CONVERGENT TECHNOLOGIES: CONFRONTING CONSTITUTIONAL ISSUES AND REGULATORY CHALLENGES*

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I. INTRODUCTION

The last decade prior to the end of the 20th century sent very strong signals of what might perhaps be a revolutionizing trend in the communicative technologies. We have been witnesses, at times as real eyewitnesses, to such developments as the Internet, cellular telephony, cable TV and rapid developments in personal computing -- generally developments that were thought of to be rather unimaginable.

Of recent, a new development is underway which would tend to undermine our usual notions of communication, information and everyday life. It is said that, owing to leaps in technological endeavors, a grand unification of, perhaps, all known electronic modes of communication will likely result. We are faced with convergence.

As students of law and law practitioners, it is but perfunctory for us to pore into the black letter law and see whether it is responding to changes. Others take refuge in what it says. Others become rather resigned to the inadequacy of the existing legal regimes and have become quite easily tempted to forecast

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corresponding revolutionary changes in law.[1] Before being tempted into rushing into foisting novel legal proposals, it is an opportune time to pause and review the legal entanglements involved. It is most opportune considering that communications convergence is yet at a relatively early stage.[2]

This paper modestly attempts at traversing some of the legal questions involved amidst the backdrop of convergence of technologies.

II. CONVERGENCE OF TECHNOLOGIES

A. Brief historical account

Telecommunications is, perhaps, one of the most important technological upshot that has affected the development of society during the past century. Society has always regarded it as a necessity[3]. Prior to the development of electronic or electrical modes of communication, communications was always achieved by direct and visible physical means. These usually took the form of messengers carrying written messages to flag signals, drums or smoke signals.[4] While, these methods did increase the speed by which information is transmitted, they were not without limitations. The most obvious is that they are sensory dependent.

Later on, the electric telegraph was developed. With this method, information would be converted into codes and transmitted by electrical signals through metal cables. The significance of this development is readily apparent. The distance that a message could be sent no longer depends, directly, on how far the eyes can see or the ear can hear. The capability of transmission of information by electrical signals over long electrical cables opened the way for overcoming the problem of distance. But these electrical signals had to be sent through cables –

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[1] P. Waters & D. Lloyd. *Competition In Converging Markets - Communications Research Forum 2000.* Available at <http://www.gtlaw.com.au/pubs/competitioninconvergingmarkets.html> last visited 13 February 2001.

[2] *Green Paper On The Convergence Of The Telecommunications, Media And Information Technology Sectors, And The Implications For Regulation: Towards an Information Society Approach.* European Commission Brussels, 3 December 1997 available at <http://www.ecommerce.goc/green/html> last visited 13 February 2001.

[3] FRANCIS LYALL, LAW AND SPACE TELECOMMUNICATIONS 2 (1989).

[4] *Id.*, at 3-4.

very long cables. To address this problem, the early wire telegraphs had to utilize the same path utilized by railways.[5] It is significant to note that the development of the telegraph was intimately bound with rail traffic.

The next important development was that of telephony.[6] Both the telegraph and the telephone utilized cables. Both also demanded large investments and were tremendous undertakings. It is, perhaps, due to these reasons that the wired communications became natural targets or objects of state monopoly.

During the latter part of the 19th century, radio communication started to develop.[7] This is significant for it allowed long distance communication without the burden of having to install and lay long cables. Radio communications information, after being converted into electrical signals was sent over free space.[8] While cable based communications had to have fixed receiving and transmitting locations, wireless communications were broadcast in practically every direction and anyone located within range could set-up the receiving equipment.[9] Wireless or radio signals had its own problems, however, in terms of difficulty with handling large volume of information, the resultant unreliable signal quality and interceptability.[10] Cable communications had the advantage of being more reliable (i.e. less dependent on weather conditions) but were disadvantaged with respect to necessity for wires. With the advent of very high frequency and satellite technology and the resulting improvement in quality and reliability, wireless communication seemed to be getting the edge.[11] Of recent, however, developments in fiber optics have given the boost for cable communications.[12] Both modalities are in current use to date. Both are, in fact, extensively used.

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[5] XVIII THE NEW ENCYCLOPEDIA BRITANNICA, *Telecommunications*, 69.

[6] *Id.*, at 83-85. *See* LYALL, *supra* note 3 at 5.

[7] LYALL, *supra* note 3 at 6-7.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] F. Guterl & G. Zorpette. *Fiber Optics: Poised to dispose Satellites*. IEEE SPECTRUM, August 1985, at 30-32.

