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**REGULATING MOBILE CONTENT: CONVERGENCES AND
CITIZENSHIP**

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REGULATING MOBILE CONTENT: CONVERGENCES AND CITIZENSHIP

Gerard Goggin*

Internet and media convergence has been for sometime concentrated on mobile technologies. Most notable, perhaps, has been the emergence of a cluster of online, mobile data and content services and technologies that have been precursors of fully-fledged mobile media themselves. With these important, lucrative, and potentially far-reaching developments in mind, this paper focusses on international approaches to regulation of mobile content with case studies of the US, Canada, Britain and Australia.

As well as reflecting on the trends across these countries, I also consider the implications of such regulation, and the new models of governance they represent, for questions of cultural citizenship. To what extent are questions of cultural citizenship being posed in regulatory and policy models and discussions of mobile content? At stake here is the convergence, or rather clash, of the quite distinct models of cultural citizenship and exchange, that come respectively from the histories and traditions of telecommunications and the Internet. Thus in conclusion I raise the question of why the commons debate with respect to mobiles be so belated? Is the commons a useful notion to draw upon in thinking about the future of mobiles, or are there new concepts required to register what is at stake in these velocious transformations?

I. INTRODUCTION: THE MOBILE RECASTING OF INTERNET LAW & POLICY

The development of mobile cellular networks, especially as these have evolved from second-generation (2G) to second-and-a-half generation (2.5) through to the third-generation-networks and compatible devices, has seen a number of new platform and protocol capabilities and possibilities. What has also emerged are new services and applications for mobile cellular devices, such as:

- 1) Personalisation and customisation services (such as the highly popular ringtones and wallpapers, in particular);
- 2) Location-based services;
- 3) Mobile games;
- 4) Group chat applications;
- 5) Push-to-talk (or walkie-talkie-style services);
- 6) Moblogging, which allows multimedia material to be posted to blogs directly from a cell phone.

These developments still rely upon capabilities of the mobile cellular network.

There are, of course, other important developments in mobile, wireless, portable and pervasive computing technologies that rely on other network technologies, with different reach, mobility handling capabilities, and distinct histories. These include wireless local area networks such as the WiFi 802.11 family of wireless standards, the developing WiMax standards, satellites, and developments in the Internet protocol to allow in-motion and mobile connection

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(as envisaged, for instance, in IPv.6). There are other developments such as the ubiquity of consumer electronic and media devices such as iPods, MP3 players, and digital cameras — all which are becoming networked in various ways, whether through Bluetooth, cabled connections to networked devices, radio frequency identification (RFID), or WiFi. It is important to register also that cell phones, especially in their guise as ‘smart’ phones, or dedicated camera, video, or music record and play devices, also have the capability to connect across different kinds of networks (for instance, WiFi, when cellular connection is not available).

I provide this brief sketch of mobile and Internet convergences to show the complicated, messy, and dynamic field this paper is concerned with: those kind of new technologies, cultural forms, affordances, and audiences centred on mobile, convergent devices.

In particular, I have in mind here:

- 1) Developments in mobile premium services which consumers access through dedicated telephone numbers (adult text message ‘chat’, or video downloads or delivery of ringtones through MMS);
- 2) Mobile portal services offered by mobile carriers (such as Vodafone or 3, for instance) for their own customers;
- 3) Browsing or accessing the open Internet through a mobile device;
- 4) New sorts of film, video, or television, delivered or broadcast to, and watched on, mobile devices (such developments span use of MMS through 3G platforms to Digital Video Broadcasting — Handheld [DVB-H] and kindred digital broadcasting standards, as well as the fast growing, user-innovation-led area of broadcasting and voice over Internet protocol).

In this paper, my interest lies in the way that the introduction of mobile content services has highlighted the assumptions, limits, and politics of existing media and cultural regulatory arrangements.

Such convergences offer considerable challenge for law and policy — challenges systematic and global in their scope, but very much played out at the national level. These transformations also pose challenges to broadcasting law and policy. Despite the scope and potential depth of these changes, they have been afforded little systematic scholarly, or policy, consideration to date — something not entirely explained by the newness of the phenomenon.

A rare exception is the important research undertaken by the Oxford Internet Institute (OII) which led a Working Group of Mobile Phones and Child Protection, for the European Internet Co-regulation Network (EICN) (Ahlert, Nash & Marsden, 2005; EICN, 2005). The OII/EICN research usefully charts emerging European approaches, and also makes a recommendations concerning regulation of commercial and Internet-based content. The focus of this work is explicitly upon child protection in multimedia online mobile services. This flows from the EICN’s first policy statement that ‘European policy makers, members of the industry and users should aim at making the next-generation mobile Internet a secure environment for children’ (EICN, 2005; cf. Reding, 2006). The research builds upon earlier OII work on child protection in the Internet and Internet safety (see for instance Nash and Peltu, 2005). Central to the OII/EICN’s prescriptions is the principle of co-regulation:

[C]oregulation, as the policy-making process involving industry, governments and user groups in the regulatory debate, is probably the most appropriate

approach to this issue, as it offers the most scope for stakeholders' wishes to be taken into account, while also potentially offering transparency in the application of the regulatory initiatives adopted than self-regulation alone. (EICN, 2005)

While my paper adds further comparative material to the discussion of mobile and Internet convergences in the OII/EICN work, my approach is different. While I also discuss the much-thematized issue of child protection (something subject to moral panics, see Goggin, 2006), I frame mobile content regulation in much broader terms. Ultimately I am interested not only in how best to ensure safety and risk are managed in mobiles, but also how certain types of mobile content are constructed as requiring regulation — whereas other types are not.

