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tmdenton@magma.ca

# The Broadcasting Act and the Internet

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by Timothy Denton, BA,BCL

# Cyberspace is Ruled by Three Different Regimes

- Cyberspace is divided among three major regimes: broadcasting, telecommunications carriers, and free competition. Four framework laws apply.
- 1. *Broadcasting Act* governs “broadcasting” and “programming”, and gives privileged status to broadcasting signals.
- 2. *Telecommunications Act* governs “common carriers”, “facilities” and “services”
- 3. Spectrum is a nationalized resource, allocated by the *Radiocommunication Act*.
- The *Competition Act* governs everything else, including computers and software, publishing and speech.

# Radiocommunication and Broadcasting

- Since the Wireless Telegraphy Act of 1905, the use of radio spectrum has been a licensed activity.
- Spectrum is a nationalized resource. The government assigns spectrum to users and allocates spectrum to use, in the context of international treaty obligations.
- Market mechanisms for assigning spectrum are only now being considered, and have not yet been implemented.

# Broadcasting: The basic ideas

- The basic ideas of broadcasting date from the late 1920's and early 1930's:
  - frequency division multiplexing (stations and channels)
  - treaties govern the use of bandwidth
  - service areas based on power output (locality)
  - limited spectrum gives rise to scarcity, and thus public service obligations
  - top-down architecture, dumb terminals

# Telecommunications

- The basic ideas of telecommunications regulation derive from the law of common carriers:
  - prohibitive entry costs, hence monopolies in a given territory;
  - obligations are imposed to carry traffic without undue discrimination or unjust preference;
  - price and profit regulation limits the ability of the carrier to make excess profits;
  - obligations to serve everybody, sustained by income transfers possible inside a monopoly.

# The Competition Act for the rest of the economy

- The economy is governed by the *Competition Act*, unless it is regulated by a special act, like *Telecommunications* or *Broadcasting Acts*
- Competition is the normal process of business. No one is protected. Competition, not competitors.
- The Competition Act defines both civil and criminal anti-competitive offences.

# Telecom Act versus Competition Act

- If an enterprise is a “telecommunications common carrier”, it falls under a special regime where prices and competitive behaviour can be closely regulated to prevent monopoly abuses.
- The *Competition Act* governs the whole economy, but in practice, economic regulation offers practical immunity from its application.

# Telecoms versus Computers

- The distinction between “basic” and “enhanced” services marks the boundary between where the telecom regulator will regulate, and where he will not.
- In TD 84-18, the CRTC said: the Commission has decided to adopt definitions of basic and enhanced services that conform in substance with the definitions adopted by the FCC.

# Basic versus Enhanced

- A basic service is one that is limited to the offering of transmission capacity for the movement of information.
- An enhanced service is any offering over the telecommunications network which is more than a basic service. (TD 84-18)

# Enhanced Services

- In an enhanced service, computer processing applications are used to act on the content, code, protocol, and other aspects of the information. Additional, different or restructured information may be provided through various processing applications performed on the transmitted information, or other actions, such as editing or formatting, can be taken by either the vendor or the subscriber based on the content of the information transmitted. (TD 84-18)

# ISPs offer enhanced services

- The Internet offers a suite of services that qualify as ‘enhanced.’
- ISPs rely on access to underlying telecom transport facilities which must be
  - timely
  - affordable
  - competitively priced
  - unbundled
  - if necessary, co-located

# How the CRTC views the ISP

- The ISP is not a “carrier” within the meaning of the Telecom Act, but a customer of the telco, and enhanced service provider.
- The ISP’s rights to interconnection, unbundled facilities, colocation etc. with carriers appears to be determined in part by its regulatory status, whether they are “carriers” or not.

# Does the Broadcasting Act apply?

- The Broadcasting Act says:
  - "broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication *for reception by the public* by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

# “Programs”

- "program" means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;
- It is clear that, as Internet transmissions approach full-motion video, they can be argued to be “programs”.

# Asserting Jurisdiction

- The CRTC determines its own jurisdiction; superior courts can reverse the Commission, but have tended to respect its decisions.
- Once any part is declared “broadcasting”, the whole system tends to fall into the broadcasting (example: cable systems captured, even though they use wire)

# The Nature of broadcast regulation

- The Broadcasting Act establishes a mandate for the Commission to intervene heavily in the content of communications
  - content is regulated as to Canadian input, portrayals of women, advertizing of alcohol, and others
  - consumption is governed through the packaging of channels (tiers)
- “A licensee shall not distribute programming services except as required or authorized under its licence or these Regulations.” (Broadcasting Distribution Regulations)

# Offences

- 32. (1) Every person who, not being exempt from the requirement to hold a licence, carries on a broadcasting undertaking without a licence therefor is guilty of an offence punishable on summary conviction and is liable
  - (a) in the case of an individual, to a fine not exceeding twenty thousand dollars for each day that the offence continues; or
  - (b) in the case of a corporation, to a fine not exceeding two hundred thousand dollars for each day that the offence continues.

# The Basic Choices

- The basic choices for society to make about communication and agents on the Internet are these:
  - are they *carriers*? Do they have special obligations because of the nature of the facilities they own?
  - Are they broadcasters?
  - Are they in the free economy which is ruled by laws of general application?

# The General Laws of Communication

- The rule is: you do not need government permission (a government licence) to preach, publish, speak, or pray.
- We have gradually won these freedoms since the Reformation.
- Broadcasting, invented in the 20th century, is an exception to these general rules. Spectrum scarcity was the justification.

# Convergence

- The convergence of technologies, driven by computers and digital encoding, is causing a convergence of legal régimes.
- The issue at heart is not technological, but political. Do we wish to live in a world where communication is regulated by government licensing?

# The Rule of Law

- The rule of law is fundamentally different from regulation.
- The rule of law is: if you obey the general laws, you need never fear the discretion of an official.
- Regulation is the subjection of transactions to the prior approval of officials.
- The *Broadcasting Act* would subject the Internet to official approval.

# The Internet and Broadcasting

- To reduce the Internet to broadcasting, you would have to:
  - reduce the number of potential IP numbers to, say 500,
  - turn the telephone system into an intranet (no outside-the-system calling)
  - schedule programming (which only makes sense when there is a fixed number of channels)
  - eliminate interactivity, except to choice of “channels” and volume controls
  - eliminate the domain-name system

# The United States Supreme Court has already ruled on this question

- In the case of *ACLU v. Reno*, the US federal Court of Appeals, affirmed by the US Supreme Court, ruled that the Internet was not broadcasting on several grounds.
  - The deliberate searching out of sites that must be engaged in before a website could be accessed.
  - low entry barriers - web presence is cheap
  - the number of voices available were not limited by spectrum scarcity.

# How will Canada decide?

- The U.S. Supreme Court rules that the Internet deserved the constitutional protections afforded to **speech and printing**, rather than the more narrowly construed protections afforded to broadcasters.
- A Canadian court might weigh the factors differently, or feel more concern for cultural identity issues, than the US courts have done.
- Canadian courts are likely to follow the American lead.