The Future of Media Regulation in New Zealand: Is There One?

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Preface

As recently as 1961, the government controlled all but two of New Zealand's 34 radio stations. Our first television station had just started up. We had to wait until 1975 for a second national channel. Both were state-owned.

The years since have seen a continuous expansion of the number and diversity of broadcasting outlets: privately owned AM radio stations burgeoned, FM radio emerged, privately owned television stations were permitted, and satellite television was launched. The government no longer controlled the broadcast media, and even took steps to ensure the independence of the parts it still owned. But it still believed it had a role to play in regulating broadcasting standards. Since 1990, this role has been filled by the Broadcasting Standards Authority, administering a complaints regime set up under the Broadcasting Act 1989 to govern matters such as fairness, accuracy, balance, privacy, and taste and decency. The system applies to all New Zealand radio and television broadcasters, public and private. And since the people broadcasting to New Zealanders were invariably based in New Zealand, that regime has worked relatively well.

Until now.

But things have changed. The ongoing revolution in information technology means that New Zealanders are increasingly receiving films and audio-visual programming from sources other than television and radio. Sources that often originate overseas and are accessible to anyone with a PC via the Internet. Sources that are probably beyond the reach of the current standards regime.

This paper sets out to examine what these new technologies are, and what they mean for the future of media regulation – and in particular, broadcasting regulation – in New Zealand. How are these new technologies changing the nature of broadcasting? To what extent is the current regime well-adapted to deal with these new technologies? What pressures are they likely to place on it? Can the regulatory regime be extended to encompass the new formats? Should it be? Would it need to be modified? Should it be scrapped altogether instead?

The paper is in two parts. Part one explores the technological developments themselves. We look at the growth of audiovisual content online, the explosion in file-sharing, the development of new communities online, the rise of collaborative information tools and citizen journalism, the emergence of Internet protocol television and the use (and misuse) of filtering technology. We also outline the mainstream media's response to new technologies, and crystal ball gaze about the future of broadcasting.

Part two examines the implications of new technologies for New Zealand's broadcasting regime. We summarise the regulatory challenges created by new technologies, sketch the existing regulatory environment in New Zealand, and identify some gaps and shortcomings. We then focus on the implications for broadcasting regulation, and suggest some potential legislative and judicial responses. Conversely, we look at the case for treating the Internet as a special case, where regulation should

be avoided or minimised. We look briefly at some solutions adopted in Australia, the European Union, the United Nations and the United States. And we finish with an argument for some content regulation – even if it applies only to some broadcasters, tempered with a warning about the dangers of government excesses.

Executive Summary

Part One: The March of Technology

- The assumption that has underpinned broadcast regulation in the past - that broadcast bandwidth is a scarce, powerful resource - has been overhauled by the effectively unlimited number of channels offered by the internet.

- New technologies allow audio-visual content to be quickly and efficiently distributed around the globe.

- The ability for consumers to save and share is important to them, as is the ability to signal preferences to other consumers.

- The same technologies are triggering substantial changes in the way such content is used and distributed; changes that begin on the margins and move very quickly to the mainstream.

- The media industry tends to follow, rather than lead, these changes.

- The media industry, and in particular the broadcast sector, is presently in a period of accelerated innovation in response to consumer pressure.

- Some of the most powerful and influential developments centre on new, networked communities.

- Audio-visual content plays a key role in these communities; within which individuals increasingly "quote" media to each other.

- There are signs of the development of both formal and information standards within these communities; and also that they may embrace material that would struggle to find a place in traditional media environments.

- "Citizen journalism" has arrived, and brought with it both benefits and new challenges.

- Media consumers often act as producers and consumers in this new environment.

- A dichotomy exists between single sources of authority and the mass of individual voices.

- While blog content may be racist, hateful or defamatory, the culture around blogging regards more speech, rather than censorship, as the answer to bad speech.

- Some blog sites will increasingly define themselves as established media ventures by dictating their own standards.

- Internet Protocol Television is emerging in various ways, and is likely to further lower the barriers to entry into broadcasting.

- New Zealand is making a belated move towards free-to-air digital broadcasting based on the Freeview model pioneered in Britain.

- Programming to support the move to a multi-channel digital environment will be a focus for TVNZ in particular.

- Regulatory changes in telecommunications will increase the number of consumer able and willing to consumer audio-visual content via the Internet.

- The technical means to filter internet content exist, but those means are not perfect and filtering creates its own problems.

- Generally speaking, the higher the level at which filtering is applied, the more controversial it becomes. A world in which national-level filtering was commonplace would have troubling implications for free speech and democracy.

- Old assumptions about media roles are called into question as traditional media silos break down and broadcasters publish text and newspapers publish video.

- In envisaging the future media environment it is important to regard consumers as active participants, often in "conversation" with media organisations. The evidence of recent years suggests that individuals and communities often lead trends (and thereby media industry strategies) rather than following the lead of the boardroom.

Part Two: The Regulatory Response

- The advent of new technologies creates problems for regulators trying to control material that is fraudulent, harmful to children, criminal, offensive, invasive of privacy, anti-competitive or unethical. All countries are struggling with these issues.

- New Zealand's system of media regulation is a patchwork of private and public regulatory bodies, common law and statute, and rules applicable generally and ones that only apply to certain platforms or types of content. Different regulatory bodies apply different standards. The boundaries between them are not always clear, so there are overlaps and gaps. One important gap is BSA's lack of jurisdiction to deal with broadcasting-like content over the Internet, through website downloads, file-sharing, and audio-visual content on overseas-based websites.

- Competition from unregulated content providers, the rise of citizen journalism, and increasing use of new ways of delivering information will put pressure on the existing broadcasting system. For example, on-demand video content will challenge watersheds. Existing standards will be challenged by content that is increasingly provocative, personal, invasive, graphic, violent and sensational. Sophisticated advertising will test the boundaries between advertisements and other programmes. Broadcasters will complain that it is unfair to subject them to standards that their competitors can avoid.

- The regulatory emphasis may move from dictating standards to informing audiences about the nature of the content available and empowering them to make judgements, participate in emerging community standards processes or use technical means to block what they do not wish their children to see.

- Any attempt to extend the BSA's jurisdiction to cover other broadcast-like platforms will encounter difficult practical and policy problems. Regulation could only apply to New Zealand-based content sources. The case for expanding the BSA's jurisdiction is arguably greatest with respect to audio-visual content (as opposed to text), publicly owned or funded content sources, transmissions to large audiences, and broadcasts of local news and current affairs.

- If the BSA's jurisdiction isn't extended, the government and the courts may look to other solutions to address similar problems.

- Arguably, regulating content on the Internet will do more harm than good, as it may stifle valuable information flows. Or it may be largely pointless, as the Internet is uniquely capable of avoiding censorship.

- In any event, an international consensus on regulating Internet content looks very unlikely.

- The EU is moving to impose some baseline regulation of audio-visual content across different platforms, with more strict rules applying to scheduled programming than content that is selected on demand.

- Australia has applied part of its censorship regime to Internet content. Complaints about Internet content hosted anywhere in the world are investigated, and if R or X rated material is found on an Australian site, the hosting company is told to take it down or set up a restricted access system. Infringing foreign sites are added to filtering software programmes, which must be made available to users. The secretiveness of the system makes it hard to assess, but it has been criticised as draconian and ineffective in improving Internet safety.

- The US Federal Communications Commission has general power over communications platforms, but very little power (or inclination) to control content, except for baseline standards such as indecency. It applies different standards to different platforms, something experts say will prove increasingly problematic in an age of convergence.

- There is a movement in the US to assert bloggers' rights, with some success, through advocacy and lawsuits.

- Arguably, democracy requires the continuation of at least some source of news and current affairs which is backed by a standards regime, even if other sources are not. Nevertheless, some will always be sceptical of any government's ability to own or operate news sources, or agencies that regulate them.

Five Key Points

1. An exploding information and communications technology revolution is creating a range of new formats for the mass delivery of data, including news and news-like broadcasts, films, and entertainment programming.

2. The technologies are changing the entire media environment into something more interactive, fast-paced, demand-driven, and collaborative.

3. The BSA does not have jurisdiction over many of these formats. Some may be impossible to control anyway. Competition from unregulated formats may render broadcasting standards obsolete. Already they are revealing gaps and inconsistencies in our regulatory regime.

4. The government will have to decide whether (and if so, how) to regulate them.

5. Control of broadcasting-like content will probably revolve less around laws and more around labelling and filtering requirements, voluntary protocols and self-regulation, contractual arrangements, and evolving social norms.

Part One: The March of Technology - Outpacing the Reach of Regulation?

Outdated regulatory rationale

Historically, broadcasting regulation has hinged on the idea of broadcast bandwidth as a scarce, and powerful, resource. By the same token, broadcasters have implicitly accepted regulation as part of the price of their access to a limited supply of radio frequency spectrum.

Those assumptions are fading as audio and video content shifts to the Internet, which offers an effectively unlimited supply of channels, and, crucially, the ability to deliver content anywhere in the world. This shift is analogous to the assumption of the "power to publish" in text form by all Internet users. A blog posting written from Okarito, Antarctica or slopes of Everest will be read in London, Auckland or Moscow.

Television goes online

Sound and moving pictures have been transmitted across the Internet since the World Wide Web became the dominant mode of access to the network in the early 1990s, either as downloadable files or services "streamed" across the network in real time.

For much of that time access speeds, copyright issues and the way people use the Internet (typically jumping from one resource to the other) have dictated that video works have been of short duration, and not recognisable as television per se. But the past 18 months have seen accelerating change on a variety of fronts.

As was the case for the music industry, the change has been driven to some extent by consumer piracy, and in particular the BitTorrent file-sharing technology (also characterised as peer-to-peer or P2P technology), which is suited to very large files.

As early as November 2004, the British Web analysis firm CacheLogic estimated that 35% of all Internet traffic was generated by BitTorrent. A year later, the firm claimed that proportion had risen to 60%. Other estimates have been considerably lower (of the order of 20%), but it is clear that millions of Internet users, especially in markets with high broadband penetration, are employing BitTorrent to acquire and share video programming.

Users download the programmes for a variety of reasons. In the real-time world of the Internet, users based outside the US are not satisfied with reading news and commentary about first-run prime-time series in the US, yet waiting perhaps six months until their local broadcaster airs the shows, or even waiting in vain to see certain programmes at all.

Others, living outside their country of birth, catch up on televised sporting events, or seek programmes with subtitles in their native language. Within the US, many viewers seem to use BitTorrent as a de facto personal video recorder (PVR), even when they actually have conventional access to the programmes.

TV programmes are not the only files on BitTorrent networks. They also carry box-office movies, computer applications, electronic versions of books and comics and pornography. Most - but not all - files are shared in breach of copyright. Copyright holders have had some success in closing down the web sites that serve as online directories for BitTorrent. But they have also been obliged to pay heed to the signal that consumers can and will download large video files.

In August 2005, Apple Computer catalysed the market by leveraging its relationship with Disney to offer downloads of several of the Disney-owned ABC network's most popular shows, including Desperate Housewives and Lost. The files - ostensibly for playing on Apple's new video iPod, but undoubtedly viewed largely on personal computers - were posted the morning after screening, at a cost of $US1.99. They have proven popular. And, as a fascinating side-effect, the conventional broadcast ratings of the programmes made available *improved* after Apple began selling them from its iTunes video store.

In general, the most popular programmes on Apple's service (which for licensing reasons is largely limited to the US) are also those which have proven popular with BitTorrent users. Notably, The Daily Show - whose brand has been fostered by the generous approach of its owner, Viacom's Comedy Central, to Internet sharing - has been a popular addition to iTunes.

This is not the first time Apple has attempted to take TV to the Internet. In 1999, it announced QuickTime TV, a limited bouquet of specially-created programming available for viewing in a streaming format (ie, it could be watched in real time, and not downloaded). It was not a success.

Apple's more recent intuition was the same as that which has made its iTunes Music Store the dominant player in digital music downloads: consumers will pay money for good-quality digital media that they can keep, file and play at leisure (Apple's digital rights management system does not limit the use of the digital files, but makes them hard to distribute).

The iTunes example has sparked a flurry of activity in the American industry, with several cable TV providers offering downloads, and the massive search company Google apparently rushing to market with its Google Video Store.

Google's shopfront lacks the slick, consumer-friendly feel of the iTunes Store, and its digital rights management has been sharply criticised in some quarters, but it offers a more adventurous model. Like iTunes, Google offers fixed pricing for network TV shows, but it also allows independent producers (and even individuals) to name their own prices, delivering the programmes for a 30% commission. If no price is asked, Google hosts and delivers the video for free.

Google's model has the effect of making it appear more like an intermediary, taking a commission, than an on-demand broadcaster. This may be an important distinction as its inventory - and especially the free video - grows. Videos are displayed on the Video Store page on the basis of popularity, in keeping with Google's core principle of basing the ranking of search results on observed consumer behaviour. (The Google Video Store is further discussed in the following section, *The new communities and the role of media within them*.)

With the success of the iTunes venture, some of the same American TV networks have embarked on another experiment: making hit programmes available for free, the day after broadcast. These programmes cannot be downloaded, but are streamed across the network, and contain advertising that viewers cannot "skip" (although they may choose which ads they see). A two-month trial by the ABC network will be supported with sponsorship advertising from Ford, Proctor & Gamble, Universal Pictures and AT&T.