By content regulation, I mean regulation, law and policy that seeks to regulate, manage, give access to, restrict, and produce and shape markets in cultural material. The motivations for this regulation vary, according to whether it aims to 'censor' material because of concerns relating to sex, nudity, violence, politics, or 'hate' speech; or whether what regulators have in mind is the need to manage access to and use of material by categories of users (minors, under-18-year-olds, children); or whether it constitutes positive content regulation, that would seek to promote the creation and availability of certain sorts of content (national or minority cultural expression; children's programming; desirable genres thought to be culturally necessary or uplifting, such as educational programming or drama) (Goggin & Griff, 2001). The area is a very wide one, and debate and theory concerning content regulation has been given considerable impetus with the advent of the Internet.

The paper is based on comparative research into mobile content regulation in four jurisdictions: Australia, Britain, Canada, and the US. There are clear limits to my case studies here, as they only constitute a small sample of international mobile law and policy, restricted to material available in English. Moreover in the span of this paper, I am not able to do justice to the complexities of each country's emerging frameworks and concerns.

What I hope to do is to indicate the range of approaches being adopted, and to draw out the issues that cut across different countries. I am mindful that policy actors and legislators in these countries often seek to learn from each other's experience (or at least policy discourses in these countries selectively include reference to these countries).

Some of the insights what follows are drawn directly from my own involvement as a consumer advocate, regulator, and policy actor in mobile policy formulation and debates.¹ For this perspective, as well as a scholarly perspective, I have a keen interest in the macro- and micro-politics of regulation, and its intricate entwining with the political economy of global mobile networks.

The organization of the paper, then, is as follows. In parts 2 through 5, I survey the approaches taken to the content regulation of mobile content in the US, Canada, British and Australia respectively, and identify how this differs from traditional media but also the Internet. In part 6, I offer a comparative, if provisional, discussion of approaches adopted in these four countries. In part 7, I consider the questions of cultural citizenship raised by the discourses and experiences of mobile content regulation to date. I also briefly canvass the potential but also limits of the concept of 'mobile commons' to fruitfully advance such discussion. Finally in

¹ I am a public member and deputy-chair of the Telephone Information Services Standard Council (TISSC) in Australia (www.tissc.com.au), and long-standing consumer and public interest advocate in the area of telecommunications. In these roles, I have been directly involved in national debates on mobile content regulation.

section 8, I conclude by remarking on the need for a reconceptualisation, and opening up, of policy regarding mobiles, especially by recursively involving their publics.

II. UNITED STATES: THE SELF-REGULATORY APPROACH

There is no Government mandated or legislated mobile content regulatory scheme in the United States, and it has been left to the mobile industry body to develop a self-regulatory scheme in this area through a code of practice. In a February 2005 letter to the wireless industry representative body, the Chief of the Federal Communications Commission (FCC)'s Wireless Telecommunications Bureau, John Muleta, asked the industry association Cable Telecommunications & Internet (CTIA) — The Wireless Association to address the issue of access to adult content via mobiles:

With adult content available from a myriad of sources, now more than ever it is important for carriers, content providers, and parents to know what is being done by industry to prevent access to adult content by minors, as well as what they can do to protect their children ... I ask that you consider whether the availability of adult content via mobile devices warrants changes to CTIA's carrier code of conduct to promote industry self-regulation. Through responsible action on the part of wireless carriers and content providers this important social goal can be achieved without government intervention and without interference to the provision of content to adults. (Muleta, 2005)

Interesting, Muleta encouraged CTIA to engage in policy learning from other jurisdictions:

I encourage you to examine the efforts that are being made by both government and industry in other countries to address the issue of access to adult content by minors. For example, the United Kingdom, Australia, and Israel have each recently confronted this subject, with differing results in each case. This issue is not confined to our borders and we should be mindful that other parts of the international telecommunications industry are facing similar circumstances. (Muleta, 2005)

In November 2005, CTIA launched its Wireless Content Guidelines, featuring:

- 1) Voluntary content classification standards, currently into two categories — 'Generally Accessible Carrier Content' (all ages) and 'Restricted Carrier Content' (18 and older);
- 2) Classification criteria, to be developed further, is based on existing standards from related industries.
- 3) No restricted carrier content will be available until access controls are deployed.
- 4) Controls and tools, such as filters, to be developed and made available for access to Carrier Content and the Internet.
- 5) Industry compliance with applicable laws regarding the protection of minors and to cooperate with appropriate law enforcement agencies as required by law on reported and known illegal content.

The definition of Carrier Content is 'any content made available to consumers by the participating carriers in ... video and images, music and audio, games, adult-oriented text-based

entertainment services, and lotteries and gambling.’ Significantly, it does not include ‘content that is: 1) generated, owned, or provided by the end users, including message boards, chat rooms, blogs, etc., or 2) accessed by the user via the public Internet (or other public data networks).’

