*David J Brennan**

PRINTING IN ENGLAND AND BROADCASTING IN AUSTRALIA: A COMPARATIVE STUDY OF REGULATORY IMPULSE

I INTRODUCTION

When a new means of communicating information to the public emerges, what also emerges is an impulsive urge from governments to exercise special controls over that new means: special controls upon who may communicate and what may be communicated. Shortly after the introduction of printing into England, special controls were placed upon what may be published in print that were quite distinct from controls in respect of what may be said in public. Special controls were placed upon who was entitled to print, as distinct from who was entitled to speak in public. In the regulation of broadcasting in Australia, we see analogous special controls. What explains this phenomenon? What policy justifications (if any) for it exist? And, moreover, how will this regulatory impulse cope with the era of digitisation and global computer networks?

In the final decades of printing regulation in England, Richard Atkyns set out a justification for the Crown's regulation of printing in England.[1] Atkyns was the holder of a royal patent grant entitling him to the exclusive right to print all books which 'touch and concern' the common law.[2] He therefore had good reason to defend the Crown's exercise of power over printing, being a beneficiary from that exercise. Indeed his motivation for writing was to defend his patent grant from commercial attack by authors, printers and booksellers prejudiced by its scope.[3] Atkyns titled his paper *The Original and Growth of Printing: Collected out of History, and the Records of this Kingdome. Wherein is also Demonstrated, That Printing appertaineth to the Prerogative Royal; and is a Flower of the Crown of England.* Atkyn's argument was that printing was first introduced into England in 1468 at the instigation of Henry VI. As such, the right and title of printing rested with the Crown. England was indebted to the Crown for the introduction of

---

* BCom, LLB (Hons) (Melb); Research Fellow, Law School, University of Melbourne. This article owes its existence to the encouragement given by Associate Professor Andrew Christie, Law School, University of Melbourne and has been enhanced by its review in draft by Ms Susan Bridge, Executive Director, Australian Publishers' Association. All errors are my own.

1 Richard Atkyns, *The Original and Growth of Printing* (1664). This was not published under his name until 1664: Fredrick Siebert, *Freedom of the Press in England 1476–1776 : The Rise and Decline of Government Control* (1952) 22.

2 'The Case of Booksellers and Printers Stated, with Answers to the Objections of the Patentee 1666', *Early English Books 1641–1700*, microfiche 1566: 24.

3 Ibid.

printing and it was, therefore, only proper that the English people should suffer the regulation of printing by the Crown.

In the 1660s this argument may have had its own internal logic. It is notable, however, that Atkyns felt the need to revisit the origins of printing in England to justify a special regulatory regime for printing. It betrays a belief that Crown control of printing was not inherently justified by the nature of printing. Crown regulation required justification in terms of the Crown's paternity of printing. However, subsequent historians (who unlike Atkyns had no vested interest in hoping to establish this paternity) have shown Atkyns to be in error. It has been irrefutably established that William Caxton, in 1476, introduced printing into England, not at the mandate of the king but on his own initiative. If the Crown had nothing to do with originating printing in England, what justifications then remained for the continued special control of that activity? In 1695 the English Parliament forever ended that special control over printing. It has not been reintroduced in England since, and such special control over printing has not been a feature of common law countries.

In 1905 in the Australian Senate the Wireless Telegraphy Bill was introduced. Senator Keating, in the course of delivering the Bill's second reading speech, noted that it gave the Postmaster-General the exclusive control over transmitting and receiving messages by wireless telegraphy. He then made the following comment, almost by way of an aside: 'Of course, it might be argued that it is not desirable that he should have that power.' No one made that argument in 1905. Today, broadcasting in Australia is an activity as highly regulated as printing was in England prior to 1695. But what policy justifications exist for that special control of broadcasting? The current government in Australia seems to assume that whatever that policy is, it also supports its regulation of communications to the public utilising the internet.

The aim of this essay is to detail some of the significant features of English printing regulation and Australian broadcast regulation and, in so doing, to answer why such special control over the two actually arose. The essay concludes by making some comments on the policy justifications for any special control and the likelihood of the continuation of such regulation in a digital world.

II REGULATION OF PRINTING IN ENGLAND 1484–1695

The Crown and Regulation

The first printing press was brought into England in 1476.[4] The Crown took an immediate interest in this emerging technology. Although printing was in its infancy in England, it was already well established on the Continent. As a consequence, the first English laws directly affecting printing were permissive. In 1484 an Act was passed restricting aliens from trading or working in England. However, an express proviso was inserted that aliens may import books and work as a printer.[5] This policy of free trade in books and printing suggested a desire to foster in England the distribution of books and the development of the new invention.[6]

Shortly after 1483 the regulation of printing altered significantly. Firstly, a series of patents were granted to printers to print books of a particular kind. These grants were said to be by exercise of the prerogative power of the Crown. Examples included patent grants to certain printers to the exclusive entitlement to print books which concerned certain subjects (for example, the common law) or were of a particular genre (for example, almanacs).[7]

In 1534 the 'free trade' proviso from 1484 was reversed; it became an offence to buy a book which had been bound abroad or to buy a book retail from an alien. The reason for this about-turn in policy has been explained in terms of economic protectionism and censorship. The Act of 1534, though it was aimed at a certain kind of man – one who was taking business away from worthy citizens – made it more difficult to bring into the country a certain kind of publication – one that might put wrong ideas into the heads of the King's loyal subjects.[8]

After 1534 there appeared a series of royal proclamations against seditious and heretical books and their authors. However in 1557 Queen Mary, observing the failure of these proclamations alone to stem the tide of dangerous books, incorporated by Royal Charter the Company of Stationers, a London trade body comprising printers, book binders and book sellers ('the Company').[9] The preamble to the Charter declared that the King and Queen, 'wishing to provide a suitable remedy against seditious and heretical books which were daily printed and

4 William Blades, *The Biography and Typography of William Caxton, England's First Printer* (2nd ed, 1882) 80–1.
5 1 Ric 3, c 9; Atkyns, above n 1, 6.
6 Siebert, above n 1, 25.
7 Ibid 33–4.
8 Cyprian Blagden, *The Stationers' Company: A History 1403–1959* (1960) 29.
9 Benjamin Kaplan, *An Unhurried View of Copyright* (1967) 2–7.

published', wished to give special privileges to the ninety-seven members of the Company.[10] These privileges were:

(i) no-one in the realm should exercise the art of printing unless he were a member of the Company or unless a patentee by Crown prerogative;

(ii) officers of the Company were given general search and seizure powers to seize anything printed contrary to the Charter, and to imprison and fine offenders.

