS Mobility fall under the exemption order? In April 2006, the CRTC ruled that these services do in fact fall under the New Media Exemption Order.

But CRTC chose to deregulate further, determining that all mobile television services, whether or not the Internet is involved in the transmission, should be exempt from regulation. CRTC Chairman Charles Dalfen said: “The Commission considers that exempting mobile television services promotes innovation in delivering television to Canadians without adversely impacting the ability of licensed broadcasters to fulfill their obligations under the *Broadcasting Act*.”¹⁴

Consumers of mobile video in Canada are better off as a result of the CRTC’s decision. But it still begs the question – why have a two-tiered regulatory system in an age of converging media? CRTC is doing its best to split hairs here. A broadcaster sends a video signal through the airwaves to a receiver, where a consumer watches it. This is subject to regulation. A wireless carrier sends a video signal through the airwaves to a receiver, where a consumer watches it. This is not subject to regulation.

Increasing Complexities from Innovation

It was just this dichotomy that Viviane Reding cited in 2005 when she first began promoting a revision of the Television Without Frontiers Initiative:

*Consumers today have a much wider choice of TV and TV-style content, such as sports and premium film content, delivered via a huge variety of digital cable and satellite channels. And choice doesn’t just mean zapping among channels. Today’s consumers can use their TVs to interact with broadcasters in ways unheard of in 1989, such as choosing content that they like, voting, competing in TV shows, and contributing to charities. Besides interacting via traditional television, many consumers now choose to buy “video on demand”, delivered via cable, fibre or digital subscriber line. The growth of Internet Protocol TV in many countries is driven by demand for premium content, for which consumers are willing to pay. Other emerging technologies, such as mobile web streaming, are also expected to transform the audiovisual media services market in the coming years.*¹⁵

That paragraph is an inspiring summary reflecting both the ever-increasing entanglement of media and the ever-increasing demand of consumers to access content in new ways. Unfortunately, rather than regulating down to allow all media, “old” and “new,” to compete free of regulations, she crafted a new two-tiered model in which so-called non-linear services such as web downloads are treated differently from so-called linear services such as broadcasting.

¹⁴ “CRTC exempts mobile television services from regulation,” news release, CRTC, April 12, 2006.

¹⁵ Viviane Reding, “Why Europe needs to modernize its TV without Frontiers Initiative,” European Commission Information Society and Media DG, undated from 2005.

Reding does recognize that consumers increasingly are little focused on the means of delivery of content; it is the content itself that drives their behavior. Canada's examination of mobile video shows how difficult it is to create artificial regulatory distinctions with content distribution, and that is the point being made by the European business groups lobbying against the proposed Directive.¹⁶

As long as distinctions are made in media delivery – linear vs. non-linear, terrestrial broadcasting vs. wireless broadcasting – policymakers will find themselves forced to return to orders and statutes every time a new technology emerges. Consumers are better off when regulators don't get involved in new technologies, either insisting on the right to pre-screen them before entering the market or imposing new restrictions after market entry.

No one can predict what future content delivery technologies or services will emerge, but most would agree that more will emerge; it's hard to accept the notion that where we are now is as far as technology is ever going to bring us. With that in mind, perhaps what global regulators need is a list of Do's and Don'ts that can be applied whenever regulation of media content or delivery is weighed.

Policymaker Do's and Don'ts

1. **Do enforce existing child-protection laws.** Most societies agree that child pornography is not a welcome aspect of their culture and have laws in place addressing that. If a new content delivery medium is making such material easier to traffic, there's no need to regulate the new medium, which presumably has some salutary aspects as well; better if law enforcement uses the new technology to track down and arrest the perpetrators who are already engaging in illegal activity.
2. **Don't distinguish between types of content delivery.** Is it linear or non-linear? It uses spectrum, but is it a broadcaster or a wireless provider? Such distinctions make no sense in a converged digital age, and in fact may cause investment to gravitate to some services over others. This will not be to the benefit of the consumer if the less regulated technologies receiving more investment are viewed by consumers as less user-friendly and robust.

¹⁶ For an amusing – and enlightening – look at how difficult it is to distinguish between linear and non-linear media, see the March 2006 issue of MediaPost's *Media* magazine; that debate is the theme of the entire magazine. Editor-in-Chief Joe Mandese in the magazine's introduction states magazines are inherently non-linear, because people read what they want when they want. But he also notes they are linear, in that they have a carefully arranged format of content from front to back. To make the issue completely non-linear, they realized from a production standpoint they couldn't get rid of the issue's binding, but they did scramble up their content, not just by moving stories around but by moving text into odd positions, including upside-down, running sideways from bottom to top, and even spiraling around in squared-off circles. One article can only be read when it is held up to a mirror. It made this reader long for a more linear format.

3. **Do harmonize by deregulating down.** As #2 makes clear above, there is no justification to regulate content providers differently. Yet as we've seen, when regulators look to "harmonize" such regulations, it usually involves imposing regulations from old industries onto new ones. This will retard technological growth and impede the rollout of new content delivery services to consumers.
4. **Don't discourage migration of content.** The consumer demand for content is growing daily. Increasingly we will be seeing content production from a wider range of players, but it's natural to assume that some of the most popular content will remain that produced by professionals, such as TV and movie studios. That professional content should be able to migrate freely from traditional media to new distribution outlets. To the extent those producers remain under traditional regulations (if #3 above has yet to be implemented) then at a minimum their regulations shouldn't carry over into any new media applications in which they participate.
5. **Do support intellectual property rights.** Content producers and distributors recognize the consumer demand for content. Intellectual property rights of those content producers should be respected under existing law as producers and distributors experiment with new distribution channels.

These five Do's and Don'ts seem relatively straightforward and obvious, but there is not a nation on this Earth that is practicing all five of them. Some of these rules involve not doing harmful things in the future; that's where we can hope the globe's regulators begin. Others involve pro-active steps to reduce or eliminate regulation; those are always more difficult. But every one of those five Do's and Don'ts enhances freedom of expression, boosts innovation and delivers direct benefits to the consumer, and doing the opposite of any of those five retards innovation and harms the consumer. Perhaps this is the message that most needs to be heard by regulators, both abroad and in the U.S.

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