Applauded by the FCC, the Guidelines were principally developed by the CTIA’s Mobile Content Action Team, comprised of CTIA members. The Action Team’s intention is ‘to invite the proliferation of desirable content while effectively protecting the intellectual property rights of the content distributed over the network, and providing a business framework that represents all the members of the value chain’. It is unclear from the documents publicly available whether there was any formal public consultation in the development of these guidelines. In its November 2005 newsletter, CTIA foreshadowed the next steps in its self-regulatory processes would be a carrier-only subgroup to look at auditing the guidelines for compliance and consistency, and also the formation of a cross-industry group to work with ‘the existing ratings services to explore expanding their service to include mobile content.’ (Desautels, 2005).

III. CANADA: THE CASE OF NATIONAL CONTENT

Currently, there is no direct regulation of mobile phone content in Canada, nor any classification system. However, as in the USA, the industry has developed a self-regulatory scheme.

The mobile carrier and service provider industry peak body, Canadian Wireless Telecommunications Association (CWTA), administers the provision of SMS short codes. A SMS short code is a short 5 or 6-digit telephone number, to which text messages can be sent for consumers to participate in some sort of automated application, such as purchasing of good or services, retrieval of information, voting on TV or radio, or marketing (early examples of which were voting in Canadian Idol, or trivia contests in the 2003 National League Hockey final playoffs sponsored by beer company Labatt Blue).

The CWTA’s ‘Common Short Code Initiative’ aims to ensure the interoperability of short code numbers across different carriers and service providers, and also seeks to ensure a common set of keywords (‘info’, ‘help/aide’, ‘stop/arret’) (CWTA, 2005). A condition of access of providers to short codes is compliance with a quite rudimentary Code of Conduct. The Code of Conduct includes basic provisions on opt-in and opt-out, provision of price information, basic customer support requirements, time and date of time-sensitive information such as sports news or stockmarket updates, stipulation that program must not be misleading, and, significantly for my purposes here, age verification provisions for services involving ‘alcohol, tobacco, and adult oriented content’ (CWTA, 2004).

The Canadian Radio-television and Telecommunications Commission (CRTC) has only recently entered the arena of mobile phone content, specifically in the area of ‘mobile broadcasting services’. In August 2005 it released Broadcasting Public Notice CRTC 2005-82 *Call for comments on a regulatory framework for mobile broadcasting services*, in response to requests it received from for regulatory clarification after several mobile carriers announced plans to launch new mobile services. The Notice asked for public comment on whether new mobile broadcasting services should be exempt from meeting broadcasting regulations — in line with the 1997 exemption of licensing regulation of media broadcasting undertakings (CRTC, 1997), ‘delivered and accessed over the Internet’ (CRTC, 1999, established this definition of ‘new media’).

In April of 2006 the CRTC issued Broadcasting Public Notice CRTC 2006-47 - Regulatory framework for mobile television broadcasting services, which ruled that the new mobile broadcasting services in question qualified for the Exemption Order. It also issued a second notice, Broadcasting Public Notice CRTC 2006-48 — Call for comments on a proposed exemption order for mobile television broadcasting undertakings, that proposes to widen the scope of the Exemption Order to capture mobile broadcasting services 'not necessarily' delivered and accessed over the Internet. The Notice also proposes that, as an exemption criteria, the consent of a broadcaster is required prior to any retransmission of its signal. Final closing date for submissions and replies was 26 May 2006, and hence the outcome of this was not available at the time of writing. The CRTC Notices are not clear if they include all types of mobile content services.

One of the interesting features of the Canadian debates on content regulation in mobile phones is the prominence of national content as a concern. The CRTC has a mandate, set out in the Broadcasting Act, to ensure the presence and development of Canadian content over Canada's broadcasting systems ('Canadian content is the cornerstone of Canada's *Broadcasting Act*'; CRTC, 2003). This broadly entails goals under rubrics of 'reflecting our Canadian values', 'reflecting Canada to Canadians', and 'support for Canadian talent', and regulation in this area is significant. Since it is so noticeably supported in broadcasting over radio, television, cable and satellite, it is no surprise that the future of Canadian content via mobile phones is now a subject of debate.

In 1999, the CRTC decided that new media should be exempted from Canadian content obligations. A key argument that underlay their decision was that new media services were unlikely to compete significantly with traditional television broadcasting services, and new media was enhancing opportunities for Canadian expression. More recently, the CRTC has taken the position that new mobile media also should be so exempted:

without regulation, mobile television broadcasting undertakings currently provide a predominance of Canadian channels on their services. The Commission also concluded that mobile broadcasting television undertakings can offer additional benefits to Canadian broadcasters by expanding the audiences for Canadian programming, and to Canadian producers by expanding the opportunities to create and license new content. In addition ... the Commission considers that the mobile television broadcasting services, as described, are unlikely to compete significantly with traditional television broadcasting services due to the limitations of the wireless technology, the battery life and small screen size of the handset, the poor image and audio quality and the type and range of programming choices offered by the mobile broadcasters. (CRTC, 2006a)

In April 2005, the Telecommunications Policy Review Panel was established to conduct a review of Canada's telecommunications framework, and it released its full report in March 2006. The report calls for a relaxing of CRTC regulation to rely more on market forces and to better target social objectives and protect consumers' interests:

In the long run, Canada may lose more by restrictive regulation of cable telecommunications networks to advance a declining form of broadcast content delivery than it could gain by embracing the full potential of new cable-based

IP platforms. The Panel believes, in order to realize the full potential of broadband services in Canada, the asymmetry between the broadcasting and telecommunications regulatory frameworks should be examined. ('Afterword', Telecommunications Policy Review Panel, 2006; cf. Evans, 2006)

While such an approach is favoured by the mobile telecommunications industry, as indicated in their response to the CRTC's call for comments on its proposed exemption order (CRTC, 2006b), their counterparts in the broadcasting industry have signalled their opposition. The CAB proposes a distinction between 'telephony-based mobile services' and 'newer broadcast-based technologies', the latter having greater possibility of competing with and being substituted for existing broadcasting services and receivers. It contends that the exemption is appropriate for the telephony-based but not broadcast-based mobile services (CAB, 2006a). For their part, television, film, and radio producers and artists, as well as copyright holders, also have concerns about an exemption of mobile technologies from content regulation, as the Alliance of Canadian Cinema, Television and Radio Artists submits:

ACTRA believes that the mobile broadcasting services proposed by TELUS, Bell, Rogers and LOOK should be authorized by CRTC license, subject to the application of appropriate conditions which ensure that a range of Canadian choices is fully integrated into the program offerings and that the companies distributing the programs are making a reasonable contribution to the production of the Canadian programs. (ACTRA, 2005)

IV. BRITAIN: VARIETIES OF CO-REGULATION

In Britain, industry self-regulation has also played a leading role in mobile content regulation, but with a closer, complementary reinforcement by the statutory legislative and regulatory framework.

Britain moved quite early to regulate premium rate mobile content services, bringing it under its established premium rate telecommunications framework. Premium rate services have been a diverse class of telephone services offered since the early 1980s that have a layer of value added to the standard telephone service. This can either be content or interactive functionality, or both, and is charged at a higher rate than a standard telephone call. Services can be pre-recorded, live, and now include premium rate SMS/MMS. Some examples of premium rate telephone information service are: specialized weather or sports information services; competition entry lines; live counselling services; 'psychic' line; 'adult entertainment' services (Goggin & Spurgeon, 2005). The most common method of billing is for premium rate services to be charged to a telephone account. A number of countries, especially in Europe, have dedicated premium rate telecommunications regulators, and there is an international association of premium rate telephony regulators, the International Audiotex Regulators Network (IARN), which was established in 1995. Since at least 2002, mobile premium services have been offered on dedicated number ranges, such as those mentioned in the Canadian short code initiative above.

The British regulator ICSTIS (the Independent Committee for the Supervision of Standards of Telephone Information Services) is very much a co-regulatory undertaking.² ICSTIS's strictures have a statutory basis through the UK *Communications Act*, enforced by the converged

² In October 2007, ICSTIS was renamed Phonepay Plus (<http://www.phonepayplus.org.uk/>).

regulator Ofcom. Ofcom is given the power to set conditions on the 'provision, content, promotion and marketing of premium rate services' (s. 120). It also has the power to approve a code regulating the content and provision of premium rate services made by someone else as long as this meets stipulated conditions (s. 121), and to enforce this or other determination it makes. Ofcom has relied on this power to authorise ICSTIS and its code and guideline. ICSTIS has universal coverage of premium rate SMS/MMS services across the industry in the UK, including services provided by third-party content providers, as well as those provided by the carriers on their proprietary networks (Goggin & Spurgeon, 2005). Thus ICSTIS regulates some aspects of mobile content through a specific, authorised 'guideline' on premium rate SMS which addresses a range of consumer protection issues specific to these services such as instructional messages, group text chat, text chat and dating services, and text chat and the youth market (ICSTIS, 2006).

There are a number of other aspects of mobile content regulation, however, such as issues of access of children and minors to inappropriate content, as well as application of classification schemes, that it was believed could not be dealt with under the existing British premium rate regulatory framework, and hence new self-regulatory approaches were devised.

In January 2004, the mobile carriers released a *UK Code of Practice for self-regulation of new forms of content on mobiles*. The Code of Practice declared that the mobile operators would appoint an independent classification body 'to provide a framework for classifying commercial content that is unsuitable for customers under the age of 18' (Orange et al., 2004). Launched in February 2005, this body is the Independent Mobile Classification Body (IMCB; <http://www.imcb.org.uk/>).

The IMCB operates under a contract between itself and the mobile operators. However, the IMCB is a subsidiary of the British premium rate telecommunications regulator, the long standing Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS). As well as being charged with handling complaints and disputes, IMCB has the power to review and amend the Classification Framework, after consulting with the carriers. Board members of IMCB come from ICSTIS, and it is obliged to consult with the mobile operators in the appointment of any new members.

IMCB and its Classification Framework deal with commercial content services including: still pictures; video and audiovisual material; and mobile games, including java-based games. Content regulation of a number of other important mobile services is dealt with elsewhere:

- 1) Text, audio and voice-only services, including where delivered as a Premium Rate Service and regulated by ICSTIS (as discussed above)
- 2) Gambling services (because they are age restricted by UK legislation)
- 3) Moderated and unmoderated chat rooms (commercial unmoderated chat rooms will only be accessible by those 18 and over)
- 4) Location-based Services (which are the subject of a separate Mobile Operator code of practice available at www.imcb.org.uk)
- 5) Content generated by subscribers, including web logs
- 6) Content accessed via the internet or WAP where the Mobile Operator is providing connectivity only. (IMCB, 2005)

This list usefully gives a sense of the complexity of mobile content regulation in the UK, and the wide range of regulatory approaches and institutions that need to be co-ordinated to deal effectively with the issues it is felt to raise.