Although some commentators have questioned the technical practicality of such a large-scale streaming exercise (which requires a consistent quality of service across the public Internet), other networks were quick to follow ABC in announcing their own plans. In the same week as the ABC announcement, the US Fox Network said it would be making 60% of its programming available online on a similar basis.

In Britain, the BBC is trialling a variety of alternative means of delivery, including MyBBCPlayer, which allows BBC channels to be viewed live on the Internet. The BBC's initiative has prompted both ITV and Channel 4 to reveal plans for similar offerings to debut later this year.

Another BBC trial project, the Integrated Media Player (or iMP), allows consumers to download programming via the Internet for up to a week after broadcast. Digital rights management software provided by Microsoft causes the programmes to "expire" on the user's hard drive after a week.

The most interesting element of the iMP trial is its use of P2P technology similar to that at the heart of BitTorrent: users get files not only from the broadcaster, but from each other. The intention is to ease one of the major problems with mass video distribution - the enormous demands on network capacity it generates.

The BitTorrent software does no more than put users in touch with each other in a "swarm" of data that will likely span the globe. Once connected to a swarm and downloading pieces of the file, a user will also be uploading pieces of the file required by others in the swarm.

A swarm will consist of two kinds of user client: seeders (users with a full copy of the file, uploading to the swarm) and peers (users with part of the file, both uploading and downloading). The BitTorrent technical protocol requires clients to request from their peers copies of the file fragments that are the most "rare" (available on the fewest peers), thereby making those fragments available across more clients. Thus, the work of delivering the file is distributed across the swarm, employing the upstream bandwidth of all those connected to the swarm.

In sum, this has the remarkable effect of not only allowing bandwidth to expand to meet demand, but of actually reversing the bandwidth equation.

To explain by way of example: a single provider may purchase a one-megabit-per-second circuit connecting his server to the rest of the Internet - enough for 10 users to simultaneously download the file at an optimum 100 kilobits per second. But if 20 users are simultaneously downloading the file, there is only half as much bandwidth available - 50Kbit/s - meaning a slower download. In a BitTorrent swarm, more users will typically mean the opposite - a faster download.

This means of distribution also has a social dimension. It is evident to users which programmes are the most popular with other users - those showing the most seeders and peers. The effect is that a disparate community of users can make a major impact on both demand for and availability of the programme.

Remarkably, the BitTorrent protocol was developed by a single programmer: a young man called Bram Cohen, who has Asperger Syndrome (a mild form of autism). The story of the impact of motivated individuals and mobilised mass communities has been played out repeatedly through the history of the Internet.

In September 2005, Cohen's company, BitTorrent Inc. (the company, the protocol and Cohen's version of the client software all share the same name) accepted $8.75 million in venture capital from the Silicon Valley firm DCM-Doll Capital Management, with the stated intention of developing legitimate business models.

Commercial copyright owners have been in discussion with Cohen's company since then, and in May 2006, Warner Brothers announced plans to use BitTorrent for legitimate distribution of movies (simultaneous with DVD release) and TV programmes. At the time of writing, the means by which it will charge for the programming is unclear, but the company says it will pursue a strategy of mass distribution at modest prices.

The implications of such a strategy are remarkable. At minimal cost to the rights owner, it potentially leapfrogs both physical distribution networks and national regulators. The social dimension of BitTorrent, noted above, further implies that an independent production could develop into a worldwide "hit" with virtually no conventional distribution resources.

The new communities and the role of media within them

In parallel with developments at an industry level, the Internet has also seen an explosion in the use of video - and often the same programme material - on a very different basis.

The most striking example of the trend is the California-based YouTube, a "community video" hub that represents a classic example of the kind of "techno-bubble" that has characterised the emergence of important Internet trends in recent

years. YouTube allows anyone to upload short (limited to 10 minutes' duration) video clips for others to see, at no cost.

YouTube launched in June 2005 and its traffic began to climb steeply two weeks later. By February 2006, it was streaming 15 million a videos a day. By May 2006, the figure had jumped to 40 million - amounting to an astonishing 200 terabytes of data daily.

YouTube is not the only such hub - the free section of the Google Video Store effectively fills the same role (although, unlike YouTube, Google makes it easy to download its free videos for offline viewing), and there are other, smaller projects. None of them have achieved the cultural clout of YouTube.

One reason for YouTube's success is that it has explicitly acknowledged its technical and cultural links to the blogging phenomenon. In the past two years, as PCs and PVRs have made it easy for consumers to capture and edit digital video, some blogs have specialised in posting clips from TV news shows, The Daily Show and other sources.

What they are doing is what bloggers have always done, and, indeed, what people have done since they first got email: quoting media to each other. The clips become a topic for debate or an item to be shared in the same way as a text news report or an amusing picture.

But quoting broadcast media in this way still requires time, some skill and network resources. YouTube solved some of these problems, and made it easy for the clips it hosted to be linked from and embedded in blogs and other websites.

YouTube also offers the personal features characteristic of such "social networking" web services as MySpace.com. Registered users have access to a "My Videos" page where they can list their favourite clips, and can associate an unlimited number of "friends" with their personal YouTube profile. These friends can be sent messages at any time.

YouTube has also embraced "tagging", which is also characterised as "folksonomy": an open-ended classification system in which any user may define and apply a tag (typically one or two words) to media material to indicate its content or tone. The YouTube site displays a "tag cloud" of both the most recently-added tags and the most popular.

Some of the videos it shows are copyright to those who uploaded them - and, indeed, apparently trivial amateur videos created by teenagers seem to comprise a growing proportion of the archive. Many others breach copyright in some way, although the site's terms of use forbid the posting of copyright material without permission. Such material ranges widely - from transfers from personal VHS tape libraries of vintage TV, to the genre of "video karaoke", in which ordinary people tape themselves miming to well-known pop songs.

A few individuals have achieved a measure of fame through the latter route: most notably the Back Dorm Boys, students at Guangzhou Arts Institute in China, who

have appeared on American network television and are now the official spokesmen for one of China's largest Internet portals.

Clips in another currently popular genre, the "trailer mash-up" are far less numerous but much more interesting. The author of a trailer mash-up will typically take elements from one (or sometimes more) feature film and re-edit and combine them into a mock trailer for what appears to be a completely different film. This, *Brokeback to the Future* takes scenes from the *Back to the Future* films and assembles them into a trailer for a film with the plot of *Brokeback Mountain*. Another clip re-edits the horror movie *The Shining* into what appears to be a romantic comedy.

The most dazzling work in the genre, *Starlords*, is a blend of the Star Wars and Lord of the Rings movies (with additional disco music) crafted, without the permission of the copyright owners, in New Zealand.

The genre demonstrates both the malleability of digital media and, in some cases, the way in which deliberate editing can make media material appear to be something other than what it really is. The potential for video material to be "quoted out of context" is enormously increased.

Copyright owners are poised between asserting their rights and tolerating YouTube. This year, the NBC network demanded that YouTube stop hosting clips from its *Saturday Night Live* programme (the clips were available in a different format on NBC's website). YouTube, in line with its declared practice, immediately took down the clips. On the other hand, some copyright owners have begun to supply material such as "making of" mini-features directly to YouTube.

Users are also forbidden to "submit material that is unlawful, obscene, defamatory, libelous, threatening, pornographic, harassing, hateful, racially or ethnically offensive, or encourages conduct that would be considered a criminal offense, give rise to civil liability, violate any law, or is otherwise inappropriate."

Reports suggest that clips falling into one or more of those categories are indeed posted, but are often removed under an increasingly proactive editorial management regime. Registered users may also click a button below each clip to report it as "inappropriate". An accompanying message encourages them to "Please help keep this site FUN, CLEAN, and REAL."

Although tags such as "sexy", "porn" and "cock" are popular, none of the material available on YouTube would be regarded as pornography under New Zealand regulation, and many of the clips thus tagged are jokes (a clip promising "the biggest cock you've ever seen", for example, proves to feature a giant shuttlecock). In some cases, the following message will be displayed before a clip can be viewed:

This video may contain content that is inappropriate for some users, as flagged by YouTube's user community.

By clicking "Confirm," you are agreeing that all videos flagged by the YouTube community will be viewable by this account.

And yet, some material which might be considered racist or otherwise offensive remains on YouTube. For example, a clip entitled 'The Islam Problem' seeks to suggest that its scenes of an extreme Shia ritual involving flagellation will be seen in Europe "Soon, at your favourite city," remains available.

Also available on You Tube - and quite popular - is an apparently genuine video created by Iraqi insurgents and framed as a message to the West (the commentary on the video is in English). It provides an interesting example of the way that such video communities can offer material that would not likely be screened on television.

YouTube's community monitoring appears to be more effective than Google Video's top-down system, under which no video, whether free or for sale, will be published on its site before it is verified by a staff member. Google's decisions play a key role in setting a more general standard for acceptable content, and at the margins may be seen as controversial. Several popular Google videos feature young women in the kind of self-shot webcam video common in the Internet porn industry, but with less explicit nudity. The exact nature of the standard applied is unclear.

YouTube and sites like it are beginning to bear out the prediction of Ashley Highfield, the BBC's director of new media and technology, that television will become more akin to a conversation, composed of video works of relatively short duration. He has predicted that perhaps a third of future "television" will be generated by users.

This path has its perils. It is easy to imagine embarrassing videocam clips being uploaded to YouTube as a form of bullying, for example.

The role of video media on YouTube is in many respects similar to that played by music in the MySpace.com community. In her March 2006 essay. *Friendster lost steam. Is MySpace just a fad?*, the American academic Danah Boyd (who works with the University of California at Berkeley's Digital Youth Project) described the way MySpace recognised and harnessed the key role of music as a medium:

MySpace … contacted promoters and got them to engage with the "cool" people on the site by promoting LA-based events. From this, there was the emergence of band profiles, giving musicians an opportunity to create identity and have a place to point fans to. Music is cultural currency. 20-somethings want to know how to get on the list. Young people follow music and celebrities. Other young people follow the young people that follow music. Music played a critical role in increasing its popularity, simply by giving it cultural currency amongst celebrities and by marking MySpace as "cool." (Even teens who don't care about music recognize that music differentiates people and is part of the "cool" narrative.)

The sheer scale of these communities - by the time News Corporation completed its purchase of MySpace this year, the site had more than 50 million registrations - suggests that the trading and parading of media as a way of negotiating identity in vast networks is not going to go away. The US music industry is already familiar with the concept of "MySpace bands" - artists who have developed momentum inside the community before springing straight to mainstream radio play and sales success.

MySpace is as controversial as it is popular. Although it has moved away from its original identity as a "dating" site (and towards its current focus on media), there is no doubt that it is used as a means of making contact for casual sex.

Most MySpace users are young and although the operators take some measures to protect users (the profiles of those under 16 are not visible to other users, for example) concern persists about the essentially unregulated interactions of those in the community.

In a recent address to the American Association for the Advancement of Science, Danah Boyd explained the mechanics of "friending" on MySpace and concluded that the booming popularity of such virtual public spaces was linked to the disappearance of such unregulated spaces in the physical world: "Youth are not creating digital publics to scare parents - they are doing so because they need youth space, a place to gather and see and be seen by peers."

Whatever qualms exist, the commercial and social power of the new, networked communities suggests that they will persist and grow in importance, even as their users may eventually move on. The experience so far also suggests that they will continue to evolve - and sometimes in sudden, unexpected directions.

Although YouTube handles short clips only at present, it seems highly likely that that model it incorporates will play a growing role in the next decade in not only determining the commercial fortune of video media, but in establishing community standards for that material.

In the short term, however, the greatest threat faced by YouTube is probably its own success. The massive bandwidth it now requires costs the company more than a million dollars a month. Right now, it's not clear how it plans to reap back that expenditure.

The increasingly important role of online communities in the media market was underlined by Fox Network's recent announcement that it will provide downloads of *24* and other prime-time programming via MySpace. The two companies are both owned by News Corporation.

From the other side: blogs, wikis, citizen journalism and user-generated content

There can be no doubt that in the past decade media consumers have begun to take a more active role in the media sphere. They see themselves not only as consumers, but as producers. There has been no more striking indication of that shift than the rise of "citizen journalism" in 2005.

The BBC correspondent Martin Bell once memorably declared "People blithely imagine that journalists are where the news is. Alas, not so; the news is where the journalists are."

When the Indian Ocean tsunami struck on Boxing Day 2004, the only journalists working where the waves struck were themselves victims. But there were a handful of professional journalists holidaying in the tsunami zone - and many more members of the public who took on a journalistic role. The only video footage of the tsunami striking came from holidaymakers with handycams. Days before reporters were able to reach some of the worst-affected zones, people who had been there were filing reports via email and their blogs. They had resources and equipment that, 10 years ago, would have been the preserve of professional news teams.

The changing nature of news was further emphasised in response to a decidedly unnatural disaster: the London bombings of July 2005. As soon as the news began to break, the major London newspapers appealed via their websites for eyewitness reports from readers. The reports - published swiftly and only lightly edited - were notably concise and relevant. The newspapers' readers appeared to have taken seriously their duty as reporters.