[12] *Id.*

Alongside these events, electronics started to progress both in terms of miniaturization and increasing complexity.[13] Semiconductor based transistors replaced space-consuming vacuum tube components.[14] Integrated circuitry, composed of hundreds of individual electronic components would soon after arrive.[15] Combined with digital techniques, personal computers would allow computing power to be available to homes and small enterprises when just years before it was an exclusive domain of the very large corporate entities and government bodies.[16]

Considering the whole matter from the perspective of the technological and industrial disciplines, it becomes readily apparent that developments in one field will almost immediately catch the attention of the other fields. More so if we realize that all these technological fields have their common genesis from the disciplines of electronics and physics. The computing discipline was quick to capitalize on the developments in telecommunications to allow networking and remote access.[17] Telecommunications and broadcasting was quick to utilize computing with respect to its own routing and switching of information.[18] In this light we may be able to view convergence less of an awesome novelty to an 'expected novelty'.

B. Some definitions and distinctions

To allow for a common appreciation, certain definitions need to be made. As can be observed from the definitions or notions of the three components -- telecommunications, mass media and information technology -- there is an inherent tendency to cover one field within the other. They are more often formulated in a broad manner. It is possible to say that the current dilemma may have been caused partly by such formulations. In all probability, those who conjured the definitions may never have realized that the intersecting spheres, which have remained in the periphery of the particular component, in the

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[13] VI THE NEW ENCYCLOPEDIA BRITANNICA 678.

[14] *Id.* at 680.

[15] *Id.*

[16] BLAINE BROWNELL, USING MICROCOMPUTERS 13-18 (1985).

[17] The increasing importance of the Internet and wide-area-networks depends heavily on the facilities provided by telecommunications agencies.

[18] XVIII THE NEW ENCYCLOPEDIA BRITANNICA 94.

definitions may, in the future, become dominant features in the main field of each component.

1. Telecommunications

Statutorily, it is defined as any process which enables a telecommunications entity to relay and receive voice, data, electronic messages, written or printed matter, fixed or moving pictures, words, music or visible or audible signals or any control signal of any design and for any purpose by wire, radio or other electromagnetic, spectral, optical or technological means.[19] It is easy to see that the phrase "any control signal of any design" does not distinguish between analogue and digital. By its crafting, it readily invites computer-based information technology; more so because the enumeration includes data and electronic messages.

Even the Supreme Court has adopted a broad categorization. In *Philippine Long Distance Telephone Co. vs. National Telecommunications Commission*,[20] the Court declared that "'(t)elecommunication' is, in itself, a comprehensive term. Etymologically (tele [from the Greek] + communication), it means simply communication over distance, making no limiting reference to the means or mode of such communication." It goes on to add that it makes no distinction between voice and non-voice messages. As a result, while the respondent in that case, Eastern Telecommunications Philippines, Inc., was traditionally transmitting through non-voice modes like telex, the Court has allowed it, using its same legislative franchise to maintain and operate a modern international gateway facility which can carry both voice and non-voice. The Court explained that "(t)here is a basic and well-known scientific reason why the statute makes no such distinction. Voice messages do not travel via wires (cables whether submarine or underground or aerial) or any other media qua voice (i.e., as sound waves); voice transmissions, exactly like data (or non-voice) messages, travel in the form of electronic impulses through cables (or any other media) and are simply converted at the point of reception or destination into other forms visually or audibly perceptible by human beings." Now, if no such distinction is made as voice and non-voice messages on account that both are converted into electrical signals, for the same reason no distinction can be validly made between different types of non-voice signals or mixed types. No objection can then be

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[19] Rep. Act No. 7925 (1995), sec. 3(a).

[20] G.R. No. 94374, 21 February 1995, 241 SCRA 486.

made if a telecommunications facility were to process "messages" of the format utilized in the broadcast media.