V. AUSTRALIA: THE CLASH OF REGULATORY MODELS

Australia is an appropriate final case study, not only because of its internationally recognised, and criticised, Internet content laws, because it is a jurisdiction in which questions of mobile content regulation have been hotly debated.

Concerns about mobile phone content were first raised in 2002, as were questions of regulating other consumer protection aspects of mobile phones (such as clear pricing information, terms and conditions of contracts, opt-out of mobile content services, independent complaints handling, and so on). At this time, Australia still had separate regulators of telecommunications (the Australian Communications Authority, or ACA) and broadcasting (the Australian Broadcasting Authority, or ABA), each the custodian of separate pieces of legislation, the 1997 *Telecommunications Act* and 1992 *Broadcasting Services Act* respectively. The two agencies merged on 1 July 2005, to become the Australian Communications and Media Authority (ACMA) — the legislation, however, has not been overhauled. The ACA signalled that it would seek to develop appropriate regulation in the area of mobile premium services in particular, using what powers it had under its custodianship of mobile phone numbers.

The telecommunications regulator proceeded to develop what was in essence a co-regulatory framework. Rather than specifying detailed rules for mobile premium services regulation, the ACA indicated what it saw as the minimum requirements and then proposed that the onus would be on the carriers and service providers comprising the industry to provide an adequate scheme to restrict inappropriate content finding its way to minors, and also to offer consumer protection. The ACA was not able, however, to require such a scheme without additional regulation being created by the Minister for Communications, in the form of various ministerial determinations and directions. By mid-2005, the regulatory framework was in place, and industry was poised to provide a code of practice, with an independent complaints handling scheme, for the approval of the then merged regulator.

Prodded into action by the Minister and regulator developing these instruments, the industry had sat down with consumer advocates to develop such a code of practice (a process that actually began in 2004). The code was developed in process chaired and resourced by the Australian premium telecommunications regulator, the Telephone Information Services Standards Council (TISSC) — the Australian counterpart to the British body ICSTIS mentioned above.

The various sections of the industry had found it difficult to come to an agreement in the early part of the process in 2002-2003. The content service providers favoured quickly developing a code of practice, and designating TISSC as the independent complaints handler. At least one carrier (the former monopoly provider Telstra) favoured this option at first. Other carriers however had different views. Those with international affiliates, such as Hutchison and Vodafone, argued against regulation to start with, arguing that their own procedures as mature and responsible businesses were sufficient. Singtel Optus, the carrier formed in the early 1990s as the second carrier to compete with Telstra, in the duopoly transition to open competition, argued that mobile phone content should be regulated on the model of the Internet content regulation model: that is, an industry code of practice, with the broadcasting regulator as the ultimate custodian, if required.

Once the carriers did come to a unified position, it was motivated by their fears of a public backlash against mobile content becoming available to minors — and also the concern that the government would take a highly reactive stance on this also. The carriers' decision to present a united front was also driven by the desire to best maximise their collective position against that of the content service providers, who were using their network platforms to compete with them for mobile content business.

Thus, once the carriers did announce their intention to work with consumers to produce a code of practice, they were adamant that it would only apply to premium mobile services delivered by content service providers on short code telephone numbers (the 19x range in Australia). The carriers did not wish a code of practice to apply to their own 'portal', or proprietary network-based mobile content services — making various arguments against this, notably distinguishing between their own responsible and consumer-friendly procedures, compared to the poor record of the service providers, and also, and rather more convincingly, noting the difference in information and control available with portal services as opposed to the short code telephone number services.

As it transpired, the government and regulator did not buy this argument, and the provisions of the regulatory framework included proprietary ('portal') services (ACA, 2005). Despite this, the carriers argued strongly through the code of practice development process to ensure a lesser level of regulation on their services than those offered by the content service providers.

The mobile premium code development continued through these vicissitudes and debates until all parties agreed on a draft code and framework that was released for public consultation in November 2005. Despite fully endorsing this scheme, the carriers over Christmas 2005 engaged in a volte-face, and withdrew their support citing as their reason that it was too 'prescriptive'. Instead the carriers developed their own scheme (AMTA/ADMA 2006a & b). In essence this is a greatly diluted version of the collaborative developed and consulted-upon scheme, but featuring the Telecommunications Industry Ombudsman as the independent complaints handling body. The carriers put their scheme to a greatly abbreviated, limited consultation, and submitted it to the regulator in August 2006.

The carriers' force majeure was designed to obtain their desired outcome — less prescriptive regulation — at the cost of both consumer groups and, more importantly, their service provider competitors. The major change in the carriers' new scheme was splitting the scheme into a 'framework' that would be enforceable by a complaints handling body, and ultimately the regulator, and 'guidelines', that would be only up to each carrier or service provider to put into practice as they saw fit. This is more in keeping with the British *Code of Practice* described above. Thus the Australian scheme, like the British, puts adherence to the detail of the framework in the hands of each mobile content provider, and enforcement in the hands of the carriers through their contracts with these providers.