As had been the case in the tsunami's wake, there were also bloggers thrust into prominence by virtue of having simply been on the scene. The London author of one blog, Pfff, posted a compelling account of surviving the Edgeware Road blast. His traffic jumped from three visits a day to 1500 an hour. Many others used their blogs as simply a place to respond and react. Before days' end in London, blogs in New Zealand and many other countries had published posts from expatriates in the city. The tracking service Technorati reported a 30% jump in blog postings worldwide.

The same day was also a significant one for Wikipedia, "the free encyclopedia that anyone can edit". Within minutes of the news breaking, volunteers working from several countries opened a new Wikipedia entry. Updated constantly through the day, the freshly-created page more than rivalled conventional news media in its coverage.

Similar calamities actually helped establish the blogging phenomenon. On the morning of September 11, 2001, the New York Times' response to the human terror on its doorstep was sluggish and institutional. At the same time, one of the original bloggers, Dave Winer, was gathering and publishing reader reports and conveying a human dimension absent from the city paper's work. Less than two years later, the blog of a 28-year-old Baghdad-based gay architect who called himself Salam Pax was read by millions, and became the most compelling account of the Iraq invasion. As lay commentators and reporters Iraqi bloggers continue to provide important coverage from the country.

But the London attacks saw the emergence of a new dimension. They took place in a modern western capital, where hundreds of thousands of people carry mobile phones with picture and video capabilities. The BBC received 30 mobile video clips from members of the public on the day of the attacks (prompting its director of news, Helen Boaden, to declare a "gear shift" in the corporation's relationship with its audience) and one such clip was the first mobile video to be aired by CNN.

Another consequence of that day in London was a sharp rise in the prominence of another Internet community development - the photo-sharing site Flickr, which like broadcasters and newspapers, distributed images captured by ordinary people. (The response of major media organisations has been to either emulate or acquire these

new developments - The Guardian now routinely covers breaking events with rolling "newsblogs", and last year the Internet portal Yahoo bought Flickr.)

Amateur camera news is not new - the 1991 Los Angeles riots were sparked by amateur video of Rodney King being beaten by police - but it is now vastly more likely to be captured, and a more important part of TV news practice, as evidenced by TVNZ's One News "YourCam" promotional campaign.

The limits and perils of user-generated content: what are the boundaries?

All the new phenomena noted above usher in problems as significant as their promise. There is, for example, a far less savoury side to the mobile video trend, as witnessed in Britain's "happy slapping" craze, in which innocent members of the public are assaulted and sometimes robbed, and the mobile video of the incident is subsequently posted on the Internet.

No reputable broadcaster would air such video as entertainment - although some have jumped at the chance to show "happy slapping" video as news content - but the amateur video makers do not need reputable broadcasters to make their work available globally. They just need a website.

The boundary between news and prurient entertainment is increasingly blurred in this new world. News broadcasters - in western countries anyway - will have a code of ethics as to what is proper to show of a war or accident scene, and regulators on hand to enforce decisions. Opportunistic mobile video makers may have no such boundaries.

When everyone with a cellphone is potentially a photojournalist or a cameraman, cannot be assumed that all citizen journalists will display the sense of duty or responsibility of those in London.

When Lady Diana Spencer met her end in Paris in 1997, the only bystanders with cameras would have been professional photographers. Even if one of those photographers breached the privacy of the dying princess, the prospect of international odium would have deterred publication. Things would not be the same today.

It is likely that legislators, regulators and interest groups will have to broaden their message in coming years; addressing not only easily-identified conventional broadcasters, but also a far more diverse group of camera-carrying citizens.

Wikipedia also is beginning to look more like an unfolding experiment than an unalloyed benefit. It has gathered more than a million articles in English (and nearly three million in other languages) since it was launched in 2001. But in the past year, some of its strongest supporters have criticised or abandoned the project, frustrated by constant "edit wars" over controversial topics, and the way in which some entries

actually degrade over time as less able editors alter them (an editor is anyone who adds or amends content on Wikipedia; it is not necessary to even register to do so).

More seriously, some entries are wrong, malicious or defamatory. In one notorious incident, an editor wrote a passage falsely alleging that the journalist John Seigenthaler was implicated in the assassination of John F. Kennedy.

Wikipedia's critics - and they include Larry Sanger, creator of the NuPedia project that became Wikipedia - contend that the enyclopedia needs a dose of authority; that it needs formal experts with a final say. Its supporters insist that errors and vandalism in the work can be swiftly put right by other editors, that Wikipedia is self-correcting.

This dichotomy - between a single source of authority and a mass of individual voices - is a key one for regulators seeking to understand the new media. The strong cultural belief in the blogosphere - and in Internet culture in general - is that undesirable speech should not be quelled, but answered with more speech.

While the role of bloggers in holding to account the mainstream media is frequently overstated (the vast majority of blogs do nothing of the kind), there is no doubt that such a role is now a permanent feature of the media environment, and that it has improved media content. Blogging began as a vehicle for the individual voice, but many major blog sites are group efforts that carry paid advertising and attract millions of readers. Some have been the scene of a new kind of investigative reporting, in which the investigation is distributed amongst volunteers from the reader community. Perhaps the best-known example of this phenomenon is the so-called "Rathergate" scandal during the 2004 US presidential campaign. When *Time* magazine named Power Line its "Blog of the Year" for its role in the affair, it would have been better advised to credit many individuals whose contributions served to call into question (within hours rather than days) the document on which CBS News based an apparently damning story about President Bush's military career.

Blogging also delivers expert commentators to the established media, which are no longer the preserve of journalists. University professor Glenn Reynolds, founder of Instapundit, one of the first mass-audience blogs, now frequently writes commissioned work for print publications. Many lawyers, scientists and academics have come to prominence via the unmediated access to an audience offered by their online journals.

On the other hand, blog content can also be racist, hateful and defamatory in ways that would not be tolerated in any established medium. It can be one thing to (as The Guardian has) adopt the blog format for certain purposes, quite another to adopt a blogger, as The Washington Post discovered this year.

Under pressure to "balance" the commentary of an experienced political correspondent, the Post hired Ben Domenech, the 24-year-old founder of the hugely popular and highly partisan conservative blog site RedState. The arrangement lasted only three weeks, by which time Domenech had been exposed as both a serial plagiarist and as the author (under a pseudonym) of potentially offensive comments in the discussion forums on his own website.

Ironically, the Post did not make these discoveries itself. Rather, it felt the lash of collective reporting on several left-wing websites, where readers and blog authors turned up the embarrassing information.

But the Domenech case perhaps highlighted some boundaries between the mainstream media and the blog world. Domenech's writing (he taunted his "enemies" as the controversy grew) proved a poor fit for a newspaper of the Post's stature. It may be that some blog sites will increasingly define themselves as established media organisations by dictating their own standards, while others will remain partisan and shrill.

The default principle ought to be to leave this world alone. Yet regulators may also wonder whether there are boundaries and where those boundaries might be.

The emergence of IPTV

One reason that both the file-sharing networks and the iTunes and BBC-style save-and-view model have flourished is that both broadcasters and consumer telecommunications networks are largely not yet ready for the delivery of Internet Protocol Television (IPTV), although a number of countries with high broadband penetration - France, South Korea, Japan, France and Britain - have commercial operators providing some kind of IPTV service.

France is Europe's biggest IPTV market and is expect to have a total 1.7 million subscribers by the end of 2006. That will be nearly half the total for the whole of western Europe, but IPTV uptake is expected to increase over the next few years as telecommunications operators in Denmark and other countries roll out services in pursuit of the so-called "triple play" market: voice, data and television.

It is important to note that although, as the name suggests, the technical means of delivery for IPTV is the Internet Protocol, it will not necessarily be delivered over the public Internet. Indeed, it probably will not, in order to ensure quality of service not available on the wider Internet, which delivers data on a "best effort" principle.

In a true IPTV system, viewers receive programming, in real time, across broadband connections, either via a home computer or a dedicated set-top box, rather than having to download programmes first. This does not necessarily mean that they would be watching a particular programme at the same time as all other interested viewers: just that the programme is streamed across the network.

Although New Zealand Telecom's original JetVideo IPTV trial involved only conventional broadcast programming and pay-per-view movies, IPTV offers capacity for many more - and more personalised - "channels". If Telecom proceeds with its IPTV plans in light of recent regulatory changes, it seems likely that barriers to access will be even further lowered. With the cost of television production steadily falling, and the need for expensive radio frequency licenses or satellites removed, it is not hard to envisage a large range of groups and individuals delivering television to niche audiences for a least a few hours a week.

This would not mean that the practice of saving and sharing would disappear. Consumers have clearly expressed a desire to archive digital media for themselves, and IPTV is likely to bring with it a new generation of personal video recorders (PVRs), capable of recording and story multiple programmes at a time.

Now and the near future in New Zealand

At the time of writing, a group of free-to-air TV broadcasters were preparing to launch a digital platform called Freeview, which is closely based on the platform of the same name established in 2002 in Britain.

New Zealand's Freeview will encompass both DTH (direct to home, or satellite) and DTT (digital terrestrial television) services, with satellite services likely to launch later this year, followed several months later by terrestrial.

Freeview's role will be tightly circumscribed. It will not provide access, either terrestrial or satellite, and the only onscreen service it provides will be a shared EPG (electronic programme guide) to be transmitted along with the broadcast signal. This EPG will be available for use by PVR-style decoders providing a free-to-air alternative to Sky TV's My Sky service. The group's key role will be to agree standards and ensure that Freeview-compatible decoders are available at retail.

The DTT service will effectively duplicate the national DTH footprint, but is regarded as essential because DTT signals can be received by standard TV aerials, meaning that consumers will need only to buy a low-cost decoder and not pay to have a satellite dish installed. Existing Sky dishes will be able to receive Freeview services, but an additional decoder will be required.

Likely participants at launch are TVNZ, Canwest, the Maori Television Service and the Racing Board. The participation of new entrants will depend heavily on the entrance fee for Freeview participation (in Britain it is £11 million) and the willingness of existing players to unbundle airtime. There seems to be no obstacle to offshore broadcasters delivering services via Freeview, and the success of several ethnic radio stations in Auckland suggests there may be niche markets for similar TV services.

The British regulator recently lifted all restrictions on the delivery of Pay TV services via Freeview. There is no such regulatory impediment here, but all New Zealand services will initially be free-to-air. Any future shift to pay services would require the decoders available at retail to carry a slot for an access control card.

TVNZ has already indicated that additional digital channels will be used to help it meet its Charter obligations by showing Charter programming in prime time, while it continues to screen such programming in off-peak slots on its two main channels. It may also use the digital channels to experiment and take greater programming risks. Canwest can be expected to use any additional channels to re-screen popular local productions and perhaps to further pursue the programming path taken by its C4 music channel, which has recently acquired Comedy Central's *The Daily Show.*

It seems likely that TVNZ will concentrate on programming to support Freeview, which will probably mean a lesser focus on other modes of digital delivery, including Internet broadcast and IPTV.

TVNZ's experimental Commonwealth Games Internet simulcast was carried by the Wellington company R2, which also provides Internet streaming services to Radio New Zealand, The Radio Network and several other stations, and also carries Nasa TV, the Bloomberg financial news service and the Christian channel Shine TV. The effectiveness of R2's service is hampered by a dispute over "open peering", in which Telecom and TelstraClear have declined to freely exchange traffic with other parties across a national string of internet exchanges; instead requiring that content providers pay to deliver traffic into their networks and thus reach their customers. Most content providers have declined to pay.

Other radio stations, including Auckland's 95bFM and George FM, offer live streaming services, under licence from the relevant music rights bodies.

Radio New Zealand recently expanded a podcasting service - allowing programming to be downloaded and played on other devices - which has proved popular with listeners. Various smaller operators, including 95bFM and the Christchurch production company The Voice Booth, also offer podcasts for download and subscription.

It is unclear to what extent recently-announced changes in telecommunications regulation will affect the peering dispute, or Telecom's plans to provide IPTV services.

What does seem certain is that the regulatory changes will see progressive increases in DSL speeds and monthly data caps and reductions in prices for heavy-user packages in particular. This will increase the base of users able to view live internet programming or download large video files.

The first change to take effect will be an order for Telecom to make DSL available at unconstrained (8Mbit/s) speeds under the existing UBS (unbundled bitstream) arrangement which allows competitors to re-sell services over Telecom's copper network. Local loop unbundling and "naked DSL" will become a factor towards the end of 2007. (Naked DSL allows consumers to maintain a copper line solely as a broadband data connection, with no obligation to buy conventional voice services.)

Media delivery via mobile phone networks will continue to focus on brand pay content, although it is possible that local operators could eventually adopt Freeview-compatible phones (which contain a miniature Freeview decoder) like those recently unveiled in Britain.

Governments and Internet filtering

It is technically possible to block undesirable Internet content by a number of means: by blocking web pages that contain certain banned keywords, or by relying on a blacklist of specific domain names or numerical Internet Protocol addresses that have been found to contain undesirable content.

Filters can also be deployed at a number of levels: on a single Internet-connected computer, at the workplace or enterprise level, at the ISP level or - as in the case of the so-called "Great Firewall of China" - at a national level.