The terms of the Charter had been proposed by the London trade body itself whose interests were in protectionism. The Crown was prepared to make the declaration for a different reason: censorship. By limiting printing to the members of one London-based peak body, and giving that body enforcement powers as if it were an executive arm of government, printing was made more amenable to control and regulation by the Crown.[11] If a printer's trade depended upon the licence of the Crown, one may reasonably expect that printer will be loath to criticise the Crown, or the prevailing order.

In 1559, a year after her accession, Queen Elizabeth issued (under her authority as head of the church) a royal injunction which required that ecclesiastical pre-publication approval be obtained for all new works.[12] In 1566 the Company was made the principal agency to enforce these regulations.[13] The power of the Company was further strengthened, and the regulation of printing thereby tightened, by a subsequent Star Chamber Decree of 1586.[14] Like the Charter, the Decree was promoted by the Company for financial reasons, and sanctioned by the Crown because it was thought to provide more safeguards against the printing of schismatical publications.[15] The Star Chamber Decree of 1586 prescribed an additional licensing obligation which required a printer to obtain the permission of a warden of the Company prior to printing any work.

10 Ibid 21.
11 Ibid 31.
12 Siebert, above n 1, 56.
13 Ibid 59.
14 Ibid 61.
15 Ibid.

The First Newspapers and Regulation

The first newspapers in England in the 1620s provide a useful illustration of how printing was regulated under this regime.[16] The early newspapers agitated for England's participation in the Thirty Year War at a time when such participation was something King James hoped to avert. In 1621 the King found that he had at his disposal several means to regulate these unlicensed newspapers. First he issued a proclamation directed against 'the great liberty of discourse concerning matters State'. The King stated when making the proclamation that 'no man was to think himself free from punishment because there are so many offenders'. True to his word, the Company received a request from the Crown to imprison a printer for 'the publication of a news-sheet on the war in the Palatinate without license'. The printer was imprisoned. Then, another printer petitioned the Crown requesting that he be granted the patent for the exclusive printing of all newspapers, subject to such newspapers being properly licensed by the Company. This patent grant was made. Thus, within a short space of time all the devices of the Crown for the control of printing had been employed in regulating newspapers.

The Parliament and Regulation

In 1640, with the formation of the first parliament, the regulation of printing continued after a three year hiatus. Now the parliament replaced the Crown as controller of printing. The *Ordinance for the Regulating of Printing* issued in 1643 preserved both the Company of Stationers' monopoly position and the pre-publication licensing of literature.[17] The ordinance provided for the cooperation of the Company in the enforcement of parliamentary licensing, in return for parliamentary recognition of the Company's monopoly position. Under the terms of the ordinance, prior to publication all books, pamphlets and papers were required to be licensed by persons appointed by parliament and registered with the Company. However the three year period in which printing was (for the first time since the 1400s) comparatively unregulated had given rise to a multitude of printers outside the Company. This meant that the new alliance between the Company and parliament was seriously challenged (and eventually defeated) by the 'irregular' printers who had sprung up in the absence of control.[18] From this time the printing controls and regulation, which had been largely successful in the past, became increasingly futile.

---

16 The following exposition is drawn from Siebert, above n 1, 149–51 (ch 7: 'Regulation of Corontos'). Originating in Holland, the first news sheets were known as 'corontos'.

17 C H Firth and R S Rait, *Acts and Ordinances of the Interregnum 1642–1660* (1911) 1, 184.

18 Siebert, above n 1, 176.

This marked the turning point in the history of printing regulation. Once the genie of unregulated printing escaped from the bottle, the policy justifications for any special controls at all seemed to be on uncertain ground. This period may be usefully contrasted with what is occurring today in Australia. Digital technologies increasingly mean that unregulated broadcasting may occur. This, too, is equally challenging the underlying policy grounds for any special regulation of broadcasting in Australia.

What remained of parliament in 1649 passed a new *Printing Act.* This recited all the familiar elements of past regulation: Company monopoly, pre-publication licensing and Company enforcement. The Act expired in 1651 and there existed another hiatus in which printing was again unregulated. This was remedied by a further *Printing Act* of 1653, which contained the elements of parliamentary licensing and Company enforcement. However, the Act of 1653 marked a change in policy regarding the Company's monopoly position; from now the exclusive right to print was placed under the jurisdiction of the Council of State; the Company lost its exclusive right to print, granted under its Charter in 1557.[19] In 1655 Oliver Cromwell as Lord Protector introduced his own system of control. Under these arrangements the Council of State remained as the chief regulatory body and the Company continued to occupy a semi-official enforcement role. Under this regime, among those prosecuted was the printer of a pamphlet entitled *A Charge of High-Treason Exhibited Against Oliver Cromwell.*[20]

The Printing Act 1662

After the Restoration, Parliament passed in 1662 what was to be the final attempt to specifically regulate printing. The *Printing Act 1662*[21] was a detailed piece of legislation comprising four aspects which together operated to form a cohesive regulatory regime.

Printing, Importing and Selling

Under the 1662 Act, the Company's monopoly position was both reinstated and curtailed. Printing was strictly limited to master printers of the Company, and the printers at Cambridge and Oxford Universities. However, the policy of the Act was to regulate by limiting the number of the Company's master printers down to twenty. The Company could appoint no new master printers until their number had been reduced to less than twenty.[22] In 1662 there were fifty-nine master printers.[23] The

19 Ibid 228–9.
20 Ibid 229.
21 13 & 14 Car 2, c 33.
22 Ibid s 10.
23 Siebert, above n 1, 239.

importation of English-language books was prohibited and foreign language books (which were subject to official scrutiny on entry) could be imported only by members of the Company.[24] Booksellers had to either be members of the Company or appointed by the church.[25] It was an offence to print, import or sell anything that was 'heretical, seditious, schismatical, or offensive ... to the Christian faith or to the doctrine or discipline of the Church of England'.