Some government agencies have also clustered telecommunications and broadcast. The National Statistics Office defines telecommunications as the quick transmission of signals, sounds or images over great distances through electromagnetic impulses as the telephone, telegraph, telex, radio and television.[21]

The broadness of the scope of telecommunications becomes even more expansive when one considers its purpose. The WTO-GATS recognizes telecommunications both as a distinct service as well as means of transport for delivering many types of services electronically.[22]

2. Mass Media[23]

The Public Telecommunications Policy Act defines broadcasting as an undertaking the object of which is to transmit over-the-air commercial radio or television messages for reception of a broad audience in a geographic area.[24] There is some congruence with the definition with common usage. However, the same Act does not make any categorical statement with respect to cable TV (CATV) which, though not transmitted over-the-air, achieves substantially equivalent results. Prior issuances seem to include cable TV as part of broadcast media. Executive Order 205 s. 1987, promulgated under then President Corazon Aquino's legislative power entitled as "Regulating the Operation of Cable Antenna Television (CATV) Systems in the Philippines, and for Other Purposes" includes, in its whereas clauses the following:

> Whereas, when the public interest so requires monopolies in commercial mass media shall be regulated or prohibited;

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[21] PHILIPPINE YEARBOOK 961 (1992).

[22] *The European Commission "Info-Point" on World Trade in Service, Opening World Markets for Services, A Guide to the GATS (Communications services)* available at <http://gats-info.eu.int/guide.pl?MENU=ccc-2> visited on 21 November 2000.

[23] Mass media on print is excluded.

[24] Rep. Act No. 7925 (1995), sec. 3(c).

This seems to imply that CATV is being treated as form of mass media. The Department of Justice so declared.[25] The DOJ defined, citing a previous opinion,[26] mass media as "any medium of communication, a newspaper, radio, motion pictures, television, designed to reach the masses and that tends to set standards, ideals and aims of the masses". The distinctive element then, as contrasted with telecommunications, is its purpose of "reaching the masses". The definition is practically medium neutral.

Also underlying the definitions mentioned is that mass media is still seen as *non-interactive*.[27] This is emphasized by the fact that the enumerated forms are traditionally one-way media with little or no opportunity for immediate user response and by the fact that the message is intended only to be "received" by the masses.

3. Information Technology

Of the three components, information technology proves to be the most elusive of definition. Executive Order No. 356 (23 May 1989) describes "Information Technology" as "currently used to refer to computers, telecommunications, and office systems technologies". The Electronic Commerce Act of 2000[28] defines "information and communication system" as a system intended for and capable of generating, sending, receiving, storing or otherwise processing electronic data messages or electronic documents and includes the computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic data message or electronic document. This is based on the definition of "information system" of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Electronic Commerce.[29] It includes computers and is "intended to cover the entire range of technical means used for transmitting, receiving and storing information."[30]

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[25] Sec. of Justice Op. No. 95 s. 1999.

[26] Sec. of Justice Op. No. 163 s. 1973.

[27] One other element of mass media mentioned in DOJ Opinion No. 95 s. 1999, citing Allied Broadcasting vs. FCC (436 F2d 68,70) is that of "the freedom to be selective in the choice of what is to be printed or broadcasted."

[28] Rep. Act No. 8792 (2000), sec. 5(d). *See*, also, Implementing Rules, sec. 6(f).

[29] JESUS M. DISINI, JR & JANET C. TORAL, "THE ELECTRONIC COMMERCE ACT" AND ITS IMPLEMENTING RULES AND REGULATIONS 15 (2000).

[30] *Id.*

The US Telecommunications Act of 1996 defines "information services" as offering the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.[31] This definition was formulated in relation vis-à-vis the other category, "telecommunications services" and was intended to parallel the definitions between "enhanced services" and "basic services".[32] It is considered "enhanced service" if it employed computer processing applications that act on format, content, code, protocol or similar aspect of the subscriber's transmitted information or involved subscriber interaction with stored information.[33] Services not meeting this definition were generally considered "basic services".[34]

In parallel, the Implementing Rules of Republic Act 7925, or the Public Telecommunications Policy Act, provide a similar definition of "enhanced service." "Enhanced service" refers to a service which adds a feature or value not ordinarily provided by a public telecommunications entity such as format, media conversion, encryption, enhanced security features, computer processing and the like; provided that in the provision of the enhanced service, no law, rule, regulation or international convention on telecommunications is circumvented or regulated.[35] Apparently, owing to the origins of the usage of the term "enhanced services", it is identical to information services.

A fair reading of the provisions of the Electronic Commerce Act and the Public Telecommunications Policy Act and their respective implementing rules, would yield to clear intention to equate information technology with the term "information and communication system" and the supply of service utilizing that "system" to "information service" or "enhanced service". Its entanglement with telecommunications occurs because in the provision of such service the mode is through telecommunications.[36]

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[31] 47 USC § 153(20) *cited in* G. Rosston & B. Wimmer, *The ABC's of Universal Service: Arbitrage, Big Bucks and Competition*. 50 HASTINGS L. J. 1585, 1603 n.58 (1999).

