

On the Origin of Species – Is the future of TV Darwinism in extremis?*

*and does it matter legally?

Readers of this Journal will be heartily sick of predictions of the “death of TV”. With viewing figures telling the opposite story, articles decrying such predictions are now almost as commonplace as the predictions themselves.

But beyond doubt something fundamental is happening in the TV ecosystem.

In its pre-history, TV was characterised by the transience of the live broadcast, the universality of limited choice and the simplicity of the push button. Then, slowly at first, but with increasing speed, those characteristics began to erode.

Recordings and repeats followed by VCRs, DVDs and PVRs started a trend away from “live” and towards the potentially infinite flexibility of VOD.

Digitisation exponentially increased the capacity of broadcast platforms and reduced the cost both of basic production and distribution enabling an explosion of content. An ever increasing range of formats, from handheld to home cinema, provides content providers, distributors and consumers with a sometimes bewildering array of decisions.

Simplicity replaced it seems by Complexity.
Uniformity by diversity.

The defining characteristic of this change is technology. Technology enables an explosion in the ways content can be accessed, distributed and shared. Technology enables the capturing of high quality images at extraordinarily low unit cost. Technology provides the opportunity for universal connectivity and puts affordable second (and third and fourth) screens in the hands of millions of viewers enabling mass interactivity.

In the not too distant future these themes, flexibility, portability and connectivity, are set to provide every individual on the planet with the potential to access, interact with and manipulate any content anywhere at any time.

The result will be an infinite, unpredictable, variety of ways in which content is exploited. From set piece 3D to viral clip; from second screen interactivity to viewing content split screen whilst gaming on a connected TV. Each of these contexts in which content will be accessed will effectively become a micro-medium in which it will surely be as true as ever that the “medium is the message”.

After all, the same content can produce a fundamentally different message if presented in a simple linear feed or with a full plethora of interactivity including additional camera angles, supplementary editorial content and social media.

In short, these changes will create an immense diversity in the environments which TV content will inhabit. And, just as Darwin hypothesised, different habitats will support and reward different characteristics.

We already see this change. High end distribution creates the right conditions for big ticket, appointment to view, events. Smaller scale niche content thrives in intimate flexible and interactive environments. But this is only the beginning of the future. In the face of exponential growth in the diversity of TV environments in which content can exist, TV businesses will be driven to make difficult choices in the way they are shaped. Truly Darwinian “natural selection” in a challenging new range of environments.

In short, technology will create conditions which will force TV to evolve rapidly and, critically, this will create ever increasing greater diversity.

This will no more be the death of TV than the evolution of simple primitive single cell organism into multiple and complex flora and fauna we see in our planet today was the end of life on earth. But it will represent a fundamental change in which homogeneity and predictability will be replaced by diversity and chaos raising some fundamental questions for intersection between TV and the law.

Just three examples of many:

Content Regulation: A diversity of “micro-media” challenges the basis of traditional regulation.

Effective regulation must be appropriate, proportionate and effective, criteria which can be assessed only in context. Already, for example, appropriate, proportionate and effective regulation for a major peak time live event would almost inevitably be inappropriate, disproportionate and ineffective for a niche interactive environment.

To date the regulatory response has generally been an effort to identify different environments and regulate each. However, it is questionable whether

this approach will be sustainable as contexts become infinitely flexible and unpredictable.

One possible response would be to shift the focus of content regulation from broadcaster to producer. Might producers be placed under the primary regulatory obligation to ensure any licensee of their content uses it accordance with some defined principles of “responsible use in context”?

Rights: Although under increasing strain, the underlying principle of copyright, that exploitation is restricted unless licensed, remains the cornerstone of TV rights.

It is however questionable whether this is sustainable indefinitely. In the face of TV’s ever more diverse future

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will the courts and commerce be able to cope with splitting hairs ever more finely on questions such as what constitutes a work or a copy? Will we need to stand back and fundamentally reinvent the rules of copyright to focus on substance rather than form?

Revenue: The continued strength of TV platforms worldwide and the rise of Google demonstrate the continued strength of advertising and subscription as revenue models for content.

Apple and Amazon show that, in a connected world transactional models can be equally effective.

In a world of ultimate flexibility, finding the right approach becomes ever more difficult. The challenge is not simply identifying and executing individual revenue opportunities. The bigger question is how broader content exploitation strategies should be developed in such a complex world.

How exactly, for example, might a single sports property be exploited across an integrated field of live subscription based events, transactional opportunities to purchase additional content and second screen based interactive advertising?

The questions will be legal as well as commercial. How to shape downstream royalties and associated rights and, working within relevant competition laws, how much influence can a content owner exercise over the activities of its ever more diverse licensors and sub-licensors?

In summary, rapid technological development will drive ever increasing diversity in media and in business models. The question is whether legal solutions founded in the past will be sustainable in this future.

As Darwin himself put it “It is not the strongest of the species that survives, nor the most intelligent, but the one most responsive to change”. In the future of TV, that will be true legally as much as it is technically or commercially.

This edition of the GMC Quarterly takes a look at the business, legal and regulatory environment for the new television ecosystem, from “Second Screen” exploitation, to “TV Everywhere” to changes in broadcast spectrum licensing rules.



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