It was also an offence to print, import or sell anything which 'may be to the scandal of the Government or Governors of the Commonwealth or of any Corporation'.[26]

Licensing

The 1662 Act established a licensing system under parliamentary authority. It prohibited the printing of any book or pamphlet unless it 'shall be first lawfully licensed and authorised to be printed by such person and persons only as shall be constituted and appointed to license the same'.[27] The licenser was required to testify under his hand on the manuscript copy that nothing in the book was 'contrary to Christian faith or the doctrine or discipline of the Church of England or against the state or government of the realme or contrary to good life or good manners'.[28] It seemed that the licensers faced an almost impossible task due to the proliferation of irregular printers; no more than half the pamphlet literature was licensed.[29]

Copyright

Prior to the Company's incorporation by Charter, an ordinance of the Stationers' Guild made it an offence to print any work without the 'copy' being entered in the register book of the Company.[30] This practice gave a form of copyright protection. A perpetual right of property in the author's 'copy' in the manuscript was thus recognised. However, with the exception of the universities, printing was the exclusive right of members of the Stationers' Company. The only way an author could have his or her work printed, was to assign the 'copy' to a member of the Company. Hence, the author's copyright had in practice no existence independent from a Company printer.[31] The 1662 Act enshrined this practice in law. It placed a positive requirement upon any printer to first enter the assignment of the Copy of the

24 13 & 14 Car 2, c 33, s 8.
25 Ibid s 4.
26 Ibid s 1.
27 Ibid s 2.
28 Ibid s 3.
29 Madan, *The Library* (4th Series, 1925) 6, 121–2.
30 Blagden, above n 8, 33.
31 Augustine Birrell, *Seven Lectures on the Law and History of Copyright in Books* (1899) 82.

book in the 'Booke of the Register of the Company of Stationers of London'.[32] It was an offence to print or import any book which either fell within the terms of a royal patent grant, or which by entry of 'the Copy' in the registration book of the Company, copyright had been assigned to another printer.[33]

Enforcement

Shortly after the enactment of the 1662 Act, the Office of the Surveyor of the Press was established to enforce the Act's regulations. This was done on the perception that the Company's past performance as enforcer was unsatisfactory. It was seen that the Company's interest was primarily a financial one and that often their immediate financial interest lay in the violation of regulations. This conflict of interest, inherent since the Company's incorporation under Charter in 1557, finally led to the Company never again enjoying the power it formerly enjoyed as a de facto executive censorship body. However, the Office of the Surveyor of the Press was itself ineffectual, largely due to the proliferation of irregular printers operating in defiance of the law.

The Abolition of Printing Regulation

The 1662 Act was the final piece of substantive law that sought the wholesale regulation of printing in England. The Act contained a sunset clause which required periodic renewal by the parliament.[34] It was renewed on various occasions until non-renewal in 1695.[35] The reasons for its non-renewal warrant scrutiny.

In 1695 the House of Common remitted to the House of Lords a list of eighteen reasons for refusing the Lords' request to renew the *Printing Act 1662* for another term. The drafting of those reasons was influenced by John Locke, who in around 1694 had written a memo which had clearly persuaded many members of the Commons.[36]

Printing, Importing and Selling

Locke's memo made this telling attack upon the whole notion of any specific regulation of printing:

---

32 13 & 14 Car 2, c 33, s 5.

33 Ibid.

34 Ibid s 24.

35 *Lords Journal*, vol 15, 18 April 1695, 545–6 .

36 Siebert, above n 1, 261. The Locke memo is found in Peter King, *The Life and Letters of John Locke* (1884) 202–9 ('His observations on the censorship').

> I know not why a man should not have liberty to print whatever he would speak; and to be answerable for the one, just as he is for the other, if he transgresses the law in either.[37]

This constituted a plea, in modern parlance, for technology-neutral laws applying across all modes of discourse. This was strongly echoed in many of the eighteen reasons given by the House of Commons for non-renewal.[38] The primary tenor of the Commons' reasons for non-renewal and of Locke's critique of the Act was freedom. Not 'freedom of expression' or 'freedom of the press' as those terms are today understood, but economic freedom to trade and compete. Locke attacked the monopoly position of the Company, noting that aspects of the Act served 'only to confirm and enlarge the Stationers' monopoly'.[39] The Commons observed that the 1662 Act 'restrains Men bred up in the Trade of Printing ... from exercising their Trade, even in an innocent and inoffensive way'.[40]

Licensing

The Commons could also point to the requirement under the Act of pre-publication licensing without the Act providing any criteria for what should be licensed.[41] Locke observed that the terms of the subject matter which should be denied licence were so 'general and comprehensive' that it was impossible to determine whether any book should be licensed aside from knowing what may 'suit the humours' of governors of church and state.[42] Again the objection was against the commercial uncertainty and lack of business efficacy inherent in the licensing provisions.

---

37 King, ibid 203.

38 The Commons' final reason for non-renewal related to a special proviso made in the Act relating to the parliament's printer, John Streater. At the time of the passing of the 1662 Act, Streater was also negotiating to obtain the benefit of the patent giving exclusive entitlement to print all books concerning the common law: Blagden, above n 8, 154. By a proviso in the Act, Streater's printing was explicitly and wholly excluded from any regulation: 13 & 14 Car 2, c 33, s 22. On this the Commons observed: 'There is a proviso in that Act for John Streater, that he may print what he pleases, as if the Act had never been made; *when the Commons sees no causes to distinguish him from all the rest of the Subjects of England*': *Lords Journal*, vol 15, 18 April 1695, 545–6 (emphasis added).

39 King, above n 36, 205.

40 *Lords Journal*, vol 15, 18 April 1695, 545–6 . This was the tenth reason for non-renewal.

41 Ibid. This was the ninth reason for non-renewal.

42 King, above n 36, 203.

Copyright

Both the Commons and Locke alleged corruption within the Company in the registration of copies. The Commons noted that the role of the Company as both a copyright register and printers' collective meant that members of the Company 'have an opportunity to enter a title to themselves and their friends, for what belongs to, and is the labour and right of, others'.[43] Locke made a like observation.[44] Notably, the concept of copyright per se was not attacked. The justifications for property rights owned by an author for his or her work were assumed. What was attacked was the corrupt administration of copyright in the hands of the Company.