The carriers had throughout the process tried various stratagems to keep the process in their gift. As the code development process was slow to come to fruition, Vodafone on its accord introduced its own rules, based on Vodafone UK's model (dubbed in the industry as the 'red book'). Also the mobile carriers through the Internet Industry Association developed a new code of practice for Internet accessed via mobile phones, something that at various stages was argued to be sufficient to include other forms of mobile content also.

What is evident from this account I give here is the lack of clarity and policy rationality from the side of the government. A cardinal problem was the lack of consolidated legislation, so that, more so perhaps than in other jurisdictions discussed in this paper, mobile content

regulation fell between the laws and traditions of regulating telecommunications and broadcasting. While the telecommunications and broadcasting regulators were merged in 2005, as I have noted, the legislation has not been overhauled.

The other problem was that the government took a piecemeal approach to mobile content regulation. The recurrent stumbling block in the development of an effective framework and scheme by industry and regulator alike was the central issue of how mobile phone content would be classified, regulated, and how age-related eligibility provisions would be controlled. There were, and still remain, problems about the lack of a uniform, co-ordinated approach to classifying, censoring and regulating mobile phone content, compared to television, film, and Internet. The government relied upon the regulators, especially the telecommunications regulator, to pave a way forward, yet did not provide it with sufficient powers and direction til quite late in the process.

The government did establish a review in the form of its Convergent Devices Review, announced in July 2004. However, this report of this Review was not released until June 2006 (DCITA, 2006) and, while containing much useful material as well as much-needed analysis of the policy and regulation in this area, came quite late in the process. The government's media release accompanying the release of the Convergent Device review struck the now-customary balance between the desideratum of promoting innovation and the need to protect children (Coonan, 2006).

Minister Coonan's release emphasised that the government was taking existing safeguards and applying these to convergence devices (for amplification, see Coonan, however the recommendations were not so straightforward — and much remains to be worked out. The Convergent Devices review proposed that content delivered over convergent devices, such as mobiles, should be classified and regulated as much as possible in line with the National Classification Scheme — but with some modifications:

The *broad* definitions of classifiable material under the national classification scheme apply to such material stored on a device for commercial delivery, and this is likely to include convergent devices ... [*emphasis added*]

....

Strict application of the national classification scheme, including pre-classification of all content would not be practicable in the case of convergent content, for reasons including: the dynamic nature of the material; the number of items likely to be involved; their time-specific value; and rapid refreshment rate. (DCITA, 2006: v)

As well as seeking to bring the content of mobile devices in under the National Classification Framework, the Review contemplates relying on existing classification for films and computer games if such material has already been assessed but is to be carried on a convergent device. Also it seeks to apply some facets of negative content regulation under broadcasting legislation:

Where a television channel that is subject to the BSA is made available to convergent devices, access restrictions under the BSA—including time zones, if any — would apply. In the event, however, that a program was delivered to convergent devices independently of a broadcasting service, it would be

required to meet the access restrictions of the convergent content framework.
(DCITA, 2006: v)

One principle enunciated in the Review that could become important in policy and legislation worldwide is the notion that the level of regulation levied on mobile content should be commensurate with the level of control that commercial providers have over the platform or channel.

This pragmatism writ large provides a way to distinguish between the regulation of mobile content delivered over carrier or service provider controlled phone circuits or data-switched portals, on the one hand, and the open Internet accessed via a mobile device:

Where they provide access to the open Internet, mobile CSPs have no more control over the content accessed by consumers than traditional Internet service providers (ISPs). They are regulated by the online content scheme established by the BSA which includes, amongst other things, obligations with respect to under-age account holders. (DCITA, 2006: vii)

This makes clear that industry parties providing mobile Internet are obliged to comply with the IIA Code on Internet over mobile — in line with the controversial Australian co-regulatory approach on Internet code regulation.

However, there is a technical and discursive difficulty with applying the Internet content regulation approach to mobiles. Pivotal to Internet content regulation as it has been constructed as a compromise formation, purporting to serve the interests of consenting, freely choosing adults, as well as parents and guardians wishing to control their children's access to the Internet, is filtering software. Of course there are many problems with filtering software for Internet over computers, but as yet filtering software for mobile Internet is not commercially available — and hence a number of regulatory workarounds are considered in lieu of this (DCITA, 2006, p. viii; cf. discussion of mobile filtering in Ahlert, Nash, and Marsden, 2005).

The ink was barely dry on the Australian government's media release on convergent devices regulation, when there was a public outcry in early July 2006 relating to the broadcast of footage of the *Big Brother* program over the Internet. Two male contestants in the Australian series of *Big Brother* held down one of their female counterparts while one of them rubbed his penis in her face. The 'turkey slap' incident caused a national outcry, and prompted an immediate government promise to review and strengthening legislation to ban such content on mobile and Internet devices — something that escaped television regulation at the time because the broadcast took the form of streaming, not stored, video content (footage of the incident was subsequently made available on user-generated video sharing site youtube.com).