[32] *Id.*, at note 59.

[33] *Id.* at 1602, *citing* FCC Computer II Decision, 47 C.F.R. § 64.702(a).

[34] *Id.*

[35] NTC MC No. 8-9-95. *See* Implementing Rules of Rep. Act No. 7925 (1995).

[36] Rosston & Wimmer, *supra* note 31 at 1603.

The fundamental fusion between telecommunications and information services is so apparent that some writers seem to equate information services with "other telecommunications services".[37] They cite as examples of "Other Telecommunications Services" as including "videotext, electronic mail, mail, electronic fund transfer, and value added networks. Generally, these services emphasize digital data processing as opposed to the traditional service provider's emphasis on voice transmission."[38] The enumeration is actually what is traditionally included in information services. Again, the components common genesis is shown.

C. Convergence of technologies

Traditionally, telecommunications, mass media and information technology has been seen as distinct endeavors. Of course, that statement is made from the viewpoint of users or consuming side. When one wanted to talk to someone, we generally do not turn on the TV or boot on our computers. Neither do we connect our TV sets to the telephone drop cable. But, to those in the electronic industry, it was probably just a matter of additional semester or two as electronic technology has always penetrated the trifurcate of telecomms, mass media and information technology.

A blurring of technical distinctions has been occurring.[39]

Convergence has been defined as "the progressive integration of the value chains of the information and content industries -- telecommunications, posts, multimedia, electronic commerce, broadcasting, information technology, and publishing industries into a single value chain based on the common use of distributed digital technology."[40] It is the merging of these services into one superhighway, where one can access phone, fax, internet, cable TV, broadcasting, postal services, etc., through one medium, by the process of digitalization, i.e., the

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[37] Adriana Nugter & Jan Smits, *The Regulation of International Telecommunication Services: A New Approach*, 14 N.C.J. INT'L. L. & COM. REG. 191 n.2, 122 (1989).

[38] *Id.*

[39] L. Blumensaadt. COMMENT: *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*. VIII COMMLAW CONSPECTUS 291 (2000).

[40] *WTO Impact Study, Final Report: Incremental Change or Step Function Gain? Positioning the Philippines' Communication Sector in the Emerging WTO Environment* (1999), at 6.

transformation of voice, data and video into a common stream of binary bits or bytes.[41]

The Implementing Rules of the Electronic Commerce Act[42] defines convergence as referring to technologies moving together towards a common point and elimination of differences between the provisioning of video, voice and data, using digital and other emerging technologies; the coming together of two or more disparate disciplines or technologies; the ability of different network platforms to carry any kind of service[43]; and the coming together of consumer devices such as, but not limited to, the telephone, television and personal computer[44]. The Green Paper of the European Commission, in similar fashion, views the common expression of convergence as: "(T)he ability of different network platforms to carry essentially similar kinds of services, or the coming together of consumer devices such as the telephone, television and personal computer."[45]

Technological convergence, then, is a coming together of previously disparate or discrete technologies.[46] Considering that, at the onset, we are immediately presented with the cryptic term of convergence, this recognition is important to enable us to find our way through the issues involved and avoid being mystified at the start.

From the standpoint of its technological history, there may be some danger in describing that digitalization is the technological basis for convergence.[47] It tends to undermine the contributions of the other technological fields which have made enormous contribution to the development of convergence[48] and,

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[41] Ma. Joy Abrenica, *Technological Convergence and Competition: The Telecommunications Industry* in STUDIES IN GOVERNANCE AND REGULATION: THE PHILIPPINES (D. Canlas & S. Fujisaki, eds. 1999) at 166.

[42] *See* DISINI & TORRAL, *supra* note 29 at 13.

[43] This could also be formulated as the merging of services onto a common platform. *See* Blumensaadt, note 7 at 295.

[44] *Id.* Services are provided over a single device.

[45] Green Paper, *supra* note 2.

[46] Robert M. Frieden, *Universal Service: When Technologies Converge and Regulatory Models Diverge*, 13 HARV. J. L. & TEC 395 (2000).

[47] Abrenica, *supra* note 41 at 166.

