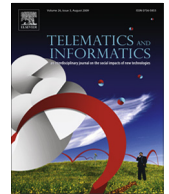




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“The More Things Change, The More They Stay the Same”: Path dependency, sports content, and the suppression of innovation in mobile television



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ABSTRACT

This paper uses the concept of path dependency to analyse the suppression of mobile media innovation in commercial telecommunications markets. This process is discussed in relation to the case of Optus “TV Now” in Australia, a cloud-based mobile television service that was subject to successful legal action to prevent its operation. The service was found to infringe the intellectual property rights of two major football leagues and a powerful telecommunications incumbent, Telstra. The details of this case study highlight the concentration of market power in the Australian telecommunications sector, and the high level of strategic value placed upon sports content in the development and delivery of new mobile media services. The analysis presented is informed by semi-structured in-depth interviews with the representatives of industry and market regulators, technology commentators, and professionals working in the telecommunications industry, as well as legal documents related to the TV Now court proceedings and service.

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1. Introduction

Optus TV Now is a case in point. We were concerned that the law as written 50 years ago hadn't envisaged the way that markets would develop and technologies would develop. Nor should you need to write laws that take into account the way markets might develop specifically (representative of an industry regulator; Interview with author, 2014¹).

This is the considered response of a policy professional to the shutting down of the cloud-based mobile television service, Optus “TV Now”. The termination occurred after a series of legal skirmishes that ended with a failed application by Optus for special leave to appeal to the High Court of Australia in September 2012. As the representative of a national market and industry regulator, this professional's comment is significant for two reasons. First, it highlights the deep and ongoing tension between the dynamism of technological innovation and the comparative rigidity of legal frameworks, which affects the development and operation of mobile and digital media markets. Second, it expresses a muted frustration with the use of these legal frameworks – in this case copyright and intellectual property law – by powerful incumbents to stall innovation and limit competition.

Reflecting the often “eccentric” development pathways of mobile television technologies (Goggin, 2012), this paper uses TV Now and its consequences as an instructive case study of the suppression of technological innovation (Winston, 1998). Building on existing descriptions and analyses of the legal issues involved in the case (Giblin, 2012a,b), this paper addresses

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¹ All interviewees have been de-identified in accordance with the conditions of clearance provided by a University Human Research Ethics Committee.

the question of how copyright and intellectual property frameworks have been used by leading telecommunications carriers and sports leagues in Australia to forestall consumer technology innovation in mobile television services. This process is explained by the concept of path dependency in the context of the TV Now service and the controversy surrounding it. Adapted for the purposes of a critical media studies perspective, path dependency is used to show how the maintenance of marketplace dominance and stability is built upon the exploitation of corporate power, the use and enforcement of legal frameworks, and the contending motivations, actions and decisions of commercial and policy actors.

According to the Optus board meeting that approved the spending on infrastructure for the TV Now service, it was designed to be an “innovative and disruptive TV & Video product to establish a leading position in the fast moving digital TV industry” (cited in [Finn et al., 2012](#), p. 9). TV Now combined the features of a mobile personal video recorder (PVR) with “Software as a Service” (SaaS) cloud computing ([Mosco, 2014](#)). Targeted at mobile smartphone and tablet owners wanting to time-, format-, and space-shift their television viewing, the service enabled subscribers to remotely record free-to-air broadcast programs via an electronic programming guide. Optus then stored the programs on servers in four different formats that could be accessed at a time convenient to subscribers on their preferred device. For Apple iPhone and iPad users in particular, the gap between recording and playback could be as little as two-minutes. TV Now enabled users to record and watch “near live” television broadcasts of sporting fixtures, a capacity that featured heavily in news coverage about the service and the legal action mounted against it ([Cauchi, 2012](#)).