Controversy over filtering escalates along with the level it is applied, and its reach. Thus, while the right of parents to install a filtering program on a home computer is generally supported, along with the rights of parental proxies such as schools and libraries, the Internet community generally regards the right of adult citizens to view what they choose as paramount. (In 1996, the US Supreme Court upheld the decision of a lower court in favour of an argument by the American Civil Liberties Union that the indecency provisions of the new Communications Decency Act were unconstitutional in part because they did not allow parents to decide for themselves what material was acceptable for their children.)

The kind of content being blocked also has a bearing on the debate. Very few Internet users object to their ISPs pre-filtering spam emails (some of which touts pornographic websites), and the active pursuit of those trading the worst kinds of pornography (and child porn in particular) is uncontroversial.

But attempts to moderate the tone of Internet discourse by technical means are another matter. In the past three years, both public and private organisations in New Zealand have installed filtering software to govern both email and web content. In general, those organisations have launched with a high degree of filtering (blocking emails and sometimes websites containing inappropriate language, for example), and then retreated to a more modest level under protest from users.

This touches on one of the key criticisms of the filtering approach: its potential for over-reach. Workers will feel that decisions on how to respond to strong language in an email rests with them, and not a technical filter.

There have been other problems with decisions on what to filter. In the year 2000, the anti-censorship website Peacefire.org published a report called 'Amnesty Intercepted', which appeared to show that websites belonging to Amnesty International and other human rights organisations were being blocked by major commercial filtering products, including CyberSitter, CyberPatrol and Surfwatch. Solid Oak software, the producer of CyberSitter, was accused by others of blocking websites which criticised its product.

Another problem is that the community standards on which filtering decisions are made vary sharply between territories. Schools in the US, where most filtering

products are developed, may wish to see access blocked to sites referring to gay rights or contraception; New Zealand schools may not.

In May 2006, the Brennan Centre for Justice at the New York University school of law published *Internet Filters: A Public Policy Report*, which updated research first conducted in 2001. The report summarised a number of studies of filter effectiveness and bluntly accused filtering software producers of making deceptive claims about their products. It listed multiple examples of both "overblocking" (preventing access to legitimate content, often including study resources) and "underblocking" (failure to block offensive content).

The Brennan report can be seen to have fallen short of its claim to have demonstrated negligible improvement in the performance of software filters since 2001 – in part because it is generally impossible to see how such proprietary products actually work – but it concludes with useful advice about minimising the undesirable effects of filtering. It advises avoiding products from companies touting "a particular ideological viewpoint", only activating filters relating to sexually explicit content and having a "simple, efficient" process for amending undesirable results.

These conclusions have some direct relevance to the situation in New Zealand. In 2005, activists discovered that Watchdog Corporation, an avowedly conservative Christian company contracted by the government to supply a filtering service to 500 New Zealand schools, was blocking access to atheist and rationalist websites, and to gay rights sites that contained no pornographic material. The company subsequently confirmed that the word "anarchy" was also blacklisted by its service.

The New Zealand Association of Rationalists and Humanists published the results of an investigation it said showed that Watchdog used a database developed by an American company called 8e6 Technologies that, under its previous name, X-Stop, was the subject of successful legal action brought by the American Civil Liberties Union, which discovered that its technology was blocking even Quaker websites.

Watchdog's current website says that the company blocks, by default, any website using "virtual IP hosting", an extremely common technical means of hosting smaller websites, on the basis that such hosting is "one of the main methods used by illegitimate sites to avoid detection." It undertakes to unblock legitimate sites, but emphasises that this is not a priority. Ironically, a number of New Zealand organisations that have been accused of generating hate speech are not blocked by Watchdog. It further appears that many schools are using the service "off the shelf" and not configuring it to suit their needs.

As China has demonstrated, a government prepared to spend time and money on technology, and to use business access as a bargaining chip, can prevent its citizens from viewing material it considers undesirable, including sites dealing with democracy.

Among the companies which have accepted Chinese government ground rules is the US company Yahoo!, which in January 2006 lost a case in the Ninth U.S. Circuit Court of Appeals in San Francisco. The court overturned the decision of a lower court

that Yahoo! could not be bound by the decision of a French court which required it to bar French citizens from participating in auctions of Nazi memorabilia.

Yahoo! had originally argued in the French case that it was technically unfeasible to block users by country of residence, but current IP geolocation techniques allow this to be done with a high degree of reliability. Many large Internet publishers already use geolocation to deliver targeted advertising.

The appeals court acknowledged that in further blocking access to French users, Yahoo risked restricting access to some American users, but declared that the case was not "ripe", meaning that Yahoo! had not yet suffered sufficient harm as a result of the French court's decision.

The question arises as to whether governments can reliably be assumed to be upholding genuine community standards, and what the consequences of attempts to restrict speech might be. The recently-launched Google Trends trial - in which the company samples and sorts search data to track Internet trends - finds that citizens of Pakistan are most likely to type the word "sex" into Google, followed by those of Egypt, Iran, Vietnam, India, Indonesia, Turkey, Saudi Arabia, Poland and Romania. Note: the ranking indicates that (a) a substantial number of queries for "sex" were generated from Pakistan, and (b) Pakistan had a higher ratio of such queries than any other in the group that generated a substantial number.

Ironically, a development that could have greatly increased the efficiency of filtering for indecent and obscene content has foundered on a refusal of several governments to accept that such content is a permanent part of the Internet environment. Two years ago, a ICM Registry, Canadian domain name registrar, came to ICANN (the Internet Commission for Assigned Names and Numbers), the body that regulates the Internet's all-important addressing system, proposing a new top-level domain (TLD): .xxx, which would be targeted at adult content websites. In part, its argument was that once the new domain was established, adult content providers could be shepherded towards it, allowing a very large group of sites to be easily filtered.

ICANN is a non-profit corporation under California law, and was established by the US government as a means of transferring internet governance from the federal government to the representatives of internet stakeholders, including national bodies such as Internet NZ. The US government has strongly resisted attempts to give national governments more control over the technical management via the United Nations, on the basis that undemocratic governments could abuse such control to curb free speech.

ICM lodged an application to manage the .xxx domain and began the defined ICANN process. But, largely through its government advisory committee (GAC), several governments (most notably those of the US, Australia and Iran) strongly objected to .xxx, which they believed would legitimise pornography. Although the process was completed and the ICANN board supported the proposal, the creation of the domain was delayed three times as the GAC refused to hear it and was recently cancelled altogether, to the dismay of Internet NZ (which took no view on the domain but supported ICANN processes) and others. Critics have claimed the US government,

which appears to have forced the cancellation, was responding to pressure from its religious conservative support base.

In general, the lower level at which filtering is applied, the less problematic the filtering is. A world in which national-level filtering became commonplace could have troubling implications for free speech and democracy.

Traditional media branches out

Another implication of the new media environment is that traditional media silos are breaking down: nearly all major broadcasters now also provide text services to their audiences. CNN, for example, is nearly as well known for its website as its TV service.

More recently, print publishers have begun to move into the domain of broadcasters. The website of the Guardian newspaper last year began publishing a weekly podcast - an Internet radio programme, effectively - by the comedian Ricky Gervais and friends. The Guardian soon declared that Gervais' was the most popular podcast in the world ("probably"), and eventually Gervais' programme switched to a commercial model, where Internet users subscribe to instalments.

Closer to home, Fairfax newspapers' Stuff website has launched VideoStuff, a regular library of free TV news clips from TV3 and Reuters. If it was offered an amateur video with sufficient news value, it would undoubtedly post that too.

This trend highlights an anomaly in any attempt to treat video content as intrinsically different to other forms of digital media. If a newspaper was to publish an inflammatory comment piece, it would be subject to the light hand of industry self-regulation, if that. But if it were to film the author reading the same piece to camera and place that on a website, it would - in the view of the EC anyway - fall into the realm of the statutory broadcast regulator.

While most broadcast programming is distributed from licensed broadcasters to passive consumers, the distinction can be at least partially maintained. It is difficult to see how it can persist in the long term.

The future media environment

The nature of media in 10 years' time will be determined to a great degree by media technology: broadband wired and wireless networks, computers, gaming machines, handheld devices, new applications offering information more quickly and, if required, at great depth. The Google Library project will be well along the path towards scanning and indexing millions of published works.

In a recent speech at Stationers Hall, Rupert Murdoch made the following prediction: "So, media becomes like fast food - people will consume it on the go, watching news,

sport and film clips as they travel to and from work on mobiles or handheld wireless devices like Sony's PSP, or others already in test by our satellite companies."

Murdoch will be right to some extent; but he seems envisage a landscape of passive (but busy) consumers of commercial media products - eating the media "fast food" they're given. Or, to put it another way, a vast walled garden.

This is to greatly underestimate the role that consumers already play in media creation and distribution.

The boom in popularity of mobile SMS texting is a good example of consumers adopting technologies for their own purposes. SMS was envisaged by both handset manufacturers and network operators as a niche application; one perhaps of use to business customers. In fact, it has become as significant a use of mobile phones as voice calling. What drove consumers to text was not the device itself, or the entreaties of the phone companies, but the fact that others were doing it.

Media consumers increasingly look to communicate and share experience with each other. The key principle of Murdoch's own MySpace is social interaction.

Whatever happens next, it is vital to see consumers as active participants - often, as Ashley Highfield puts it, in "conversation" with established media. As consumers they may still need some regulatory protection, but they will also need enabling. It may be that the job of the regulator becomes that of the advisor, the developer of best practice, rather than that of the enforcer. Media consumer-producers who would be outraged to be regulated in line with present broadcasting standards might still adopt a shared, voluntary code of practice, especially if they helped create it.

Part Two: The Regulatory Response

Problems for regulators

These developments plainly pose thorny problems for those wanting to curb the worst excesses of media content. Traditional laws, legal regimes, and regulatory distinctions are increasingly being taxed – and worse, rendered obsolete - by new technologies.

Existing media regulatory regimes are usually targeted at media organisations, for example. Do these need to be extended – or new rules created - to cover citizen journalists, blogging or producing news-related video or audio content for websites and broadcasters? Sometimes there may be debate about who is responsible for media content. If harmful video material is made available on a website, for example, the supplier of the material, the host of the website, and even the ISP may have some degree of responsibility. Even more problematic: under new technology regimes, there may not be any identifiable person or organisation doing the publishing. For instance, how can BitTorrent content be controlled, when there doesn't seem to be any single broadcaster at all? Of course, file-sharing and other new technologies have vastly increased the amount of copyright violation. Can copyright laws catch up? Does a new balance need to be struck between copyright owners and those who want to use copyrighted material? As we have seen, self-regulatory regimes are emerging on sites such as Google Video and YouTube. Are these adequate to cope with pornographic material, hate speech, fraud and the like? We have also seen that traditional media are developing new media outposts. Should the same content rules that apply to TVNZ's broadcast programming apply to its website? Is it fair to regulate the content of terrestrial broadcasters when the similar content can be downloaded over the Internet from rival broadcasters (perhaps based overseas) that are not subject to the same – or any - regulatory regime?

These new technologies (along with other developments such as commercialisation, big media monopoly and cultural change) are also having an impact on the nature of media content. News and entertainment are becoming blurred. Advertising is becoming much more sophisticated and ever harder to distinguish from news and entertainment. The pace of news and current affairs is quickening, in part due to the twenty-four hour news cycle. Soundbite lengths are shrinking. News content is becoming more analytical and polarised. Sources of news and current affairs are becoming at once more diverse (bloggers, podcasters, independent news websites, multiple digital channels) and less diverse (as traditional media outlets are consolidated in the hands of fewer owners, which sometimes amalgamate them, as happened with the Dominion and the Evening Post in Wellington). Public relations experts increasingly influence news content. Reality TV is pervasive. News filters can be used to individualise news diets. Increased competition produces trends toward the sensational, the graphic, the violent and the sexy.

These changes put pressure on regulatory regimes that seek to uphold standards such as balance, fairness, accuracy and taste. Some argue that such regimes are no longer

necessary, given the increasing diversity of viewpoints and channels of communication available today. Others say they are no longer fair, given the increasing competition from rivals who fall outside the regime's jurisdiction. The counterargument is that news, current affairs, and cultural content, and particularly popular audiovisual content, has a powerful influence on the public and on the proper functioning of a democracy. Commercial imperatives, they would argue, do not always ensure that this power is responsibly used.