[48] Other technological fields would include, among others, laser physics and material science which developed the optical fiber, radio communications technology which allowed transmissions at ever increasing frequencies.

consequently, to place an under emphasis of the other basic infrastructural requirements for convergence. To place focus on digitalization gives the notion of compactness whereas convergence actually deals with massive structures like long fiber-optic and coaxial cables and high transmitting frequencies. Moreover, digitalization's close association with information technology gives undue emphasis to the notion of convergence as "just around the corner." It is as if it is so near that we are being prodded to act with almost panic haste lest we be left behind. Unstripped of these blurring notions, "convergence" may become a convenient ideological tool for calling for dramatic policy changes as liberalization or deregulation. Moreover, the common view of digitalization's affinity with information technology, shifts the debate highly in favor of deregulation for information services is the least regulated among the three components discussed.

Convergence has also been utilized in various ways. No attempt is made here to provide a comprehensive or the most appropriate classification of the various types of convergence. However, a review of those made by others would prove instructive. One such taxonomy is reproduced below.

> a. network level technology convergence which involves the merger of underlying transport technologies, such as circuit-switched and packet-switched networks, such as the migration of circuit-switched voice networks to packet-switched data networks;
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> b. bundled convergence on the other hand emerges where services continue to be delivered over their traditionally separate platforms and continue to be used separately, but they are marketed, priced and billed in a single retail package. For example, fixed telephone and pay TV access offered as a single, cut-price package;
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> c. gateway convergence involves separate services, usually delivered over one transmission pathway, which are accessed by the customer through a single user interface. For example, access to voice telephony and e-mail via a mobile handset;
>
> d. service convergence involves the delivery of multiple services through a single 'pipe' to the customer, such as pay TV and Internet over xDSL;
>
> e. substitutional service convergence emerges where an existing service 'encroaches' on separate existing service and becoming suitable for that service. For example, the gradual emergence in some markets of the substitutability of mobile voice services for fixed voice services;

f. new converged services emerge where new technologies and functionality are used to develop entirely new services, which may or may not substitute for existing services. For example, unified mailboxes that operate over a variety of networks; and

g. the convergence of markets involves the development of services to such an extent that they become genuinely substitutable for other services as far as both suppliers and consumers are concerned. For example, it is often claimed that HFC Cable and xDSL over copper are fully substitutable.[49]

The importance of classifying the various types of convergence is that each type progresses at different rates and may require appropriate regulatory approaches. Moreover, it may not necessarily follow that one type of convergence will necessarily follow.[50]

D. Significance for the Philippines[51]

1. Public Benefit Perspective

Convergence is expected to be significant to the country in view of the expected benefit to the public it will bring. Convergence promises to open up vast channels of information and allow cheaper linkages in society.[52] Openness to convergence, coupled with a liberalized atmosphere, is also argued to be a lure for investments as it is supposed to allow new players sufficient ground.[53]

Public benefit may also have to be viewed in light of the fact that electronic communicative devices have different rates of penetration in our country. We have seven times more television sets than we do have telephone sets.[54] We also have a proliferation of cable-TV companies.[55] With convergence

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[49] Waters & Lloyd, *supra* note 1.

[50] *Id.*

[51] This is not intended to be exhaustive but only illustrative.

[52] Abrenica, *supra* note 41 at 179.

[53] Melissa McMorrow. *Prospects for Local Competition in Telecommunications: A Comparison of the Chilean and American Approaches to Regulatory Reform.* 22 HASTINGS INT'L & COMP. L. REV. 747, 769-771. (1999).

[54] Angus Hendersun, *The Philippines: Challenges in Promoting a Viable Communications Industry.* [October 1997] Available at <http://www.gtlaw.com.au/pubs/philippines.html> last visited 11 November 2000.

of technologies, existing infrastructure and appliance-buying patterns of consumers may be an advantage in terms of providing telephony and information services to a broader section of the population.

2. Implications for the Universal Service

Universal service may be defined as a "public policy to spread telecommunications to as many members of society as possible, and to make available, directly or indirectly, the funds necessary to support the policy."[56] It could be simply described as providing that plain old telephone service for everyone.[57] It is the social justice aspect of telecommunications policy.[58]

The Philippines has, as a policy declaration, adopted the idea. Presidential Decree 217 provides as one of the basic policies, "the attainment of efficient telephone service for as wide an area as possible at the lowest reasonable cost to the subscriber."[59] In the same vein but in less forceful language is the national policy declaration in the Public Telecommunications Policy Act. It provides:

> a. A fundamental objective of government is to develop and maintain a viable, efficient, reliable and universal telecommunication infrastructure using the best available and affordable technologies, as a vital tool to nation building and development;
>
> b. The expansion of the telecommunications network shall give priority to improving and extending basic services to areas not yet served. For this purpose, government shall promote a fair, efficient and responsive market to stimulate the growth and development of the telecommunications facilities and services, with emphasis on the accessibility by persons to basic services in unserved and underserved areas at affordable rates;[60]

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[55] Abrenica, *supra* note 41 at 177.