Enforcement

The Commons finally offered as a reason for non-renewal that, intricate regulation notwithstanding, 'irregular' printing was rampant. The *Printing Act* simply did not meet its primary purpose, to prevent 'the frequent abuses in printing seditious treasonable and unlicensed books'.[45] If anything, such books were being published all the more frequently. Enforcement of the Act was so inadequate that it rendered the Act unable to meet 'the end for which it was made'.[46]

On 18 April 1695 the House of Lords agreed with the reasons given by the Commons for non-renewal. The *Printing Act 1662* forever lapsed.

III REGULATION OF BROADCASTING IN AUSTRALIA 1905–2000

The Early Years

Australia commenced regulating broadcasting from the inception of wireless transmission of information. The *Wireless Telegraphy Act* was passed in 1905. This followed the passage of similar legislation in England the previous year. When introduced into parliament, the entitlement of the government to regulate wireless communications was barely questioned. As noted in Part I, during the Bill's second reading speech in the Senate, Senator Keating posed rhetorically 'Of course, it might be argued that it is not desirable that [the Postmaster-General] should have that power'.[47] However, no serious questioning of the entitlement arose. The brief Act

43 *Lords Journal*, vol 15, 18 April 1695, 545–6. This was the third reason for non-renewal.

44 Locke gave the example of a Mr Ansham Churchill who was said to suffer injustice due to the copyright fraud of the Stationers' Company: King, above n 36, 203–4.

45 13 & 14 Car 2, c 33, preamble.

46 *Lords Journal*, vol 15, 18 April 1695, 545–6. This was the first reason for non-renewal.

47 Commonwealth, *Parliamentary Debates*, Senate, 2 August 1905, 465.

was referred to in its second reading speech in the House of Representatives as a 'purely formal matter' ; it was to bring Marconi's invention under the same regulatory scope as traditional (wired) telegraphy.[48] One member questioned whether the Act amounted to an appropriation of the invention.[49] This was answered by the government that the Act 'is designed to enable the Commonwealth, not to appropriate the invention, but to control it'.[50] And control it the Commonwealth did.

Early Radio Control

The *Wireless Telegraphy Act* required broadcasters to obtain a licence from the Postmaster-General; the 'communications' minister of the day. The penalty for broadcasting without a licence was £500 or a maximum of five years' imprisonment 'with or without hard labour'.[51] The Act also empowered search and seizure of apparatus used in contravention of the Act.[52] Regulations were to be made under the Act. Initially, these were promulgated in piecemeal fashion, with naval administration during the First World War. In 1923 the first broadcasting stations commenced operation under a short-lived subscription business model.[53] The first consolidated set of regulations appeared in 1924. These regulations provided, inter alia, that a broadcasting licence 'shall not be granted to any person who is not a natural-born or naturalized British subject'.[54] The 1924 consolidated regulations reveal two classes of broadcasting licences: class A were those broadcasters financed by receiver licence fees[55]; class B were to be financed without resort to the receiver licence fee. Under the regulations, the Postmaster-General could insist upon the broadcast of any 'items of general interest or utility as the Postmaster-General deems desirable'.[56] Moreover the regulations provided that 'all matter

48 Ibid 464.

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 1905, 2242–3 (Austin Chapman).

50 Ibid 2243 (Isaac Isaacs).

51 *Wireless Telegraphy Act 1905* (Cth) s 6.

52 Ibid s 8.

53 Listeners paid a subscription to one or more stations to have their set 'sealed' to that particular station. A licence fee under the *Wireless Telegraphy Act 1905* (Cth) was also paid. Four broadcasters were established under the 'sealed set' system: 2SB, 2FC, 3AR and 6WF: Postal and Telecommunications Department, *A Report on the Structure of the Australian Broadcasting System and Associated Matters* (1976) A21.

54 *Wireless Telegraphy Regulations 1924* (Cth) reg 4(2).

55 Per annum licence fees were levied the owners of all receivers, following the UK model for financing public broadcasting: Postal and Telecommunications Department, *A Report on the Structure of the Australian Broadcasting System and Associated Matters* (1976) 8.

56 *Wireless Telegraphy Regulations 1924* (Cth) reg 59(a).

broadcast shall be subject to such censorship as the Postmaster-General determines'.[57]

In 1928 the Government nationalised the class A licensed broadcasters, and in 1932 formed the Australian Broadcasting Commission (the ABC) to operate as a national, public network. The class B licensees comprised the commercial sector and their licences limited their broadcasting to a defined geographic licence area. As explained in a 1976 departmental report, during this period the die was cast for Australian broadcasting for the century:

> The national sector would be government owned; it would have the most powerful transmitters and the best frequencies; its programs would be nationally orientated and transmitted through national and country relays; it would cover small States and country areas where the population density was insufficient to support stations dependent upon the sale of advertising; and it would be financed by receiver licence fees. The commercial sector, on the other hand, would be privately owned; it would have less powerful transmitters; its programs would be locally orientated and so would its coverage; and it would be financed from the sale of time to advertisers.[58]

A commercial trade association developed: the Federation of Commercial Broadcasting Stations. (This today finds its form in three trade associations: the Federation of Australian Radio Broadcasters, the Federation of Australian Commercial Television Stations and the Australian Subscription Television and Radio Association.) Content restrictions on broadcasters could be enforced by the Postmaster-General's power under the *Wireless Telegraphy Act* to not renew a broadcaster's licence. Similar powers exist today, reposed in the Australian Broadcasting Authority (ABA).[59]

Actual Censorship

In 1935 the government began to exercise its censorship powers over broadcasters. The Postmaster-General's department censored a broadcast on 2SM which was critical of the government's defence policy.[60] This was the catalyst to the government's decision to first regulate ownership of commercial broadcasters beyond the existing requirement that a licensee be a British subject. Regulations

57 Ibid reg 59(c).

58 Postal and Telecommunications Department, *A Report on the Structure of the Australian Broadcasting System and Associated Matters* (1976) 8–9.

59 *Broadcasting Services Act 1992* (Cth) s 47.