Does it matter? Is there a need for regulation at all? Regulation might be seen as desirable to avoid the following harms, some of which overlap:

Unclear identification of content
- classification into age-categories; content warnings
- identification of supplier of content
- identification of advertising

Misleading material
- fraud
- deceptive advertising
- defamatory material
- misleading electioneering
- inaccurate news and current affairs
- photo/video manipulation

Harm to children
- pornography
- violent content
- other age-inappropriate content

Incitement to crime or violence
- bomb-making instructions

Offensive content
- hate speech
- taste and decency standards

Copyright violations

Lack of access for people with disabilities
- eg closed captioning

Harm to interests of privacy or confidentiality
- identity fraud
- invasion of privacy

Unethical news or current affairs
- right of reply or other balance standard
- fairness
- privacy
- accuracy

Anti-competitive practices

Anti-democratic practices

- misleading electioneering
- inaccurate or unbalanced news, current affairs
- narrow range of viewpoints

Regulators around the world are grappling with these problems and many others like them. Multinational groupings such as the European Union, the World Trade Organisation and the United Nations are starting to address them as well. There are no simple solutions. The rest of this paper sets out to explore the ramifications of new media technologies for media regulation in New Zealand, by:

1. Describing New Zealand's media law framework
2. Examining how that framework will cope with new technologies
3. Outlining some implications for the regulation of broadcasting
4. Considering the underlying debate about whether Internet regulation, in particular, is desirable at all
5. Outlining some of the international responses to the issue of media regulation in an age of convergence
6. Suggesting a democratic rationale for continued regulation of local broadcast content, even if other platforms cannot be effectively regulated

NZ's existing media regulatory framework

This is something of a patchwork (see diagram below). Some laws (such as defamation, and contempt of court, and crimes such as criminal trespass and harassment) apply to all forms of media. Others apply only to particular branches of the media (such as broadcasters) or to particular types of content (such as advertising). Some are governmental (the Broadcasting Standards Authority, the censorship bodies); others are forms of industry self-regulation (the Press Council, the Advertising Standards Authority.) Thus, the rules and standards that apply to some forms of media or media organisation do not necessarily apply to others.

To complicate matters, the edges of these jurisdictions are becoming fuzzier. The Press Council now considers complaints against websites associated with newspapers and magazines. It also hears complaints about news agencies that are not its members. Advertisements are becoming increasingly integrated into other media content. The Office of Film and Literature Classification has jurisdiction over Internet files, including video and audio content, unless they are streamed in real time, in which case they arguably fall within the BSA's jurisdiction. (The BSA has held that video clips available for download on a website – even a television broadcasters' website – are not "broadcasts" within their jurisdiction. On the other hand, it suggested that material that is "continually being shown on the website, regardless of whether users choose to view it" – that is, streamed on a fixed schedule – may be broadcasts.[1])

[1] *TVNZ v Davies* BSA 2004-207[11] The definition of broadcasting in the Broadcasting Act is "any transmission of programmes, whether or not encrypted, by radio waves or other means of

There has even been litigation over the proper agency to hear complaints about the juxtaposition of advertisements and television programmes,[2] and over the relevance for censorship decisions of the possibility that the material will be broadcast on television in future.[3]

Even the definitions of a "journalist" and the "media" are vexed. Parliament occasionally gives rights to "accredited news media reporters", though it is not clear what that term means. Might it include a blogger? The editor of a trade publication or newsletter? Someone conducting research for a documentary or book?

In practice (and usually, in law), the reach of the regulations and standards does not go beyond New Zealand's shores. In 2002, the Australian High Court held that an Australian named Joe Gutnick was able to sue Dow Jones for defamation in Australia over a story published on a website in the United States.[4] The same result would probably be reached in New Zealand. There was much hand-wringing about the case in legal circles. The ruling "could strike a devastating blow to free speech online," wrote the New York Times in an editorial. "To subject distant providers of online content to sanctions in countries intent on curbing free speech – or even to 190 different libel laws – is to undermine the Internet's viability." However, the decision has not produced a rash of lawsuits around the world aimed at foreign Internet publishers. In fact, a series of legal and practical hurdles make it difficult to bring such lawsuits. Even if it can be argued, as was accepted in Gutnick, that publication on the Internet brings foreign publishers within the purview of New Zealand's regulatory agencies, they have very limited practical ability to do anything about offending material.

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telecommunication for reception by the public by means of broadcasting receiving apparatus but does not include any such transmission of programmes—

(a) Made on the demand of a particular person for reception only by that person; or

(b) Made solely for performance or display in a public place."

The definition in the Films, Videos and Publications Classification Act is the same.

[2] *Watson v TVNZ* [2002] NZAR 520, *TV3 v BSA* High Court Wellington CP 155/02 25 July 2003

[3] *Re Society for the Promotion of Community Standards Inc* High Court Wellington CP 300/02 11 November 2003; *In re Baise Moi* [2002] NZAR 897 (HC) and CA 239/03 9 December 2004 (CA).

[4] *Dow Jones v Gutnick* [2002] HCA 56

Sidebar: Digest of information about key regulatory agencies

	News-papers	Mags	TV	Cable, Sat. TV	Radio	Film	Video DVD	Web	Books	Theatre
***Common law* – eg defamation, privacy, contempt, breach of confidence**	A A	P L	P L	L	I	E	S		T	O
***Crime* – eg Trespass, name suppression, reporting suicide, harassment**	A A	P L	P L	L	I	E	S		T	O
Censorship										
ASA	A	P	P	L	I	E	S		TO	ALL
BSA										
PC										

Press Council
Regulates: Newspapers and magazines and associated websites
Standards: Statement of Principles (ethical standards, broadly drafted, not exclusive)
Author of standards: Industry
Funded by: Industry
Process: Complaints driven
Determined by: Council with majority of public members and (usually) retired HC judge chairing.
Remedy: (If complaint against member) requirement to publish the "essence" of the determination if complaint upheld
Average number of complaints determined annually: about 50
Average upheld/part upheld: 23%

Broadcasting Standards Authority
Regulates: Television and radio, including subscription services and (perhaps) streaming video on the Internet
Standards: Codes of broadcasting practice (mostly ethical standards, fairly specific, exclusive)
Author of standards: industry and BSA together

Funded by: government, levy on broadcasters.
Process: Complaints driven
Determined by: Authority of four members appointed under statutory criteria, chaired by long-standing lawyer
Remedy: costs, compensation for privacy infringement, corrective statement/apology, order broadcaster off-air or advertising blackout for up to 24 hours.
Average number of complaints determined: about 200
Average upheld: 21%

Advertising Standards Authority
Regulates: Advertising in any form
Standards: Codes of practice (general ethical guidelines and subject-specific codes; exclusive)
Author of standards: Industry
Funded by: Industry
Process: Complaints driven
Determined by: Advertising Standards Complaints Board, with half public membership, and Advertising Standards Appeal Board, with a majority of public members.
Remedy: advertisement withdrawn
Average number of complaints determined annually: about 250
Average number upheld/settled: 52%

Office of Film and Literature Classification
Regulates: publications (including films, videos, DVDs, books, print media, computer files, computer games, billboards, t-shirts)
Standards: related to sex, horror, crime, cruelty or violence and "injurious to the public good"; variety of statutory factors.
Author of standards: Parliament
Funded by: Government, fees
Process: Classification system, complaints, investigation, courts
Determined by: Chief censor and staff, and Film and Literature Board of Review on appeal. All government appointments.
Remedy: ban or restriction (criminal offence to breach) or excisions
Average number of classifications issued annually: About 1450 and about 700 film poster, slick and advertising approvals.
Average number banned: 14%

NOTE
There are other sources of laws and guidelines that affect the media, including:

- In-house codes of ethics and procedure
- A union code of ethics
- In-court media coverage guidelines
- Fair Trading Act
- Privacy Act
- TVNZ Act, Radio NZ Act
- TVNZ and Radio NZ are subject to the Official Information Act
- Broadcasting Act
- Copyright Act

- New Zealand Bill of Rights Act
- Telecommunications and Radiocommunications Acts and regulations
- Commerce Act
- Voluntary quotas
- Human Rights Act (incitement to racial hostility)
- Coroners Act (suicide reporting)
- Medicines Act (health advertising)

Key features of NZ framework

Different regulations for similar content on different formats
As a result of the "patchwork" of media regulation outlined, publications with very similar content may be subject to different standards regimes. For example:

- Television can screen content that may have to be banned as objectionable if contained in a movie screened in cinemas. For example, an approving discussion in a programme like "Sex and the City" of the pleasures of urine in association with sex would probably have to be banned under the definition of "objectionable" in our censorship legislation if it were contained in a movie.

- On the other hand, cinematic movies can contain content that would breach broadcasting standards. For example, "Fahrenheit 9/11" may be thought to breach balance requirements; "Baise Moi" may be thought to breach the provisions on violence.

- There is no forum for complaint about breaches of journalistic ethics contained in a book, or written by a blogger. Thus there may be no remedy for an unfair or inaccurate book or blog entry, whereas a newspaper that published identical content may be subject to a Press Council adjudication.

- The standards applied to print media are looser than those applied to broadcasters. The Press Council's "Statement of Principles" contains a less detailed and far-reaching set of constraints for print publishers than the equivalent broadcasting codes. For example, the rules about what constitutes an invasion of privacy, or breach of the fairness and balance standards, are much clearer in the broadcasting codes, and the Statement of Principles does not contain rules about taste and decency, law and order, alarming material, or the reliability of sources (though complainants may complain to the Press Council about matters not contained in the Statement of Principles.)

- Material that is broadcast on free-to-air television is subject to stricter requirements than material broadcast on subscription television (and especially subscription services with content filters.)

- There are also differences between the free-to-air and radio codes. Some of these can be justified by the differing nature of the two mediums (such as, the rules for television about explicit depiction of violence). The justification for

others is unclear (such as the guidelines, for free-to-air television alone, that require contributors to be informed in advance of their proposed role in any particular programme, and that require particular care to be taken when dealing with situations of grief and bereavement).

- The BSA can publish the contents of jokes in its newsletter reporting its decisions even though it has ruled that the broadcast of the jokes is discriminatory.

- A newspaper's website is subject to the Press Council's jurisdiction. But a radio or television station's website isn't, even if the content is identical.

- A video or audio clip that is broadcast over the airwaves is subject to the BSA's jurisdiction. But when is it made available on demand on a website, it becomes a publication that falls under the censor's jurisdiction, including the offence regime for objectionable material, and potentially the labelling regime.

- The Advertising Standards Authority has concurrent jurisdiction with the OFLC over film posters, though they apply different standards. The ASA recently upheld a complaint about the public display of a film poster which had been approved for display by the OFLC.

As media formats converge, these distinctions are likely to become problematic (see below).

Different regulations for similar content broadcast at different times
Even within the broadcasting regime, similar content may be regulated differently depending on when it is broadcast. "Adults-only" programmes may only be screened on free-to-air television between 8:30 pm and 5:30 am (or between noon and 3pm on school days), for example. Depending on the content and context of the programme, a show may require a warning if screened at 4pm but not at 10pm, or on Saturday morning rather than Tuesday morning. Promos may raise special considerations. They must be screened at times that are suitable to their content, and must take into account the interests of children who may be watching, so it may be permissible to screen them at some times but not others.

Subscription TV has a separate classification regime, but it also restricts particular content to particular times for UHF channels. For example, R18 shows may only be screened between 8pm and 6am. There are no express rules about promos (except liquor promos). Digital subscription TV services with the ability to filter content have a different regime again, with no time restrictions. The Subscription TV Codes are currently under review.

Once again, media convergence, and particularly developments such as video on demand and MySky, create problems for these distinctions, especially television watersheds.

Different regulatory systems have different concerns
The philosophical foundations of the different regulatory systems differ. For instance, the Press Council is almost solely concerned with journalistic ethics (although it is

also constitutionally obliged to foster free speech). The Broadcasting Standards Authority is concerned with ethics too, but has other functions: classification/content identification, community standards, and the protection of children. The ASA has a similar range of concerns. All three bodies are only tangentially concerned with prevention of harm to the public. Yet "injury to the public good" is the foundation stone of the censorship system, and it must be explicitly considered in nearly every censorship decision. These different conceptual foundations can lead to different conclusions about similar material.

Little difference between private and public broadcasters
New Zealand's media regimes generally do not distinguish much between public and private broadcasters. TVNZ and Radio NZ receive direct government funding and are subject to charters, but these do not form the basis of a complaints regime.

Lack of ownership restrictions
Restrictions on media cross-ownership and foreign ownership do not exist in New Zealand, though the media is subject to the ordinary market dominance principles in the Commerce Act.

Largely complaints driven
Media regulation in New Zealand is almost entirely driven by complaints. Those aggrieved by the performance of the media must complain to broadcasters, regulatory bodies or to the courts – otherwise, no action is taken. (A key exception is that films must be rated or classified before they are exhibited in theatres or video stores.) There are no government or industry oversight bodies roaming the media landscape looking for breaches of media regulation (except the censorship compliance unit in the Department of Internal Affairs). To some extent, private watchdog groups such as GALA, VoTE and the Society for the Promotion of Community Standards perform this role.

Broadcasters responsible for "pass-through" content
Many pay TV channels are simply funnels for content that is assembled and edited overseas. The local broadcaster is simply a transmission vehicle for schedules that are developed elsewhere. Some, such as CNN, are being broadcast live. The local broadcaster simply takes the "feed" and has no editorial involvement, or real ability to influence the content. (Occasionally, free-to-air channels will do the same thing, when taking a feed from a US network during a breaking international news story, for example.) Even though these programmes may have been developed in a completely different regulatory environment overseas, the local broadcaster is still responsible for ensuring compliance with New Zealand standards. As the BSA has said, "[t]he Broadcasting Act makes it clear that broadcasters are responsible for broadcasting standards in relation to the programmes which they broadcast, irrespective of the degree of control they have over specific content."[5] (However, as we have seen, the standards applying to pay channels are less rigorous than those applying to free-to-air

[5] *Hamilton v TelstraClear* 2004-094 [17]

television, and there is a degree of flexibility in the interpretation of the standards when considering live broadcasts.)