VI. COMPARATIVE APPROACHES TO REGULATING MOBILE CONTENT

To bring together this discussion of national approaches to regulating mobile content, I want to briefly comment upon what seem to me to be significant features of these four countries' approaches to regulating mobile.

Firstly, there is reliance upon self-regulation of mobile phone content in all four countries, in varying degrees. However, the degree and context of such self-regulation, and whether it can be more accurately characterised as co-regulation needs careful inquiry. It is likely, I suggest, that there will be an interaction between self-regulatory codes of practice, and regulatory instruments, and laws — not least given the diverse range of types of mobile content, platforms, and

audiences. At a level of principle, therefore, I agree with the OII/EICN emphasis on the desirability of co-regulation. However, I believe it is very important to define what co-regulation means; not least, because the interplay between self-regulation and regulation by the state has been a persistent, very hard-fought, if rather subterranean site of struggle.

Secondly, one of the important aspects of mobile content regulation is what specific regulatory approaches are needed to deal with the distinctive features of mobiles, and what aspects of mobile content can be dealt with by existing systems of censorship, classification and regulation. I have not had the space in this paper to discuss how mobiles fits into the overall regulation of media content in the countries studied, but this is a very live issue.

For example, there is an obvious policy, if not intellectual response, to discern and highlight the very different treatment of television, radio, print, film, computer or video games, Internet, and now mobiles. One response to this is to call for a harmonisation or unification of laws: Britain, for instance, rewrote its laws to enact a new *Communications Act*, Canada retains separate broadcasting and telecommunications acts but a single regulator, whereas in Australia the project of combining telecommunications legislation and broadcasting laws has not seized by the current government. In some countries redrafting, or at least systematic cross-referencing and co-ordination of legislation, will be necessary in order that governments and regulatory agencies have the necessary power to regulate desired aspects of mobiles — especially content regulation.

Thirdly, regulatory responses and philosophies are being shaped by perceptions about the amenability of mobile technologies to forms of control. Rather like early debates on whether the Internet was beyond the reach of law-makers, or whether it was technically possible to regulate content on the Internet, so too mobile content regulation is being crafted explicitly with the control of various actors in mind (not least the non-human actors in the form of mobile technologies). Further analysis and discussion of the capabilities, forms, and shaping of mobile technologies is very much required here.

There is much else to say about the comparative experience of mobile content regulation, not least with the benefit of an expanded set of case studies from other countries. However, what I wish to turn to the penultimate section of the paper are important matters that have been relatively neglected in the discourses and debates on mobile content regulation: consumption, citizenship, and commons.

VII. CITIZENSHIP AND COMMONS

As represented in the four countries studies here, and perhaps elsewhere also, the international discussions on mobile content regulation have very heavily focussed on what might be termed ‘negative’ content regulation. Negative content regulation stems from the need to manage, restrict, authorise, govern, and regulate certain types of cultural materials.

‘Negative’ regulation, of course, is very productive with respect to power, as the work of Foucault suggests. At stake in debates about making the Internet safe for ‘families’ and ‘children’ are very normative notions of what families and citizens are, as Matt Allen and Jane Long have noted in their work on Internet regulation and governmentality in Australia (Allen & Long, 2004). There are important links between narrow notions of regulation as the province of the state and the expanded sense of the scope and reach of regulation of society, culture and everyday life (something theorised in du Gay et al’s ‘circuit of culture’ model, see du Gay et al., 1997).

This caveat aside, perceptions of what needs to be so regulated vary across cultures, social arrangements, nations, and population groups, but in quite a number of Western countries, as the OII/EICN study reveals, access of pornographic and sexual material on mobiles to minors is a priority issue for regulation. So too is the safety of mobiles for children in the face of paedophilia (very often the subject of moral panics). It is important to be quite specific about which issues are most thematized in various countries, as the experience of the Internet bears out — where in some countries political expression and dissent provoke much anxiety (China or Singapore, for instance), or the threat of terrorism after the New York bombing of September 11, 2001 (in a number of Western countries).

Less prominent also have been 'positive' aspects of mobile content regulation, such as objectives of promoting certain sorts of desired genres, formats, or national content. Canada is a very interesting example here, but it is a country in which discussions of national content have been an important part of mobile content regulation debates, as part of a general rethinking of cultural regulation of convergent media in a world where national boundaries are evidently porous in the face of such technologies.

I find it striking that in discourses on the law, policy, and regulation of mobile and Internet convergences that 'negative' aspects of mobile content have been most prominent. Matters of consumer protection in relation to accurate information on pricing, terms and conditions of contracts, customers complaints, and so on, have not attracted the same levels of public or policy interest, despite their potential to effect a greater number of people. What underlies this, I think, is a lack of interest in new forms of consumption in which mobiles are fundamentally involved.

To explain this, I offer the example of new forms of sexual identity, intimacy, and friendship that mobiles have very much supported. The case can be made that the Internet and mobiles also have made visible and given support to more fluid sexual identities and practices, especially those outside dominant, heteronormative arrangements (for evidence of this, see contributions to Berry, Martin, and Yue, 2003). Sexual minorities in a range of cultures have embraced such new digital technologies (McLelland, 2003 & 2005); but also these technologies have given created new sorts of access to sexual materials, and new forms of intimacy and connection, for a wide range of apparently 'straight' sexual citizens. There is a very interesting, but still little remarked, relationship between digital technologies and 'sexscapes' (that is, ideas and relations of sex, romance, and intimacy; Erni). Alan McKee's groundbreaking research on consumers of pornography in Australia has demonstrated that many people now take advantage of the Internet to consume erotic and sexual material (McKee, 2004).