60 Julie Bailey, *Parliamentary Debates on the Legislation of Commercial Broadcasting: Australian Film and Television School Monograph 6A* (1980) iv.

were made in October 1935 under the 1905 Act which restricted the number of class B (commercial) broadcasting licences which could be owned or controlled by a company or individual.[61] This triggered (for the first time in Australia) a serious broadcast policy debate in the parliament. William McCall of the United Australia Party, by notice of motion in the House of Representatives, vigorously questioned the regulation of broadcasting:

> We boast that this is a free country, and that we enjoy the right of free speech; but the bureaucratic control of broadcasting makes this an empty boast, for no man may speak to his fellow citizens over the air save by permission of the department. What the department says shall be said, must be said, or the would-be speaker must remain silent.[62]

McCall considered that the new regulation had as its motivation a desire to advantage the ABC, whose class A licences attracted only a 20% audience share. He thought that a 'divide and rule' policy was being adopted through the new regulations against the class B licences. McCall concluded his address to the parliament thus:

> We, the members of this Parliament, can and will hold fairly the balance between the A class stations and the B class stations. In this country, and throughout the British Empire, we believe in free speech; we have a free press, then let us, subject to reasonable control, have a free air. When all is said and done, the public pay the piper and should be free to call the tune.[63]

The philosophy expressed by McCall, that broadcasting and printing should be viewed from the same regulatory standpoint, echoed that of Locke in the late 1600s regarding printing and speaking. However, this found little favour from the speeches which followed in the Parliament. Mr Archie Cameron expressed the nub of the counter view:

> If we take another view of it, there is a very great necessity for the control of wireless broadcasting in Australia. If this Parliament does not take this little giant in hand and control him, it will not be long before wireless broadcasting will control this Parliament. It is in a better position to mould public opinion than is the press.[64]

---

61 Ibid.

62 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1935, 2361 (William McCall).

63 Ibid 2363.

64 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1935, 2371 (Archie Cameron).

Of course, at the time printing was regulated it was printing which was in a 'better position to mould public opinion' than was public speaking. The regulatory impulse appears to be strongest in respect of the most novel and popular mode of communication to the public at any point in time.

In 1938 the Postmaster-General ordered (without prior warning) that the line between the 2KY studio and its transmitter be disconnected. This was in response to a broadcast editorial attacking the Postmaster-General's policy of not allowing criticism over the air of Nazi and fascist regimes.[65] The Federation of Commercial Broadcasting Stations responded to this government action in the following terms:

Because it is necessary for the Government to act in a regulatory fashion to prevent chaos on the air by allocating wave lengths ... is no reason why the Government should set itself up as a censor of morals or the standard of entertainment broadcast.[66]

However shortly thereafter the federation, like the Company of Stationers before it, became somewhat more complicit in its dealings with government. In 1939 the federation and the government cooperated in drafting the 'Standards of Broadcasting Practice of the Australian Federation of Commercial Broadcasting Stations'.[67] An excerpt from the Children's Program Standards of the era give some flavour of the tenor of these early codes:

> All stories must reflect respect for law and order, adult authority, good morals and clean living. Where applicable, the hero or heroine and other sympathetic characters must be portrayed as intelligent and morally courageous. The theme must stress the importance of mutual respect of one man for another, and should emphasize the desirability of fair play and honourable behaviour. Cowardice, malice, deceit, selfishness and disrespect for the law must be avoided in the delineation of any character presented in light of an hero to the child listener.[68]

Since 1939 'voluntary' self-regulation has been a feature of broadcast control in Australia. Codes remain in place today and can be made terms of a broadcaster's licence. Such codes reflect a symbiotic relationship between broadcasters and government similar to that which existed between printers and governments from a

---

65 Bailey, above n 60, v.

66 Ibid. This was a communiqué from the Federation of Commercial Broadcasters' 1938 Convention.

67 Ibid.

68 Australian Federation of Commercial Broadcasting Stations, *The Standards of Broadcasting Practice for Children's Programmes* (1946) para (c).

previous era. The relationship is based upon compliance as the quid pro quo for the grant of exclusive privilege.

In 1942, as a result of the recommendations of a parliamentary committee of inquiry,[69] all broadcast regulation was consolidated into the *Broadcasting Act.* The Act conferred wide powers on the relevant government minister, including the power to grant and revoke broadcast licences, and prohibit the broadcast of material.[70] These powers survived the criticism in parliament that they conferred 'arbitrary powers' on the minister.[71] Initially the Parliamentary Standing Committee on Broadcasting was created under the Act to advise the minister on decision making under the Act.[72] In 1946, one of those specific matters was the censorship of 'talks on venereal disease and other sexual matters'.[73] In its report the committee could foresee 'a calamitous repetition of history in the fate which would eventually overtake Australia if the degenerate tenets of ... advocates of public instruction on sex matters were accepted and practised in this country'.[74] Refuting the 'fallacy' that 'knowledge is virtue', the committee recommended that talks relating to sex matters and venereal disease should not be broadcast from national or commercial stations.[75]

In 1948, the Australian Broadcasting Control Board was created and assumed many of the functions of the Standing Committee.[76] The board later evolved into the Australian Broadcasting Tribunal and then into the ABA. A policy behind the creation of the board was the removal of the regulation of broadcasting from political interference. Six months after the board's creation, the parliament had reversed a board decision which sought to ensure the provision of broadcasting facilities on an equitable basis for political parties in the lead-up to an election.[77] As this required the Communist Party of Australia to be provided free access to the airwaves – something not in the interests of any party represented in parliament – the decision was disallowed. The Parliament forced a revision: only political parties

69 Known as the Gibson Committee; see *Report of the Joint Committee on Wireless Broadcasting* (1942).

70 *Broadcasting Act 1942* (Cth) ss 44, 49 and 60.

71 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1942, 2102 (Maurice Blackburn).

72 *Broadcasting Act 1942* (Cth) Part IV.

73 Parliamentary Standing Committee on Broadcasting, *The Question of Broadcast Talks on Venereal Disease and Other Sex Matters* (9th Report, 11 March 1946).

74 Ibid 4.

75 Ibid 5, 7 and 11.

76 *Broadcasting Act 1948* (Cth), inserting Part 1A into the 1942 Act.