Regulation that covers the spectrum
Criminal law and tort law can be seen as setting a baseline of regulation applicable to all. Thus, particularly important interests - such as the need to protect trials from being prejudiced by unfair publicity - are protected against everyone and in all formats, whether there is any regulatory regime in the background or not. The laws of defamation, malicious falsehood and deceit, and the criminal law, protect against harmful or fraudulent inaccuracies. The laws of breach of confidence and privacy and trespass protect interests of confidentiality. The laws of copyright protect against theft of intellectual property.

However, these have limitations. They do not protect against all inaccuracies. They do not generally protect against mere unfairness or lack of balance. They do not necessarily protect the interests of children. They do not protect against all forms of denigration. They generally don't require content warnings. They can be prohibitively expensive, so they are not a realistic option for many. And they of limited effectiveness against breaches arising overseas.

Implications of new technologies

It is readily apparent that New Zealand's existing system of media regulation is badly adapted to the new technologies discussed above. They will quickly expose the gaps, inconsistencies and vagaries of the current regime. In particular, they are likely to throw up questions about the precise meaning of "broadcast" in our censorship and broadcasting laws.

Some examples should make this clear.

Example 1:
*An eight-year-old downloads episodes of **The Sopranos** using BitTorrent and orders a copy of **Baise Moi** over Amazon.com.*
Baise Moi has been classified R18 in New Zealand because of its extremely graphic sex and violence, which includes a rape scene. *The Sopranos* is broadcast in an adults-only timeslot, with warnings. One episode involving the beating and murder of a pregnant woman led to a successful complaint before the BSA. The eight-year-old can watch this episode, and all the others, uncut. No offence is committed (except probably breach of copyright) by the eight-year-old, or by anyone involved in the supply of the programmes.

Example 2:
An animal rights activist sets up a protest website, posting video clips of demonstrations, gruesome footage of animal experiments, ambush interviews with scientists and officials involved in experimenting on animals, footage taken while trespassing in a battery farm, and a self-produced music video decrying animal abuse.

Despite the fact that this website contains news-like information and footage, and was compiled in a news-like way, it is not subject to the broadcasting codes of practice, which provide a remedy for unfair or inaccurate coverage. It is not subject to the Press Council's jurisdiction either.
However, some of the clips may need to be submitted to the classification authorities for labelling, as they are clearly "films" and there is an argument that they are being "exhibited to the public." Under the law, some types of film being sold or exhibited to the public don't require labels – such as news and current affairs footage, which may mean that no label is required before publishing the clips of the demonstrations, for instance. However, the music video almost certainly requires a label. Labels may restrict the availability of the clips, perhaps protecting younger children. If the website encourages criminal acts, some of the content may be banned as objectionable.

Whether or not a label is obtained, the possession and distribution of objectionable material is an offence. Anyone who downloaded such material and did not immediately delete it would be in danger of committing an offence.
Remedies may potentially be available to those depicted on the website, perhaps for defamation or invasion of privacy, but any attempt to obtain an injunction may be frustrated by the generation of mirror sites overseas, as the Internet routes around the damage.

Example 3:
A bystander uses her mobile phone camera to video a horrific car accident and transmit the information to a website where it is streamed live.
Is this a "broadcast" under the Broadcasting Act? Is it a transmission of "visual images" by a means of "telecommunication for reception by the public"? If I am online, watching the website, is my computer a "broadcasting receiving apparatus"? When I dial up the web address, is the resulting transmission to my computer made on my demand for reception only by me? Depending on the answers to those rather obscure questions, this may well be a broadcast. If it is, then the entire broadcasting regime applies to the bystander with the mobile phone. The accident victim might make a formal complaint to the bystander (and after that, to the BSA) for breach of privacy. The BSA may order the broadcast of a corrective statement. If the website owner is a separate person, then he may be a broadcaster as well. If it is not a broadcast, then it may not be subject to any controlling standards regime (except for the baseline criminal and tort law).

Example 4:
A PR company hires advertising space on a newspaper's website and streams live video of PR stunts which involve turning up to parades, press conferences, sports fixtures and other news events and presenting the participants with the advertised product.
This happy scenario potentially triggers the complaints jurisdiction of the Advertising Standards Authority, the Broadcasting Standards Authority, the Press Council and the Office of Film and Literature Classification, all of them applying different standards.

Example 5:
An Internet television station is set up in New Zealand. It streams its programming, so that viewers can watch scheduled programming as it is transmitted, or choose to watch selected programming at their convenience, in which case it is also streamed to

them over the Internet. It transmits news and current affairs, among other programmes.
Again, it's not clear whether the broadcasting standards regime applies here. It will hinge on whether the "transmission" fits the definition under the Broadcasting Act. In turn, this hinges in particular on whether the transmission of the Internet content can be said to be "made on the demand of a particular person for reception only by that person." If so, it's not a broadcast. Clearly, the material is designed for the public at large. It's likely to be accessed by many people. So it looks like a broadcast. On the other hand, the data to each viewer is only transmitted on request. So perhaps it's not a broadcast. If it isn't, then the broadcasting standards requiring, for example, fairness, accuracy and balance, do not apply to the Internet programming. (It is quite possible that the live streaming programme is a broadcast, while programmes selected and then streamed are not broadcasts because only the latter are "made on the demand of a particular person…").

Whether or not there is a broadcast, some of the material may require a label under the Films, Videos and Publications Classification Act before it can be made available to the public. This is especially likely where viewers have to pay for access, and the content is entertainment rather than news or current affairs. If the station were set up in Australia, then it is possible that both regimes (the BSA and the censor) may be avoided altogether.

The existing system is a mishmash of regulatory standards, largely because separate regimes were invented to deal with different media formats. New technologies straddle those formats, or avoid them, or pose perplexing definitional issues or difficult enforcement problems. There is a danger that important standards will be inapplicable where they are most needed, and that producers of identical content will be subjected to inconsistent standards regimes. There is also a danger that whatever standards New Zealand decides to set for itself will be eroded by the easy availability of foreign material that is not subject to those standards.

Implications of new technologies for broadcasting standards

Regulatory avoidance
Some news and entertainment content transmitted in a broadcast-like manner may in fact avoid the regime altogether, though they may fall under the less onerous censorship standards. New technologies are providing an ever-increasing number of ways for content to be conveyed to New Zealanders – often in direct competition with existing New Zealand broadcasters – by people who are not subject to our codes of broadcasting practice. These include:

- downloads of films and programmes (including podcasts) from websites
- file-sharing of films and programmes, via BitTorrent, for example
- importation of DVDs, videos, CDs and cassettes
- overseas-based Internet television and radio, streaming scheduled programmes and/or films and programmes on demand, publicly or via subscription
- local Internet television and radio, streaming films and programmes on demand (and possibly even streaming scheduled programmes)

- video or audio clips, mass e-mailed to computers or cellphones

In particular, some citizen journalists will being conducting broadcast-like activities outside the broadcasting system and will not be subject to the codes' ethical standards.

Traditional broadcasters are likely to argue that this is unfair and puts them at a competitive disadvantage, or attempt to shift platforms to exploit regulatory gaps themselves.

Boundary litigation
There is likely to be litigation over boundary issues, and in particular, the definition of "broadcasting" in the Broadcasting Act and Films, Videos and Publications Classification Act. Does the definition apply to Internet transmissions at all? If so, will it be only streaming video, as the Chief Censor believes, and the BSA has indicated? When several parties are involved, who is responsible for the "transmission"? The answers to these questions about definition will dictate the reach of the existing broadcasting standards regime. They involve nuances of meaning that almost certainly were not contemplated when the legislation was passed.

There are equally problematic definitional issues in the Films, Videos and Publications Classification Act.

Watersheds
The watershed and other attempts to segregate the timing of programming in child-friendly ways are likely to become increasingly anachronistic, as new methods of obtaining programming on demand become popular.

Balance
The balance requirement will be problematic as news stories become atomised. It will be more important for balance to be contained in individual news items themselves, the more news is selected and consumed piece by piece and according to individual tastes - and particularly when that news is stored for later access. (By the same token, it will be important for any corrections that are ordered by the BSA to be stored with the original items, if they are to be publicly available, in an online archive, for instance.) If people are designing their own news schedules, then balance supplied during "the period of current interest" may not make it into those schedules.

In fact, balance may be argued to be unnecessary given the diverse range of sources of news and information in various formats. In any event, the provocative, analytical, personal style of new media is likely to influence mainstream programming in a way that will produce more authorial, subjective news and current affairs, attempting to stretch the "personal perspective" exception to the balance requirement, and eroding the code's fact-comment distinction.

It may be that balance requirements will be replaced by a system of rights-of-reply rules.

Taste and decency, violence, privacy, law and order, children's interests
Competition – particularly with lesser-regulated foreign material – is likely to see the limits of taste and decency standards tested further. As well, programmes of all sorts

are likely to be increasingly intrusive. Methods of news and data gathering are available that can push into private zones in ways that were unimaginable a few years ago. Similarly, entertainment programming is likely to continue to push boundaries, especially those concerning the glamorisation of crime, drugs, violence and other anti-social behaviour, distressing and alarming material, satire, themes dealing with social and domestic friction and horrifying imagery, and explicit material.

Pass-through channels
With overseas films and programmes available through a variety of different sources, subscription and pay-per-view broadcasters are likely to bring increasing pressure to bear on regulators: why should they be held to standards that others aren't? It seems extremely unlikely that such broadcasters will be absolved from all responsibility for the content of pass-through broadcasts, simply because they have no editorial control over them. That would be a licence to broadcast snuff movies, for example. However, the unfairness of being subjected to harsher content regulation than overseas competitors is likely to lead to fewer and fewer substantive rules about the allowable content of movies, for instance, so that the playing field will be levelled. These rules may be replaced by increasing emphasis on customers' rights to be informed about the nature of programming and to be given filtering tools to screen out particular material at their choice. This trend is already evident.

Broadcasters may still complain that it is too much effort for them to vet material before it is broadcast. They may be offering dozens of channels. Some of them may be live. Even if the baseline content rules are minimal, the problem remains. But practical solutions should easily be found that would avoid the need for extensive pre-broadcast vetting. Channels could be subject to an initial standards audit, for instance, which could provide a reasonable guarantee that the ongoing content would not breach the standards. They could be subject to similar rules governing liability of ISPs: they aren't liable for breaches until a complaint puts them on notice of a breach, and then they are responsible if they don't rectify the problem. Rights to use a channel could be – like liquor licences – easy to get, but easy to lose if the conditions were violated.

Digital manipulation of news
There have already been examples of digital manipulation of news images. This is likely to present challenges for the fairness and accuracy standards, and is much more likely to happen outside mainstream media.

Advertising developments
Old-style advertising is likely to start to disappear, as it will become too easy to avoid. Advertising is likely to increasingly be seamlessly incorporated into programming. Traditional boundaries between news, entertainment, advertising, marketing, and sponsorship will become blurred, giving rise to jurisdictional and standards issues

Criminal and tort law
Criminal and tort law will continue to provide a baseline for standards, though these are usually only available where breaches are extreme, or where plaintiffs are wealthy. These remedies may be developed, however, as we will see in the next sections.

It seems obvious that these pressures and gaps and inconsistencies in New Zealand's dating media regulatory framework will force it to be reconsidered in the near future. But what framework should replace it?

Legislative response?

The government may try to amend the vexed definition of "broadcasting", or more generally, legislate to extend the standards regime to cover some of the new formats.

In their new book "Who Controls the Internet? Illusions of a Borderless World", US law professors Tim Wu and Jack Goldsmith argue that national laws are increasingly able to control the Internet's direction, and that's not such a bad thing. For instance, French courts forced California-based Yahoo! to stop facilitating auctions for Nazi memorabilia in France or risk losing the ability to operate there. China is largely successfully blocking access to anti-government information, by maintaining a frequently updated list of banned sites and heading them off at routers to stop them being accessible within China. The Internet, the authors argue, is becoming bordered, in part because every virtual presence on the web has a physical presence subject to domestic laws somewhere in the world, and in part because people who operate on the Internet need governments to support their activities. For instance, EBay needs police to investigate fraud. The Internet, then, "is about old things – the enduring relevance of territory and physical coercion, and ancient principles governing law and politics within nations, and cooperation and conflict between them."

Parliament has jurisdiction over New Zealand-based content providers. Any such attempt would be fraught with complex issues, however:

- Which content sources should be included? Citizen journalists with their own sites? What is a citizen journalist? At one end, there are people with websites or blogs who might post occasional clips from their cellphones that are watched by half a dozen friends. At the other end, there may be highly organised (and perhaps partisan) people or groups who post regular video news items, and whose sites become enormously popular. Where would the line be drawn?

- Should sources that deal with news, current affairs, or other factual material be subject to heavier regulation – requiring balance, for example? Some of the BSA's decisions suggest that these distinctions are not as clear as they might seem. What about advocacy sites? A political point of view may influence the news presentation (as in Fox News) or it may constitute the entire rationale for the content source (as in a political party's website). Some bloggers post clips of themselves conducting interviews. Is that current affairs? What about content sources that deal with news and information about specialist issues? What about corporate or union sites that have news about their industry? If these are to be excluded, where is the line to be drawn?

