

## Internet Delivery of Content & Media: Dilemma for Regulators and Negotiators Alike

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The past decade has seen the development of technological means to deliver over the Internet a television-like experience to consumers using their home computers. No longer is it necessary to have a separate line to the house in order to view content & media; neither is it necessary to have a unique device, like a television.

This development challenges government officials who have for so long depended upon the separation into distinct categories of computer-generated messages and television signals. Likewise trade officials seeking means to either open markets or protect them are equally presented with challenging alternatives.

### History as a Guide

I am going to present examples in the regulatory and trade field that reveal how governments have already grappled with the effect of changing technology and their treatment of audiovisual content.

### Regulatory authorities and Broadcasting

Regulatory authorities are concerned about a range of public policy issues regarding broadcasting of audiovisual content. These issues include political speech, hate speech, obscenity & pornography, advertising (of certain products, like alcohol and tobacco, and aimed at specific segments of the population, like children) and cultural diversity. Government regulatory intervention has a long history, starting with the inception of broadcasting, largely because of the early adoption of the concept that the air waves were public property. The value of broadcasting as a propaganda tool has also played a vital role in government affection for control of the delivery of content.

In the past, technology repeatedly challenged regulators to change and sculpt their rules as distribution systems changed. In the United States, the advent of cable systems and, subsequently satellite systems, has resulted in a multi-tier approach: these newer systems are subject to less stringent rules than those that apply to traditional “over-the-air” television and radio broadcasting. (This explains why the American “shock jock” Howard Stern moved to the Sirius Satellite Radio network after he was censored when broadcasting over the traditional terrestrial network.)

### Trade Officials and Services

Trade officials turned their attention to carving out rules for international services trade in the 1980's. With the completion of the Uruguay Round of trade talks in 1993, and the subsequent creation of the World Trade Organization (WTO), services trade were covered by international trade rules. At a minimum, all services trade was subject to the basic principle of “most favored nation” (MFN) treatment. Specifically, services from one WTO country had to be treated equally to services from another WTO country. In a wide range of service sectors, additional commitments were taken to also provide “national treatment” and market access. Significantly, “computer-related services” was one of the covered sectors in which most countries agreed to be fully open to international trade. However, four sectors did not see specific results in the Uruguay Round: maritime transportation, movement of persons, financial services and telecommunications.

It is a popular misconception that the audiovisual sector was the subject of a cultural exception (or “carve out”). This is absolutely not true. What is true is that many countries (such as Canada and Member States of the European Union) refused to make specific commitments regarding audiovisual services. Thus, they did not agree to provide market access to foreign services nor to extend national treatment to those services. A very limited number of countries, most significantly the United States, made such commitments.

The audiovisual issues arose again during the negotiations under the Services Agreement of a chapter on basic telecommunications (which, as stated above, had not seen results in the Uruguay Round). The circumstance was as follows: even in mid-1990's it was apparent that changing technology would soon enable the distribution of cultural content, such as sound recordings, over the Internet. Some even predicted, to the strong opposition of most experts, that audiovisual content (such as television broadcasts) would one day be delivered to consumers via the Internet. Thus, a discussion took place on whether "computer-related services" that resulted in the delivery of audiovisual content were already covered by the WTO. It is an interesting question; one on which there was no agreement then, nor is there agreement now.

Future Possibilities: More Control or Negotiated Solution?

Trend to Greater Control

The past few years have seen a series of seemingly unrelated attempts by regulators to control Internet-delivered content. In the United States, the U.S. Congress passed at least three laws attempting to control pornographic and obscene material, which were appealed to the U.S. Supreme Court. In Europe, the initial focus was on preventing the circulation of hate speech over the Internet (the Yahoo case in France). In the past two years, the focus in the United States has shifted to controlling Internet gambling (the President signed a new law in the past month) and in 2005 the EU Commission proposed a set of wide-sweeping, and quite controversial, rules on audiovisual content delivered over the Internet. China has also set about instituting a series of measures aimed at controlling information delivered over the Internet, as have countries throughout the Middle East.

I suspect that the efforts of regulators will become increasingly desperate as technology provides greater flexibility in circumventing rules meant to control the delivery content.

## A Way Forward

The first hurdle is to develop agreed long-term goals, such as economic development, cultural enrichment, protection of the free exchange of ideas, etc. Many of these goals have already been articulated (and agreed) in various international fora.

Here are some specifics: the goal is to agree on principles that set “good regulatory practices” for the Internet delivery of content and media. These principles would be made formal within the context of future trade talks, and would bind governments to bring their domestic rules into compliance with them. Thus, they would apply to the Internet delivery of content and media.

Included in the principles would be the following concepts:

- adoption of transparent procedures
- recognition of legitimate domestic objectives
- guarantee of market access
- application of non-discriminatory principles.

## Legitimate Domestic Objectives

As I noted above, each country has a set of objectives that it pursues to ensure that content and media are appropriate within its social, political, economic and cultural framework. The “good regulatory practices” principles would recognize the legitimacy of these objectives, as long as they are not articulated with the intention of distorting trade, nor have the effect of unjustifiably distorting trade.

Indeed, there are certain objectives that are agreed by all nations; for example, all governments share the goal of preventing the trafficking in child pornography. There are other objectives that are unique to one nation only; for example, in Malaysia it is forbidden to criticize one of the seven sultans. It is unlikely that any other country has in place a rule that outlaws this practice.

It is the enforcement of domestic rules that becomes the issue. Using the examples cited above, it is realistic to expect that governments would willingly cooperate to shut down trade in child porn, and that no trade complaints would be raised as these efforts are carried out. It is

less realistic to imagine that governments would agree to aggressively and actively control websites that contradicted Malaysian law. And, it is possible that a trade complaint could surface, especially if the Malaysian law was suspected as being a disguised trade barrier aimed at limiting the exchange of international media and content.

### Non-Discrimination

It is perfectly possible for regulators and trade officials to successfully work on proposals that provide credible ways to pursue legitimate domestic objectives, while ensuring the free flow of services and of technological change. Interestingly enough, trade officials have long recognized the validity of the pursuit of “legitimate domestic objectives”. The concept is incorporated in the WTO Services Agreement, as well as in the key legal concept of the European Community’s 1992 harmonization initiative.

The concept of non-discrimination (that is, national treatment) would be carefully treated. A distinction would be made between regulatory treatment and financial incentives. That is, the principle of national treatment would apply to all regulations. Thus, governments would be bound, with respect to their rules, to treating foreign and domestic content and media suppliers similarly. However, with regard to financial incentives, such as tax breaks and subsidies, governments would be permitted to distinguish between foreign and national suppliers. With one proviso, and that is that the incentives were not specifically aimed at encouraging exports.

### Lastly, Where to Meet

To prevail in these efforts, the intellectual starting point is the recognition that no single agency or government will be successful over the long term in controlling technological change. The best that can be hoped for is that technology can be saddled to achieve the goals of these officials.

A further step is to find a venue for rational discussions of the issues before regulators and trade officials. Some of the obvious candidate institutions are the WTO, the International Telecom Union (ITU) and

the Organization for Economic Cooperation and Development (OECD). I suggest, however, a more unobvious series of candidates, such as academic institutions in the United States, Europe and Asia. For example, the institution with which I am affiliated—the Annenberg Center for Communications of the University of Southern California—would be the perfect place to hold a series of discussions aimed at forging a new path forward for regulators and trade officials.