77 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1949, 644 (Robert Menzies).

with members in the parliament could obtain the benefit of free access, thus denying the Communist Party.[78]

A new provision added to the *Broadcasting Act* in 1948 remains startling by any standards:

> Neither the Commission nor the licensee of a commercial broadcasting station shall broadcast any dramatization of any political matter which is then current or was current any time during the last five preceding years.[79]

This provision remained in place until a 1985 Human Rights Commission report found that it breached an article in the International Covenant on Civil and Political Rights.[80] The provision's origins arose from the suppression of popular dissent.[81] The Liberal Party had sponsored a political satire known as the *John Henry Austral* radio series. Many of the broadcast episodes had been based upon current political happenings, and were presented in a dramatised form. Parliamentary Hansard leaves no doubt that these broadcasts (authored by a Labor defector) had 'so got under the skin of the Labour [sic] Government that it ...brought down special legislation to suppress them'.[82] This, the government confirmed, was the intent of the provision: 'Let the honorable members opposite not be afraid. They will still have their melodies, but they may not have their *John Henry Austral.*'[83] After its passing the provision led to the suppression of a politically damaging, but popular, radio program. Significantly, the provision survived almost forty years under governments from both sides of politics.

---

78 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1949, 659.

79 *Broadcasting Act 1948* (Cth) inserting this provision as a new section 89(3). The provision it replaced provided for a ban on the broadcast of such dramatization of any political matter during an election period.

80 Human Rights Commission, *Freedom of Expression and Section 116 of the Broadcasting and Television Act 1942*, Report Number 16 (1985). Note that the commission wrongly asserted that the provision was introduced in 1956 'with little comment'.

81 The parliamentary debates offer a vivid insight into the controversy: Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 1948, 3319–45 (various) and 24 November 1948, 3429–39 (various).

82 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 1948, 3327 (McEwen).

83 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 1948, 3323.

Regulation of Television

In 1953 the Menzies Government introduced an interim Act which had as one of its purposes to endorse the general principle that television be developed on the same fundamental basis as had been 'so remarkably successful' in respect of radio.[84] A Royal Commission report followed. A key recommendation with respect to the regulation of television broadcasting, accepted by the government, was that the limitation of any deleterious cultural or economic effects of television should be achieved by introducing one national system and only two commercial licences in Sydney and Melbourne.[85] In 1956 the regulation of television was brought within the ambit of the *Broadcasting and Television Act 1956*, which carried over to television much of the existing regulatory regime.[86] Governments at all times since 1956 have limited the number of commercial television licences granted in any one area to no more than three. This echoes the methodologies of printing control practiced in England: a strict limit upon the number of those legally entitled to disseminate subject matter through the new medium.

Ownership and Control of Television Licences

In 1958 more television licences were granted in Brisbane and Adelaide. In 1960 the government sought to prevent a concentration of private control of the new medium of television by prohibiting one person having control of two television licences.[87] In 1965, this regulation was recast to specify that no person 'shall obtain more than a 5% interest in more than two licensee companies'.[88] This became known as the 'two-station rule' and prevented nation-wide 'networking'; no one owner could (for example) own a television licence in each of the capital cities.

This control of ownership regime for television remained until 27 November 1986, when 'cross-media rules' were adopted. From that day owners of newspapers could not own or control television interests in the same city, and vice versa. The government explained this policy position as preventing media owners from having an 'exaggerated influence'.[89] This ownership control today forms provisions within

---

84 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 February 1953, 31 (Hubert Anthony, from the second reading speech of the Television Bill 1953).

85 Julie Bailey, *Parliamentary Debates on the Establishing the Australian Broadcasting Control Board: Australian Film and Television School Monograph 6B* (1981) ix.

86 *Television Act 1956* (Cth).

87 *Broadcasting and Television Act 1960–61* (Cth).

88 *Broadcasting and Television Act 1965* (Cth).

89 Mark Westfield, *The Gatekeepers: The Global Media Battle to Control Australia's Pay TV* (2000) 36.

the *Broadcasting Services Act 1992*,[90] along with the proscriptions upon foreign broadcast ownership which have been in place in some form or other since 1905.[91] The regulatory stance of Australian governments to foreign ownership of broadcasting is best captured by a 1951 joint resolution of both Houses of Parliament:

> It is undesirable that any person not an Australian should have any substantial measure of ownership or control over any Australian commercial broadcasting station, whether ownership or control be exercisable directly or indirectly.[92]

This strongly echoes English governments' restrictions over books printed abroad.

New Broadcasters

Broadcast licensees in Australia actively seek to preserve their exclusive position. They do not want audiences and profits fractionalised by new entrants. It is in those broadcasters' interests to support any government decision which tends towards a continued limit upon the number of broadcasting licenses. Such limitations mean that the incumbents are in the position of oligopolists, much like the members of the Company of Stationers. In turn, such a dynamic helps to inculcate a symbiotic relationship between the government and the incumbent printers or broadcasters. Governments want to control printing and broadcasting. Printers and broadcasters will suffer that control in return for protectionism. It is this dynamic which helps explain why successive Australian governments stymied the expansion of free-to-air broadcasting (particularly seen in the delay in allocating FM radio licences[93]) and have delayed the development of subscription broadcasting. Subscription broadcasting, in a highly regulated form, commenced in Australia only in 1995; it has had phenomenal popularity in the USA since the early 1960s.[94]

---

90 Sections 59–61.

91 Section 57(1).

92 Postal and Telecommunications Department, *A Report on the Structure of the Australian Broadcasting System and Associated Matters* (1976) A24.

93 Franco Papandrea, 'Broadcasting Planning and Entrenched Protection of Incumbent Broadcasters' (IPA Policy Paper 2000/1, Institute of Public Affairs and Communication and Media Policy Institute, 2000) 4–6, detailing how FM radio had operated in the US since 1940, but was not introduced in Australia until 1974, notwithstanding the existence of considerable unsatisfied demand for new radio services had existed in Australia for decades.

94 Part 7 of the *Broadcasting Services Act 1992* (Cth) made allowance for subscription broadcasting in 1992, however the first subscription broadcast to the general public did not occur until early 1995: Westfield, above n 89, 300-301.