- Should advertising rules form part of the regime, as advertisements are increasingly incorporated into programming? Should the ASA or BSA hear such cases?

- Should it only cover commercial content sources? Does a banner ad turn a website into a commercial one? Should for-pay sources be treated differently?

- Should simple text sites with only static images be exempt? The traditional approach is to regard text alone (or with simple photographs) as less potentially harmful, and so to regulate it more lightly. What about the text components of mixed text-and-audiovisual sources?

- Should sources that offer a menu of viewing options for the viewer (or subscriber) to select from be treated differently to sources that provide fixed-schedule programming? Arguably, when viewers have choices about what to watch, there is less need for content regulation.

- Should some platforms be regulated differently? In practice, not all platforms are the same. At one end of the scale is the highly controlled "walled garden" environment of mobile phone content delivery, where the operator controls the network, and the content, all the way to the consumer. Although users can, with modern handsets, create and send each other still pictures and video, or make live video calls, they have no "power to publish" in the conventional sense. The publisher is clearly the only publisher on the network. At the other end of the scale is the public Internet, with millions of users producing and accessing - and interacting with - content through mushrooming varieties of portals. This is more of a giant open “town square”. At the extreme are the major file-sharing services, which are not publishers, but providers of information about content.

- Should publicly owned content sources be subject to different (and higher) standards? What about content sources that receive public funding?

- Ought there to be some requirement for content identification instead? Or as well? Ought they to follow the same sorts of classifications as in the broadcasting codes? Or the censorship laws?

- Is there a case for regulating mass e-mails, when they originate in New Zealand and contain audio-visual content? If not, why are they different?

- Should the new regime amalgamate the censor’s office and the BSA? Which standards should apply?

- What role might filters or restricted access systems play?

The dangers of wider regulation, of course, are that a new host of anomalies will be thrown up, and that some relatively minor content sources will be impaired or stifled by unjustifiably onerous duties.

In any event, domestic laws would not be able to cover foreign-based sources, short of trying to block them altogether, as China does. Absent such extreme measures, attempts to regulate entertainment and international news content on local broadcasts

may be largely fruitless, given their easy availability from international sources. Applying standards of taste, balance and the like to local content providers purveying entertainment and international news content will increasingly look unfair and unproductive. (On the other hand, a content source that was subject to standards of taste, balance, accuracy and fairness, mindfulness of children's interests, etc may have appeal to some people who value those standards, even though they can get around them if they choose.)

However, local news and current affairs may be different. This will almost all be produced by broadcasters in New Zealand, who are subject to New Zealand law. There is unlikely to be much in the way of foreign-based competition in the domestic news market - overseas news outlets have limited interest in (and knowledge of) what is happening here. Even if some entrepreneurial broadcasters try to circumvent New Zealand's broadcasting regime by routing their news broadcasts through an overseas content source, the activities of their news gatherers in New Zealand will be within the reach of New Zealand's Parliament to regulate.

The upshot: it may not be pointless, and it may not be unfair, to impose standards across different formats on local and national news and current affairs stories (including documentaries and consumer advocacy programmes). Significantly, most of the complaints to the BSA, including almost all of the very serious ones, concern fairness, accuracy, balance and/or privacy in domestic news, current affairs and factual programmes.

The best that can be said at present is that (1) it seems silly to regulate similar content differently just because it is transmitted on different platforms, where those different platforms are likely to have similar impact on their audiences; (2) any regulation short of China's solution will effectively be limited to New Zealand-based content sources; and (3) the case for expanding the BSA's jurisdiction to other platforms is arguably greater with respect to audio-visual content (as opposed to text), publicly owned or funded content sources, transmissions to large audiences, and broadcasts of local news and current affairs.

Other potential legislative responses

If government decides that it should not, or cannot, try to regulate standards across different formats, it may decide either to maintain the broadcasting regime for some broadcasters, or scrap it altogether. In either case, ad hoc legislative solutions tailored to the problems thrown up by new technologies might be created to fill the gaps. For instance, Parliament is currently considering a Bill outlawing covert filming of intimate activities or body parts (and publication of such films), largely in response to the advent of cellphone camera technology.[6] It's not difficult to envisage similar laws aimed at prohibiting other forms of invasive information gathering, preventing the misuse of images to harass, humiliate or bully people, the creation of right of reply laws, and perhaps the removal of exemptions for the media in legislation such as the Privacy Act and the Fair Trading Act.

[6] Crimes (Intimate Covert Filming) Amendment Bill 2 August 2005 257-2

Judicial response?

To the extent that a standards regime is inapplicable or ineffective in meeting the needs of people who feel aggrieved by the actions of the media or of citizen journalists, there will probably be pressure in the courts to extend the remedies offered there. Already the courts are importing considerations of journalistic ethics into the law of defamation, requiring something akin to balance and fairness before they will allow a defence of qualified privilege.[7] The tort of invasion of privacy may be developed further to include interference with seclusion (a strand of privacy that has already been developed by the BSA, but not yet by the courts). The courts may become more willing to order corrective statements.[8] They may develop the tort of harassment to protect against intrusive information gathering.[9] They may craft new remedies, as they did with privacy.

In short, the courts may well extend the rights of individuals harmed in some way by inaccurate, unfair or invasive information gathering or publication, by mainstream journalists or by others. But there will be limits. Since the touchstone of judges' willingness to offer relief is usually harm to an identifiable individual, it is very unlikely that they will stray into issues of taste and decency, or depictions of violence, or unbalanced coverage of an issue (as opposed to unfair treatment of a person.)

What's more, the available remedies will be expensive and uncertain and generally not available or feasible against overseas defendants.

We have examined some of the issues thrown up by technological developments, and some of the potential responses to them. But might the cure be worse than the ill? A lot of people think that regulating material on the Internet would do more harm than good. We explore those views in the next section.

Or is the Internet a special case?

There are robust arguments for treating the Internet as a special case.

The culture of the Internet is rooted in engineering, and network engineering in particular. The free flow of information is considered the greatest good of all, and the greatest odium is reserved for those who abuse or interfere with the network: spammers, malicious hackers, obstructive copyright owners - and regulators.

One of Internet culture's favourite aphorisms, coined by Electronic Frontier Foundation founder John Gilmore, is this: "The Net interprets censorship as damage, and routes around it."

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[7] *Lange v Atkinson* [2000] 3 NZLR 395
[8] *TV3 v Eveready* [1993] 3 NZLR 435
[9] *Khorasandjian v Bush* [1993] QB 727; *Hunter v Canary Wharf* [1997] AC 655

It is a statement of defiance, but also a profoundly realistic one. There will always be another route by which the censor can be outflanked. American (but Australian-based) commentator Mark Pesce recently wrote at length on the meaning of "Gilmore's law":

"What is censorship? At an essential level, it's someone saying, "Here's some information. I won't let you have it." The reasons for the censorship are unimportant. This is perhaps the most poorly understood aspect of Gilmore's Law. Gilmore's Law isn't a pronouncement on politics or morality; it's a scientific statement. Only one condition needs to be satisfied: someone must be in possession of some information (on the Internet) which is being withheld. Once that condition has been satisfied, Gilmore's Law comes into play.

"In this sense, Digital Rights Management (DRM) – which seeks to protect the copyright of information through various encryption and authentication techniques – represents an economic form of censorship. And, just as with political and moral censorship, economic censorship is doomed to fail, because of Gilmore's Law. Every attempt to "lock" information behind walls of commerce has been systematically thwarted; the creators and purveyors of these locks have been confronted, at every turn, by a swarm of people who are smarter, faster and more adept than the locksmiths themselves. The only way to keep information secure is to refrain from putting it onto the Internet. Once any locked information is placed onto the Internet, the lock is perceived as damage, the lock is picked, and the information is then free to replicate. That this lock-picking is illegal (because of the political and economic power of copyright holders) is as immaterial as a Chinese citizen circumventing the Great Firewall (backed by the political power of the Communist Party); in other words, both locks only maintain their integrity through the threat of force."

The view of Cory Doctorow, founder of what is regarded as the most popular blog on the Internet, Boing Boing, and until recently spokesman for the European branch of the leading cyber-rights group the Electronic Frontier Foundation, runs along similar lines. Approached for comment for this paper, Doctorow expressed strong opposition to a number of current regulatory paths, including the move by the European Union (outlined in greater detail below) to regulate Internet video but not text.

"There's nothing special about video that makes it more deserving of regulation than other forms of communications What's more, there's no reason to believe that video online can be regulated with less collateral damage than a regulation of text would impose," Doctorow told the authors of this paper.

"I grew up in Canada, which has strong hate-speech rules, and I've concluded that they do more harm than good, even though I encountered some genuinely hurtful hateful anti-Semitism now and again in my life. I believe that the answer to bad speech is more speech, and that limitations on speech are worse than speech could be.

"The (European) Commission and other regulators only get to regulate the airwaves' content on the grounds that the electromagnetic spectrum belongs to the people who use their government to apportion access to it to broadcasters on their behalf. Thus we ask a regulator to see to it that those who've received the windfall benefit of the use of our electromagnetic spectral property make such uses of it as are in our interest. This is why the commission can regulate radio and TV, but not books and magazines:

books and magazines aren't transmitted by means of public property held in trust and used in the public interest.

"There is no comparable public interest argument for regulating the Internet. The Commission doesn't grant spectrum licenses to ISPs, and ISPs don't use public goods (except for rights of way, but there are plenty of instances where rights of way are not granted to ISPs, e.g., transoceanic cables, campus networks, etc). For them to argue that there's a scarce public resource in the Internet that needs to be apportioned to those who will serve the public, and that the winners of Internet licenses need to be overseen to ensure that they're upholding their trust - it's ridiculous."

The belief in the Internet as a place for the free flow of information is widely held not only amongst users, but at the highest levels of governance. The International Conference on Freedom of expression in Cyberspace, staged by the World Summit for the Information Society and hosted by UNESCO in Paris in 2005 did not adopt a formal resolution (it was an experts' meeting) but noted in conclusion that there was "a strong endorsement … for assigning to Internet media the same freedoms as print and broadcast media have."

Ronald Koven, the European representative of the World Press Freedom Committee was reported to have "warned against all kind(s) of regulation of the flow of information," but suggested that existing restraints on freedom of expression in the offline world - such as copyright and other intellectual property arrangements, libel and defamation laws, and laws against fraud and other criminal activities, such as the sexual abuse of children - could viably be applied to the Internet.

Several participants in the meeting drew a clear distinction between illegal content and harmful content - the former being criminalized by national laws and the latter potentially provoking offence or disgust but not criminalised.

The leading British media lawyer Geoffrey Robertson joined other submitters in expressing the view that any legal action against Internet media should be taken in the country where the content originated, but noted that the legal issues around this principle were still not clear.

Robertson also expressed a view that is very widely held amongst Internet users: that the immediacy and ease of access of the Internet provided for a right-of-reply that offered "cheap and speedy rebuttal services" that were cheaper and more efficient than libel actions.

Robertson also drew a potentially crucial distinction on content: that between the media's use of the Internet and "private individual usage." Robertson warned against any attempt to devise and impose a single set of regulations for both cases.

The question is whether such a distinction can be sustained, and for how long. The demarcation is clear enough in the case of mobile telephony. Content delivered by the operator is media. Content delivered between users - even though it might consist of video and pictures - is private individual usage. The future of such a distinction on the Internet is far less clear.

Other countries' approaches to regulation

Below, we examine four different approaches to regulation: Australia's use of one regulator applying different standards, the European Union's attempt to harmonise audiovisual content regulation across different countries and different platforms, the UN's attempts to foster dialogue about Internet regulation, and the bid for "bloggers' rights" in the US, which has achieved some success in that country's courts.

The Australian experience

As in New Zealand, attempts to regulate different media platforms under different standards have thrown up anomalies in Australia. The difference there, however, is that one agency, the Australian Communications and Media Authority (ACMA), is responsible for regulation of television, radio, Internet and adult phone services. It not only regulates content, but oversees media ownership rules, broadcast licences and the "anti-siphoning" legislation that keeps major sports on free-to-air TV.

The platforms are governed by sharply differing standards. For instance, racist material is a breach of broadcasting TV codes, but cannot be the subject of a complaint on the Internet. And while only hardcore sex is banned from TV, Australian citizens may complain about anything that that implies sexual activity on the Internet, and even "material that deals with issues or contains depictions which require an adult perspective," if it is not covered by an approved "restricted access system". In effect, Australia is trying to apply the equivalent of our censorship standards to Internet content.

Under the Australian Broadcasting Services Amendment (Online Services) Act, enacted in 2000, any Australian citizen may complain to the ACMA about "prohibited content" anywhere on the Internet. The ACMA is required to investigate the complaint and identify any material that is rated R18 (deemed likely to be disturbing or harmful to people under 18), X18 (explicit consensual sex) or RC (refused classification because it contains violent sex, pedophilia, criminal instruction, or extreme violence or cruelty).

If the offending material is hosted in Australia, the hosting company is sent a "take-down notice" to remove it within 24 hours (or, if it is rated R, to secure it with a restricted access system). Failure to comply is a criminal offence and results in a fine of up to $27,500 per day. If the offending material is hosted outside of Australia, then details of the sites are sent to the makers of filter software used by ISPs who add them to the blacklist. The ISPs in turn must offer a filtering option to their customers, though customers can choose not to use it. As of last year, encouraged by a government education campaign, about a third of Internet-connected households with children were using Internet filters. The government found that it was too expensive and too impracticable to require ISPs to filter content themselves.