If it is the case that sexuality does figure as an important new feature of consumption of Internet, and also mobiles (though we know even less about sexuality and mobiles, than the Internet), it is striking that few consumers of erotic or sexual material are heard raising their voices in debates on mobile content regulation (cf. McKee, 2004 & 2006, on lack of pornography consumers voices in Internet debates).

Representatives of industry, in my experience, do occasionally raise such arguments, though more in the more euphemistic form of a consenting adult's right to consume material in private. However, what is plain is that industry — especially the carriers as large, often cross-border companies with concerns of 'brand damage' foremost in their calculations — have not been prepared in any serious form to defend mobiles as an important space of self-expression, though smaller entities, such as content providers, have done this in practice. Further, advocates of free speech and cultural expression on the Internet, have not been active in mobile regulation debates, nor argued for mobiles as an open platform.

If the prevalent mode of regulating content on mobiles has been self-regulation — or rather self-regulation embedded in co-regulatory frameworks — then this has largely left industry in the box seat to shape important features of mobiles as cultural technologies and platforms. Questions of what cultural rights citizens have with respect to commercial mobile spaces, or even public Internet over mobiles, have been mostly unexplored, and indeed policies made and enacted with little public involvement or debate.

One way that questions of cultural citizenship have been opened up with respect to the Internet, of course, has been the debates over commons — with its considerable literature, legal and technologies initiatives (Creative Commons, for instance). While the politics of commons needs further interrogation, it does offer a useful framework to bring to bear upon mobiles.

Strangely any discussion of mobile commons has been slow to come to fruition. The potential of wireless technologies and open access to spectrum has been a favoured case of commons proponents. The comprehensive account of commons offered by Yochai Benkler, for instance, valorises wireless commons but says very little about mobile commons (Benkler, 2006). Indeed Benkler tends to regard mobiles as a good example of an ‘enclosed’, or restrictive platform, which compares rather unfavourably with the open, non-proprietary possibilities that he envisions are represented by a commons based on open wireless networks.

The lack of systematic attention and debate given to mobile commons may be explained by acknowledging the different histories and meanings of telecommunications and Internet respectively. For instance, telecommunications networks and technologies have carried with them particular cultural and legal assumptions about access and users (such as universal service, for instance) whereas the Internet has developed differently (with the analogous debates revolving on the concept of the ‘digital divide’, or more, recently, ‘net neutrality’).

Yet if we are to credit mobile convergence, we need to address these issues of cultural citizenship, and discussing mobile commons is one obvious way to explore these.

VIII. CONCLUSION: RETHINKING MOBILE REGULATION AND ITS PUBLICS

In this paper, I have traversed a great deal of ground in trying to summarise and analyse the experience of mobile content regulation in four quite different countries.

There is a basic qualification to my findings and contentions that is, of course, related to the newness of these developments. This lies in the fact that the mobile mediascape as well as its associated policy and legal arrangements will look quite different in five or ten years’ time. Despite this, I think there are important lessons to be learnt from what has occurred in mobile content regulation thus far (this paper only covers events up until October 200). The comparative view across specific countries is revealing, as too is the picture that emerges when mobiles are placed alongside other media and cultural forms.

An important finding of this paper goes to the prevalence of self-regulation. However, I also argue that self-regulation is in most cases closely bound up with forms of co-regulation. It is imperative, in my view, that those actors with an interest (especially governments entrusted with serving their publics) eschew the rhetorics of self-regulation, and democratically as possible debating the new forms of co-regulation that frames self-regulatory schemes.

Another important finding of this paper relates to the difficulties that governments and industry are having crafting suitable legislation that deals with new forms of mobile media and content. This goes to the heart of the challenges for law and policy posed by mobile

convergences, and further research is needed on what legislation is now emerging to deal with this.

As well as charting the global and some national contexts for mobile content regulation, and discussing the politics (especially in the Australian case), I also try to articulate a preliminary critique of what kinds of concerns and also what groups of users are being marginalized in current regulatory arena and efforts. Mobile technologies are becoming important for cultural expression and production, and by extension, it might be argued, for concepts of cultural citizenship. Yet cultural citizenship concerns have rarely been raised to date in mobile content regulation. This may well change as mobiles shift into the heartland of media, and so impinge on traditional rights and expectations felt to arise when discussing newspapers, radio, or television (for instance). Indeed debates about mobile television have shown signs of mobiles being taken seriously as a cultural, as much as communications, technology.

However, in the meantime, I have suggested a possible way forward to reframing debates on mobile content regulation, via a thinking through of the notion of mobile commons. Such a move will entail a sustained confrontation, comparison, and rapprochement between cultures of Internet governance, use and production, and those of telecommunications (not to mention at least a sideways glance at broadcasting). While a full discussion of mobile commons is beyond the scope of this paper, it certainly has potential to be a revealing undertaking.

In all of this, what I hope this paper has underlined is that the status of mobile phones and media in communications law, policy and regulation urgently require deeper analysis and a much broader and more representative scholarly and public debate.

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