The relationship between the broadcasting incumbents and governmental regulation is neatly captured in Mark Westfield's *The Gatekeepers*, which details the development of pay television in Australia. Two illustrations are salutary. Firstly, in 1992 a microwave distribution system (MDS) for pay television was being proposed by Steve Cosser, a person not affiliated with any incumbent broadcaster. The incumbent commercial broadcasters were unhappy about Cosser and MDS. They were collaborating to invest in a satellite delivery system in the hope of limiting subscription television to one provider which they could control. One high profile government member, Graeme Richardson, appeared sympathetic to the position of the incumbents. Aware of their commercial position, he inserted into the regulation of pay television a provision that subscribers to non-satellite services (such as MDS) need give only thirty days notice to terminate their connection. Satellite services, on the other hand, could sign up subscribers on longer term contracts. In *The Gatekeepers* Richardson is reported as boasting in relation to this provision: 'That'll fuck MDS.'[95] A second illustration outlined in *The Gatekeepers* is equally striking. The royal patents of the print era find their equivalent in an 'anti-siphoning list' of sporting events, which today bestow economic privileges upon the incumbent broadcasters at the expense of the new subscription entrants. It comprises, by ministerial decree, a denial to pay television of initially obtaining the exclusive rights to televise any listed sporting event. These events were largely nominated by the incumbent commercial broadcasters. This regulation will remain in place until 2004.[96]

Regulation of Content

Regulation under the *Broadcasting Services Act 1992* contains a range of content restrictions and requirements upon all licensed broadcasters which have evolved over the course of the century. The ABA sets Australian and childrens' content requirements for commercial, free-to-air television by the issue of 'standards'.[97] Subscription television broadcasters under a provision in the *Broadcasting Services Act* 1992 must spend 10 per cent of their annual programming expenditure on 'new Australian drama programs'.[98] Numerous 'voluntary' codes are in place as part of a claimed 'flexible regulatory regime which set out a consultative role for the ABA with respect to the way program content was to be regulated.'[99]

---

95 Westfield, above n 89, 110.

96 Ibid 244–7.

97 *Broadcasting Services Act 1992* (Cth) s 122.

98 Section 102.

99 ABA Website, 'Broadcasting Industry Codes of Practice', 21 July 2000, <http://www.aba.gov.au/what/program/codes/index.htm>, See also the *Broadcasting Services Act 1992* (Cth) s 123.

However, it would be misleading to consider that this content regulation develops in a political vacuum. Firstly, the ABA is a non-judicial arm of government; its members have a tenure of no longer than five years. One commentator has observed that broadcasting regulators 'have felt compelled to act in accordance with the perceived wishes of their political masters'.[100] Moreover, David Marr's 1999 book *The High Price of Heaven* contains an insight into how broadcast content is in fact regulated in Australia under this regime. There, Marr describes how a nightmare experienced by the Prime Minister's daughter in 1992 after watching a horror movie broadcast on television triggered alterations to the broadcasting code of conduct. Certain 'adult' content was consigned to a later time slot under the code. Marr observes that this politically forced change, initiated by a chance occurrence which upset the Prime Minister, bolted in place two undebated and uncontested assumptions: 'One was the notion that television is dangerous. The second was the understanding that the nation would be the ultimate parent to its children.'[101] Marr goes on to describe a broadcast policy sequel to this occurrence. Under the revised industry code, another broadcaster in 1997 aired an 'adult' series entitled *Sex Life* at the newly prescribed later time slot. The content of the program was analogous to that contained in print magazines available for unrestricted sale. The program attracted over one million viewers. However this was not enough to avoid the censorial power of government. The current Communications Minister, Richard Alston, cited *Sex Life* in the parliament in these terms: 'I don't think anyone in this country wants to see an electronic version of Sodom and Gomorrah ... and we will take efforts to make sure it doesn't occur.'[102] Under this political pressure, the broadcaster withdrew the program the following month. The government required a further toughening of the broadcasters' 'voluntary' code of conduct to ensure there would be no return of another *Sex Life*.[103]

One wonders whether any commercial television broadcaster today would dare to broadcast the criticisms of government contained within Marr's account. Unlike Marr and his publisher, their activities are directly licensed by government.

IV SOME CONCLUDING OBSERVATIONS

In their essence broadcasting and printing are the same: they are both means to disseminate subject matter to many recipients.[104] Although both have been, and

100 Papandrea, above n 93, 2–3.

101 David Marr, *The High Price of Heaven* (1999) ch 6.

102 Ibid 134–5.

103 Ibid 136.

104 Sub-paragraphs 31(1)(a)(i) and (iv) of the *Copyright Act 1968* provide (respectively) that 'to reproduce' and 'to broadcast', or to authorise the same, are the exclusive rights of the copyright owner of a work. The broadcast right in s 31 is being subsumed into the broad-based, technology-neutral right of

continue to be, important both economically and socially, as digital convergence fractionalises audiences the importance of both as they are traditionally understood may be on the wane. In a foreseeable period, the interplay of improved digital compression and bandwidth will mean that the infrastructure of the internet alone will enable content providers to cheaply disseminate their material to a global audience, without need of a broadcaster, publisher or other intermediary.[105] If the added value created by the activity (in this case, the public communication) does not need to be shared with an intermediary, the intermediary will be redundant; hence the newly coined term 'disintermediarisation'. As such, with the content provider's ability to cheaply self-publish, what value there is for the communication of the content will accrue entirely to the content provider, whether a film studio, musician, novelist or sports league.[106]

An abundance of modes of dissemination poses challenges not only to the business of broadcasting, but in particular to the special controls which still comprise broadcast regulation. If traditional broadcasting (that being, electronic communications intended to be received by television or radio) becomes but one of a plurality of comparable modes of dissemination, why should traditional broadcasting be regulated in a way different to those other modes? Alternatively (and this is the question the current government seems to be more attracted to) should policy be directed towards the regulation of those other modes as if they were the same as traditional broadcasting?