Objections to Optus’ nascent service were raised in late 2011 by the nation’s two dominant football leagues, the Australian Football League (AFL) and National Rugby League (NRL), and Australia’s most powerful telecommunications company, Telstra.² Also announced in 2011, Telstra purchased exclusive digital and mobile rights to live coverage of both these competitions, agreeing to pay the AFL a reported AUD\$153 million for the period of 2012–2016. At the time of the TV Now case, contract renewal negotiations were also under way with the NRL, leading to a deal worth approximately AUD\$100 million for mobile, tablet and Internet rights over 5 years. The court cases centred on the claim that the Optus TV Now service infringed the intellectual property rights of the AFL and NRL, and undermined the mobile and digital coverage rights licenced to Telstra. TV Now subscribers were eroding the commercial value of these rights by recording free-to-air television matches and watching them almost live through an Optus service, effectively bypassing Telstra’s status as the “official carrier” of AFL and NRL games on mobile and digital platforms.

This case reflects the fact that copyright law has become a “crucible” for intersecting legal, policy, economic and technology debates internationally, with the intensity of conflicts increasing as the reproduction and movement of television and media content across online, mobile and wireless platforms has accelerated ([Flew, 2012](#)). Optus’ TV Now service is an example of a legal flashpoint flowing from the growing impact of mobile and wireless communications on media systems, and the important commercial, legal and policy decisions that are made about how these systems should operate:

... [T]ypically it is the [new] technologies that come to herald and stand for the cultural and economic shifts that helped produce them, and as such they become the flashpoints for the legal dispute that follows. The technologies represent both the potential of shifting the balance of copyright to account for new dynamics in the circulation of culture, and the justification for why an older balance must be preserved or regained. Of greater consequence than the new technologies themselves are the decisions – legal, economic, political, cultural – that we make around them ([Gillespie, 2007](#), p. 31).

As one of the most valuable forms of content in the global media market, sport is a crucial site where the clash between the “newer dynamics” produced by consumer technology innovation and the “older balance” favoured by market incumbents occurs ([Boyle, 2015](#); [Rowe, 2011](#)). Recent examples of copyright disputes include the successful legal action launched in the US by the National Football League (NFL), Major League Baseball (MLB), and several free-to-air and cable television broadcasters against the Aereo Internet and mobile television service ([Boren, 2014](#); [Menell and Nimmer, 2014](#)). In the UK and France, football leagues and broadcasters have warned fans not to film and post highlights of goals on mobile video-sharing services and social networks such as Vine and Twitter because of the “the potential ‘commercial damage’ the posts can have on a broadcast rights-holder” ([Sport Business, 2014](#); [Williams, 2014](#)).³ Further demonstrating the changing geographies of television systems ([Burroughs and Rugg, 2014](#)) is a high-profile and complex case heard by the European Court of Justice in which a publican in the UK, Karen Murphy, purchased and used the decoder device of a Greek satellite television channel to show English Premier League (EPL) games in her pub ([Boyle, 2015](#)). Murphy’s action challenged the nationally exclusive system of licencing coverage rights to football broadcasts in Europe.⁴

The example of Optus TV Now and similar disputes emphasise that intellectual property rights to popular media properties are now a significant source of corporate wealth ([Flew et al., 2013](#)). Dominant broadcasters and telecommunications operators expend considerable resources to secure and enforce exclusive control over live “flagship content”, including major sports competitions and mega-events (e.g. football, tennis, basketball, the Olympics, and World Cups), in order to achieve and maintain competitive advantage in the marketplace ([Evens et al., 2013](#)). The exercise of this power also contributes to the perpetuation of a notable impasse. Multiplying television platforms and mobile media services possess the

² This led to a case (*Singtel Optus Pty Ltd. v National Rugby League Investments Pty Ltd. (No. 2)* [2012] FCA 34) heard before Justice Rares in Australia’s Federal Court that was won by Optus, and an appeal heard by the Full Bench of the same court that ruled against Optus and overturned Justice Rares’ original decision. Optus then applied for special leave to appeal to the High Court, but their application was rejected. Optus terminated the TV Now service following this rejection.

³ Twitter purchased the video-sharing service Vine in October 2012 for an estimated US\$970 million.

⁴ For readers interested in the details of this important case, I recommend consultation with the analysis offered by [Boyle \(2015, pp. 363–366\)](#) in the context of European media rights regimes and the regulation of cultural content.

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