A review by the federal Department for Communications, Information Technology and the Arts found "clear support" for the scheme from a majority of those who made submissions. But many remain opposed. Electronic Frontiers Australia (EFA), a civil

liberties advocacy group representing Internet users says the scheme's net is too wide, banning or restricting material that would not be harmful to most people. It classifies text and static images under guidelines designed for movies. It's also too secretive about which sites it is banning, because it withholds the names and addresses of banned sites in the belief they could be misused. What's more, says EFA, it has done little to improve Internet safety. More than 80% of its activity concern foreign sites over which it has no control, and which filtering tools can only imperfectly block. In its first two years, the scheme prohibited 756 items out of about 3 billion documents on the World Wide Web.

The Australian regime - one regulator, multiple roles, different rules - seems to throw up many problems. On the other hand, so does the European Union's move to as far as possible synchronise regulation of video delivered by conventional broadcast and the Internet.

The EU experience

After years of consultations, focus groups, communications, fact sheets, issues papers, conferences, speeches, and submissions, the European Union is finally poised to extend its Television Without Frontiers (TVWF) directive to cover audiovisual content on the Internet. The new system would create two categories of broadcasters - "linear" and "non-linear" broadcasters - and regulate them differently. Linear broadcasters, such as traditional television broadcasters, broadcast programmes on a fixed schedule. Non-linear broadcasters offer audiovisual content as and when the viewer wants it – such as video-on-demand services. Both would be subject to minimum rules governing matters such as protection of minors, prohibition of incitement to hatred, and proper identification of advertisements and the identity of the media service provider. Linear services would also be subject to a stricter set of rules governing things like EU content quotas, allowable advertising quantities and product placement regulations (and, interestingly, the rule that news and current affairs programmes may not be sponsored). The key to the system is the "country of origin" principle, whereby each country has jurisdiction over broadcasters located within it – and on the flip-side, each broadcaster is subject only to the rules applying in the country where it is located.

The directive excludes radio broadcasters, non-commercial services, websites without audiovisual content, services where audiovisual content is merely ancillary, and private correspondence such as email. This means that the solution is a partial one: it only applies to TV-like services (it is essentially designed to provide baseline rules so that they can compete on a level international playing field.) Because of its limited application, it may produce another set of anomalies and inconsistencies. In particular, the rationale for treating audio-visual content differently from other digital content is not clearly explained, and the distinction is controversial (see the comments from Cory Doctorow in the section above on whether the Internet is a special case.)

Although it is not a comprehensive media regime, it does point the way to toward what may become a general international media law framework: countries agree on core minimum rules; they accept an obligation to incorporate those rules into their law; the basic rules are enforceable in all countries; they are to some degree based on

the effect of the particular media form, not its platform; countries can regulate their own citizens to a higher standard if they choose, but no-one can locate in a jurisdiction where there are no standards.

However, reaching international consensus on the content of those minimum standards will be another thing. An early EU proposal to include a right of reply provision seems to have been dropped. Such a rule would also be unlikely to find acceptance in the United States, where mandated rights of reply have been found to infringe constitutional free speech rights. The hate speech provisions would also be controversial. Countries struggle to reach agreement even on copyright issues; international agreement on enforceable norms regarding taste or fairness - and even accuracy or protection of children - in news and entertainment programmes seems unattainable (though existing remedies for defamation and invasion of privacy, and their equivalents in other countries, are fairly widespread, and will offer some remedies to the wealthy.)

The EU documents produced in the lead-up to the final form of the new proposed directive also frequently mention the desirability of self-regulation. It may be that governments will increasingly be looking to support the initiatives of communities and industries in developing their own regulatory systems, such as international advertising rules. It may be that formal and informal self-regulation, through Internet etiquette, socially enforced norms of behaviour, the actions of forum moderators, automatic content-prioritising mechanisms and filters, ISP governance, commercial contracts, a variety of voluntary complaints systems, negotiated protocols and the like, will end up bearing much of the burden of controlling the worst excesses of the Internet.

United Nations' efforts

The UN has belatedly been trying to foster an international forum to discuss Internet issues. An Internet Governance Forum will have its inaugural meeting in Athens this November, convened by the UN Secretary-General. Its aim is to "facilitate the exchange of information and best practices, and help find solutions to issues of concern to every day users arising from the use and misuse of the Internet, identify emerging issues and bring them to the attention of relevant decision-making bodies, and where appropriate, make recommendations." The actual agenda seems rather narrower: cybercrime, multilingualism, spam, and Internet access issues in developing countries. However, the IGF may be little more than talkfest: it will be managed jointly by governments, civil and business organisations and the Internet community, and has no decision-making powers.

The IGF sprang from the UN-sponsored World Summit on the Information Society, held in Geneva in 2003 and Tunisia in 2005. The Tunisia Summit was attended by almost 20,000 participants representing governments, international organisations, NGOs, businesses, and the media.

The Summits were mostly concerned with fostering collaborative development of information and communication technologies (ICTs) and addressing the international digital divide. The closest they came to addressing content issues in the resulting

"Tunisia Commitment" was to agree that governments, business and civil organisations should "work together" to "address the ethical dimensions of the Information Society". The Declaration of Principles from the Geneva Summit explained further:

> "All actors in the Information Society should take appropriate actions and preventive measures, as determined by law, against abusive uses of ICTs, such as illegal and other acts motivated by racism, racial discrimination, xenophobia, and related intolerance, hatred, violence, all forms of child abuse, including paedophilia and child pornography, and trafficking in, and exploitation of, human beings."

The resolutions also deal in general terms with cybercrime, spam, multilingualism, Internet security, terrorism, consumer protection laws and privacy. However, they create no binding obligations on governments.

At the Geneva Summit, New Zealand was represented by Associate Minister of Communications and Information Technology, David Cunliffe, and three staff from the Ministry of Foreign Affairs and Trade. At the Tunisia Summit, our delegation contained only one government official, the National Library's information strategist, which may be an indication of the priority the discussions are being accorded.

United States

Regulatory environment

Like Australia, the United States broadcasting and communications complex is regulated in the main by one organisation: the Federal Communications Commission (FCC). Stemming from a 1927 attempt to bring order to the chaotic radio US radio industry, the FCC has gained authority over each new form of content delivery as it has emerged, including CB radio, terrestrial broadcasting, telephone networks, cable and satellite TV, and computer networks. However, its powers are limited, and in general, it favours solutions that leave maximum play for the market, keeping content regulation to a minimum.

The FCC does not regulate the different formats the same way. Its jurisdiction is divided into silos, the main ones being broadcast, cable and telephone regulation. Different rules apply in each. Broadcasters are subject to rules about political rights of reply (in limited circumstances), indecency and obscenity standards, lotteries and contests, educational programming, time limits on advertising during children's programmes, sponsorship identification, and programme content labelling. Cable operators must obtain local franchises, but face only some of the federal restrictions: political right of reply, obscenity and sponsorship rules; and also "must-carry" obligations requiring them to include broadcast channels on their menu. Other formats, such as wireless cable and localised satellite TV (in hotels and apartment buildings) face much lighter regulation. The Supreme Court has recently held that cable modem companies, offering broadband and DSL access to the Internet, operate at the FCC's very lightest level of regulation.

Some platforms, especially cable, are subject to additional regulation at the state and local level.

There is no specific regulation of television delivered over the Internet, or over mobile platforms, though a variety of laws deal with Internet content, such as state anti-spam laws and copyright laws. As noted above, other attempts to control Internet content, notably the Communications Decency Act, have crashed and burned in the courts.

Thus, as three US media law experts note, "communication law has always been based on different rules for different media – different regulations, different jurisdictions, even different levels of First Amendment protection. Unfortunately, this no longer reflects the technological reality…communications technology changes far more rapidly than the law."[10] Many experts are predicting that convergence will force the US to rethink its entire communications regulatory structure.

Bloggers' rights: only in America?

The American cyber-rights group Electronic Frontier Foundation is currently promoting a list of "Bloggers' Rights" (http://www.eff.org/bloggers/join/) that has support from bloggers on both sides of the conventional political spectrum. It seeks to establish the following list of rights:

You Have the Right to Blog Anonymously. EFF has fought for your right to speak anonymously on the Internet, establishing legal protections in several states and federal jurisdictions, and developing technologies to help you protect your identity.

You Have the Right to Keep Sources Confidential. In *Apple v. Does*, EFF is fighting to establish the reporter's privilege for online journalists before the California courts.

You Have the Right to Make Fair Use of Intellectual Property. In *OPG v. Diebold*, Diebold, Inc., a manufacturer of electronic voting machines, had sent out copyright cease-and-desist letters to ISPs after internal documents indicating flaws in their systems were published on the Internet. EFF established the publication was a fair use.

You have the Right to Allow Readers' Comments Without Fear. In *Barrett v. Rosenthal*, EFF is working to establish that Section 230, a strong federal immunity for online publishers, applies to bloggers.

You Have the Right to Protect Your Server from Government Seizure. In *In re Subpoena to Rackspace*. EFF successfully fought to unveil a secret government subpoena that had resulted in more than 20 Independent Media Center (Indymedia) news websites and other Internet services being taken offline.

[10] T. Barton Carter, Juliet Lushbough Dee and Harvey L. Zuckman "Mass Communication Law" (West Group, 2000), 600-1.

You Have the Right to Freely Blog about Elections. EFF has advocated for the sensible application of Federal Election Commission rules to blogs that comment on political campaigns.

You Have the Right to Blog about Your Workplace. EFF has educated bloggers on their rights to blog about their workplace and developed technologies to help anonymous whistle bloggers.

You Have the Right to Access as Media. EFF has educated bloggers on their right to access public information, attend public events with the same rights as mainstream media, and how to blog from public events.

As important as these rights are, it must be noted that there is no corresponding list of responsibilities.

American political bloggers recently gained a victory in support of the "right to freely blog about elections" when the Federal Election Commission decided that a new campaign finance law will not apply to most political activity on the Internet. It will cover only paid advertising on websites, not bloggers and online publications. But it also leaves open the potential for unaccountable expenditure by political parties in support of those blogs: for, effect, the purchase of opinion. By the same token, there is little to stop, say, a commercial business paying bloggers to write unfavourably about its rivals.

A final word about the importance of media standards

Even if the vast bulk of the content available through new technologies is out of reach of New Zealand's media regulatory systems, there remains a democratic rationale for imposing a standards regime on at least some domestic media, especially the ones that are owned or funded by the public. Whatever the considerable benefits of new technologies, Cass Sunstein, author of *Republic.Com*[11] worries that the downside for media consumers may be just as significant. If enough of us sign up to content filters that select for us only the news that interests us, or the political analysis that we agree with, then we will lose the benefits of a broadly based, diverse and objective diet of news. Worse still, society will lose the benefit of a broadly informed citizenry who have been exposed to a range of arguments from different points of view, and stories on different subjects that they may not have chosen to seek out for themselves. He points to evidence that people with particular points of view tend to become more extreme in those views when they have conversations in echo-chambers with like-minded others. The Internet has brought forth a wonderful range of diverse viewpoints, but it has also given us the tools to avoid them altogether if we choose. It's difficult to have a national conversation if we're speaking different languages.

Other commentators point to economic incentives for huge media organisations to pander to mainstream audiences, broadening the appeal of their products (and their appeal to advertisers trying to reach a mass audience), but reducing spending on

[11] Cass Sunstein *Republic.com* (Princeton University Press, 2001)

providing a diversity of viewpoints, minority interests, elite culture and debate, drama and investigative reporting.

There is a case to be made (and it's made, for example, by Ellen Goodman[12] and C. Edwin Baker[13]) for public investment in media services that strive to be objective, balanced and accurate, that focus on issues of public concern, that clearly differentiate between fact and comment and between news and advertising, and that offer a range of viewpoints – because democracy cannot function properly without this. And because the market may not provide it by itself. A standards regime is crucial to maintaining and guaranteeing the standards of such media services, even if it applies to relatively few media outlets.

There is even a case to be made for public investment in efforts to engage citizens with this kind of media, by investing in promotion and marketing of democratic debate, which after all, will be competing against the best techniques money can buy for diverting attention to other media.

It may be that corporate media will uphold high ethical and journalistic standards even if they are not subject to a standards regime, or can find ways to circumvent it. It may be that the public will demand those high standards. But it is difficult to be confident about that.

On the other hand, governments, even democratic ones, cannot automatically be considered honest brokers. In 2006, the Chinese government has obliged Google to censor its search results as a condition of doing business in China; and the US government, as noted above, put pressure on ICANN to breach its own processes and kill off the .xxx domain proposal.

In considering a response to the new environment, governments and regulators will need to balance two distinct philosophies: the traditional belief that democratic governments should regulate in the public interest; and the belief, embodied in Internet culture, that networks foster their own communities and that individual voices must be protected from authority.

[12] Ellen P. Goodman "Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets" 19 Berkeley Tech. Law Journal 1389 (2004)
[13] C. Edwin Baker *Media, Markets and Democracy* (Cambridge University Press, 2002)