Looking at the history of regulation of the printing press in England, once 'irregular' printing became uncontrollable, political justifications for any special regulation fell away as being both futile and an unreasonable restraint on the freedom to trade. Digital technologies today give anyone with a computer and a telephone line the ability to broadcast. However, the still-accepted policy justification for a continuation of special controls on broadcasting relate to spectrum scarcity and chaos. Justice Frankfurter of the US Supreme Court offered this by way of policy justification for broadcast regulation:

'communication to the public': *Copyright Amendment (Digital Agenda) Act 2000*, sch 1, items 35 and 36. This reform will come into effect on 4 March 2001.

105 See for example James Gleick, 'I'll Take the Money, Thanks', *New York Times*, 1996, section 6, 16: 'when the coming technologies of on-line commerce allow easy payment of small sums, a few cents here and a few cents there, people who create writing or music or art of value will flourish economically in ways that have been impossible until now – independent, perhaps, of traditional publishers and media empires'.

106 See generally Barry Nalebuff and Adam Brandenburger, *Co-opetition* (1996). *Time Magazine* ('Do-It-Yourself.Com', 27 March 2000) has featured Stephen King's self-publication of 'Riding the Bullet' as an example of creators by-passing traditional publishers through the use of internet technologies.

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic and that is why, unlike other modes of expression, it is subject to government regulation.[107]

This policy position has been accepted by Australian governments, notwithstanding the long standing criticism of 'analytical confusion' which has been leveled at it. Thus, scarcity of resources applies as much (or as little) to broadcasting as to printing, or any other industry. The creation of effective property rights will ensure efficient allocation of resources and entitlements.[108] However, with global computer networks, increasing bandwidth and advanced compression technologies, even assuming that this policy justification was once valid, today it appears completely at odds with technological realities. The other policy justification for regulation is chaos; regulation is required to prevent various broadcasters broadcasting on each other's frequency. However, since Ronald Coase's writings in 1959, which explained how enforcement of property rights in the broadcast spectrum overcomes such problems, this justification also has been discredited.[109] Governments today seek to auction certain spectrum for revenue reasons. However this has not led to any abandonment of special regulatory control over the activity of broadcasting itself.

However, just as it is difficult to find any policy justification for the special regulation of broadcasting, a survey of history reveals that the reasons for its special control are very understandable. Governments want to control broadcasting for the sake of maintaining power and the social order. Broadcasters accept this control so long as it creates trade barriers to protect them from competition. As has been outlined above, this control largely comes through the formation of a symbiotic relationship between governments and broadcasters. In England, a few compliant and controllable local printers were vastly preferable to the Crown and parliament, as opposed to an untold number of printers. It seems contemporary Australian governments share a similar view: a small number of compliant and controllable local broadcasters is preferable to an untold number of 'irregular' broadcasters. Richard Alston's office has stated that the recent policies pertaining to the allocation of the digital spectrum to the broadcasting incumbents and the genre restrictions on new datacasters, 'made it clear the government considered Australia did not need more

---

107 In *Media and the First Amendment in a Free Society* (1973). This argument was cited uncritically in Postal and Telecommunications Department, *A Report on the Structure of the Australian Broadcasting System and Associated Matters* (1976) 43.

108 See generally Thomas Krattenmaker and Lucas Powe, *Regulating Broadcast Programming* (1994) ch 8.

109 Ronald Coase, 'The Federal Communications Commission' (1959) 2 *Journal of Law and Economics* 1.

broadcasting services'.[110] These policies have been described by an outsider to the symbiotic relationship as betraying the government's 'ignorance, incompetence or corruption'[111]. More recently the government considered bringing streamed video and audio internet content within its broadcasting regulatory control. In the second reading speech to the Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, it was stated:

> However, there is currently some uncertainty whether services such as streamed audio and video obtainable on the Internet are, legally, broadcasting services. This is a generic issue relating to the convergence of broadcasting with other services, and it is therefore proposed to refer the matter to the ABA for their detailed consideration over the next 12 months.[112]

The government has since retreated from a position of seeking a review of this issue. A 'review' occurred internally and concluded that internet streaming should fall outside the broadcasting regulatory net.[113] One commentator has described this shift in policy direction as a profoundly important one, with the long-term consequence of potentially breaking down the central governance of broadcasting entirely.[114] If this occurs, the regulation of broadcasting in Australia will closely map the early regulation of printing. Once an activity becomes uncontrollable, unless there exists sound policy underlying existing regulatory controls, those controls will be quickly seen as folly, and will wither.

The realities of computer networks and digitisation challenge the broadcast policy of government, developed over the past century. Once any new mode of dissemination becomes more widely available, to continue its regulation as though the world had not changed at all is both anti-competitive and futile. This is what history teaches. Today, it is as if digitisation is dismantling the walls which once separated the various rooms in the house. We are increasingly living in an 'open plan' environment. The government today has an important choice as to whether or not to

---

110 Garry Barker, 'Datacast Billions at Risk', *The Age* (Melbourne), 7 July 2000.

111 Michael Ward, OzEmail's head of corporate relations, *The Australian Financial Review* (Sydney), 22 December 1999, 17.

112 Peter McGauran, Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 2000, 16123. Section 216E of the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* was inserted at the motion of the Labor opposition. It provides: 'Before 1 January, 2002, the Minister must cause to be conducted a review of whether, in the context of converging media technologies, streamed audio and video content obtainable on the internet should be regarded as a broadcasting service.'

113 Richard Alston, 'Video and Audio Streaming', Press Release, No 73 (21 July 2000).

114 Alan Kohler, 'Alston gets internet picture', *Australian Financial Review* (Sydney), 25 July 2000, 40.

continue to legislate as if this has not occurred; whether or not to require the house's occupants to move about as if those walls continued to exist.

Understanding that the symbiotic relationship between government and incumbent broadcasters has a strong analogy in the history of printing may help explain the basis upon which the government has allocated the digital spectrum. For the moment, we observe a policy of seeking to control new technologies with anachronistic tools of old broadcast policy. Eventually, though, *sui generis* regulation of broadcasting must be replaced by more broad-based, technology-neutral regulations applying to all forms of dissemination from, to or within Australia – the sentiments of Locke apply today as they did in the 1600s. This may occur eventually through the creation of new international content norms for public communications. The regulation of broadcasting as it is known today in Australia will eventually follow the fate of regulation of printing in England.