[56] Blumensaadt, *supra* note 39 at 396, note 1. *citing* E. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955, 957 (1997).

[57] J. Bahrij, *Telecommunications Law and the Policy of Universal Services Obligation in Europe, Australia and the United States*. 10:2 J. L. & INFO. SCI.184, 188 (1999).

[58] S. Siochru, *Universal Service and Liberalisation*. Available at <http://www.sn.apc.org/ecis/sean.htm.>

[59] Pres. Decree No. 217 (1973), sec. 1.

[60] Rep. Act No. 7925 (1995), sec. 4.

The Implementing Rules (for RA 7925), appears to have watered down the universal service objective by using the term "universal access". It continues to define as referring "to the availability of reliable and affordable telecommunications service in both urban and rural areas of the country."[61] While universal service refers to provisioning for all, universal access is simple providing reasonable access which might be taken to mean as a public phone within a radius of a few kilometers.[62] The evasive formulation is matched by performance shortfall in this respect, especially with teledensity targets.[63]

Convergence may have some inhibitory effect on the universal service objective. Traditional telecommunication companies may have to compete with enhanced service providers for the high-profit customers straining its capacity to supply telecommunications service to high-cost areas.[64] Note that enhanced service providers (which were earlier identified with information services) or value added service providers need not get a legislative franchise and have no obligations as to universal service or universal access.[65]

3. The WTO Imperative

The World Trade Organization (WTO) has concluded several agreements in relation to the component services. Among such are agreements are the Information Technology Agreement,[66] the Annex on Telecommunications[67] and the Agreements on Basic Telecommunications Service (ABTS).[68] Consistent with all the other agreements in relation to the WTO,

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[61] NTC MC No. 8-9-95.

[62] Siochru, *supra* note 58.

[63] *'Service remains poor, technical standards not strictly enforced,'* The Philippine Star, 11 February 1999, p. 25. *See*, also, Abrenica, *supra* note 41 at 172.

[64] *See* discussion of Bahrij, *supra* note 57 at 200-206.

[65] NTC MC No. 8-9-95.

[66] *See* discussion at K. Kennedy, *The GATT-WTO System at Fifty*. 10:2 WISC. INT'L L. J. 421, 448-451 (1998).

[67] Available at <http://gats-info.eu.int/gats-info/gatscomm.pl?MENU=aaa-7> last visited 22 November 2000.

[68] A nice brief discussion is provided by P. Spector, *The World Trade Organization Agreement on Telecommunications*. 32:2 THE INT'L LAWYER 217 (1998). ABTS is also known as the Fourth Protocol to the GATS, available at <http://www.wto.org/english/tratop_e/serv_e/4-prote.htm> last visited 22 November 2000. The ABTS is not a regular agreement in that it is not contained in one document. It consists mainly of by country specific commitments attached to the one-page Fourth Protocol. The specific commitments are available at the European Union website. Currently, the Philippine Senate has not yet given its concurrence and is still

these agreements are intended to remove barriers to international trade in services founded especially on the national treatment obligation and the most-favored-nation treatment obligation.[69] The Agreement on Basic Telecommunications Services also adopted the Regulatory Principles[70] which outlined certain criteria for a liberalized, transparent and non-discriminatory treatment with respect to telecommunication services. Like several other countries, the specific commitments of the Philippines, on basic telecommunications, are basically status quo or "standstill" statements[71], i.e. existing rules and legislation has already provided for such commitments.[72]

As it stands currently, convergence has not been sufficiently addressed by the World Trade Organization (WTO) and its related agreements owing to the reluctance of many of its members to make specific commitments in information services.[73] However, considering that the WTO Agreements, especially the General Agreements on Trade in Services (GATS) is of a continuing nature[74] convergent technologies and services will likely be addressed in subsequent rounds of negotiations. It is to our best interest, of course, that a good understanding and preparation on the subject be had.

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considering the Fourth Protocol and the ITA under Senate Resolutions 187 and 188, respectively.

[69] Kennedy, *supra.* note 66 at 426.

[70] It is a separate document serving as guide for developing pro-competitive domestic regulations. It was proposed by the US and is based mainly on the principles of the US Telecommunications Act of 1996.

[71] *WTO Impact Study, supra* note 40 at 69. The characterization as standstill or status quo may still be doubted. While the wordings of the Philippine commitments reflect the wording of our law, as a Specific Commitment to WTO, those same wordings may have to be interpreted in the light of the GATS treaty which may not be necessarily the same if it would be interpreted in the light of pure domestic law.

[72] Journal of the Senate, Session No. 24, October 7, 1998, at 402. To the same effect is the contention of Senator Blas Ople.

[73] *WTO Impact Study, supra* note 40 at 85.

[74] S. Jarreau, *Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade of Financial Services: The Lawyer's Perspective*, 25 N.C.J.INT'L L. & COM. REG. 1, 4 (1999).

III. CONSTITUTIONAL IMPLICATIONS OF CONVERGENCE

The 1987 Constitution provides that "(t)he State recognize(s) the vital role of communication and information in nation-building."[75] Ultimately, the diverse roads of technological innovations lead to and exist for one thing - public service. And the Charter itself acknowledged the importance of communications and information in the pursuit of development and advancement of the nation.

A. On ownership

It is argued that the foremost and probably the biggest impediment in realizing technology convergence in the country is the differing Constitutional requirements of percentage of Filipino ownership of the telecommunications and broadcast industries. The 1987 Constitution provides that broadcast media must be wholly owned by Filipino citizens. To wit:

> Sec. 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or association, wholly owned and managed by such citizens.[76]

On the other hand, the same Constitution requires that at least sixty percent (60%) of telecommunications equity be owned by Filipinos. It provides:

> Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least *sixty per centum* of whose capital is owned by such citizens,... [77]

The problem surfaces when technology convergence comes in. Most of the companies catering to telecommunications are able to support the infrastructure requirements of broadcast media. With the requirement of a separate franchise aside, these companies, however, will still not be allowed if there is any foreign equity participation in such companies.

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[75] CONST., art II, sec. 24.

[76] CONST., art. XVI, sec. 11(1).

[77] CONST., art. XII, sec. 11.

Some sectors advocate the deletion of such Constitutional provision, in order to keep abreast with the fast emerging technological progress in information.[78] It is believed that this particular sector needs the financial backing of foreign investors and technological expertise of foreign companies.[79] In fact, it has been reported that the country is being eyed as a major telecommunications center, [80] and would be a pity to forego such an investment opportunity.

Those who oppose liberalization in the ownership and management of the Mass Media Industry say that such will unduly expose the Filipino psyche and allow foreigners to mold public opinion and hence, adversely affect Filipino culture and tradition.[81] The other camp, on the hand, argue that even if we continue to restrict or prohibit foreign ownership and management of Mass Media, our culture and traditions will continue to be influenced by foreign publications, programs and movies which enter the Philippine market just the same.[82] Besides, Filipino ownership does not guarantee the promotion of public interest as some media companies are not created to serve the Filipino public but the interest of their owners.[83] Interestingly, some members of media advocate deletion of such provision so as to improve the quality of reportage in the print industry.[84]

Ownership of telecommunication companies were also the subject of debate in the proceedings of the 1986 Constitutional Convention. The debate was whether control and ownership be limited to a 60-40 ratio or 75-25 ratio or 2/3-1/3 ratio.[85] One delegate suggested that it is the desired objective that in due time the public utilities should be 100% Filipino-owned. At that time, however, there were public utility corporations lobbying for the retention of the 60-40 ratio, for fear of having to pay-off foreign equity partners if and when the 2/3-1/3 ratio were approved by the body, which was estimated to cost P1.2 billion pesos.[86]

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[78] F. Gozon, *Proposed Amendments to the Mass Media, Advertising and Transitory Provisions of the 1987 Constitution*, XIV:3 THE LAWYERS REVIEW 69 (2000).

[79] *Id.*

[80] *12 Aussie firms eye RP as major telecom center*. Philippine Daily Inquirer, March 15, 1999, available at <http://www. inquirer.net/infotech/mar99wk3/info_main.htm>

[81] Gozon, *supra* note 78 at 69.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] III RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES 650, 654-656.

[86] *Id.* at 650.

Another argument against the 60-40 ratio for public utilities and in favor of increased Filipino control, especially in telecommunications, was national security.[87] There were apprehensions that the telecommunications industry may be utilized by outside forces in times of national emergency like war, and hence, result in the destabilization of the Philippine government. It was submitted that according to a study of the coup attempts in Santiago, Chile, in September 1973, a telecommunications giant had a hand in it.[88]

It was countered, however, that public utilities in general are subject to the *proviso* that in cases of national emergency, these entities may be taken over temporarily by the State. In fact, this *proviso* appears in one form or another in the grants of franchise to such public utilities. Moreover, it was also pointed out that these telecomm carriers are supervised and regulated by the National Telecommunications Commission, in any case.[89]

1. The Grandfather Rule and the Control Test

In order to preserve Filipino ownership in industries and entities protected by law, there were methods adopted on how to determine Filipino ownership. The "Grandfather Rule" is a method by which the ownership is computed by digging into the equity ownership of aliens, not only on the first tier of stockholders, but until three (3) levels deep.[90] This presupposes that stockholders of one corporation are composed also of companies, or juridical persons, aside from the individual natural persons. These juridical persons would be owned by both natural and juridical persons, and down the line. In order not to dilute effective Filipino control,[91] the "Grandfather Rule" was adopted, such that the percentage of Filipino ownership in each tier of stockholder companies are looked into, and computed.

The control test, on the other hand, was adopted by the SEC in its Rules to implement the requirements of the Constitution and other laws, approved on 31 March 1967.[92] This control test, laid down the rule in determining the

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[87] *Id.* at 652, 654.

[88] *Id.* at 654.

[89] *Id.* at 651.

[90] S. Tan, *The Grandfather Rule in Corporate Share Ownership*, XVII:1 J. INTEG. BAR PHIL. 7, 13 (1989).

[91] *Id.* at 12.

[92] *Id.* at 10.

nationality of corporations with corporate stockholders. It states that corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered of Filipino nationality. If the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality.[93]

This control test has been preferred and applied by the SEC.[94] It has decided to do away with the strict implementation of the "Grandfather Rule," in lieu of the government policy to encourage and attract foreign participation in domestic enterprise, as embodied in the Foreign Investment Act of 1991.[95] However, it was submitted that this determination of Filipino nationality does not apply to industries requiring 100% Filipino citizenship.[96]

2. Unbundling Ownership

Recognizing the reality of convergence and its effect on the Constitutional proscription on ownership, Republic Act No. 8792 or the E-Commerce Act, provided that:

> Section 28. ...The physical infrastructure of cable and wireless systems for cable TV and broadcast excluding program content and management thereof shall be considered as within the activities of telecommunications for the purpose of electronic commerce.

The National Telecommunications Commission (NTC) has expressed concern over this. The problem is how to construe "electronic commerce," which could be as broad as day, and could include any and all transactions utilizing the electronic realm, for which reason it could lead to constitutional circumvention as to the 100% Filipino ownership required for broadcast media as well as cable TV since the latter is still classified as under the former.[97]

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[93] *Id. See*, also, Sec. of Justice Op. No. 182, s. of 1989.

[94] R. LOPEZ, THE CORPORATION CODE OF THE PHILIPPINES, ANNOTATED 294 (1994) *citing* Sec. of Justice Op. No. 182, s. of 1989, 19 January 1989.

[95] *Id.* at 294, *citing* Rep. Act No. 7042, dated 13 June 1991.

[96] *Id.* at 296, *citing* SEC Op. dated 14 December 1989.

[97] A. Alcantara, *NTC sees thorny issues in new e-commerce law*. Philippine Daily Inquirer, July 3, 2000, available at <http://www.inquirer.net/infotech/jul2000wk1/info_9.htm>

With the definition of e-commerce aside, it was explained in the recently released Implementing Rules and Regulations of the law that the problem on ownership requirement could be solved by allowing a broadcast or cable TV company to "spin-off" into two (2) companies. One will be the broadcast arm and shall provide content and programming, and hence subject to the 100% Filipino ownership requirement. The other will hold the physical infrastructure - the broadcast equipment, licenses and towers, and may offer voice, data, broadband and other services allowed for telecomms companies.[98]

3. The spin-off approach

This "spin-off" approach could find support in the following pronouncements of the Supreme Court regarding public utilities and operation of franchises.

In the case of *People v. Quasha*,[99] the Supreme Court had occasion to clarify whether the lack of franchise impeded the mere formation of a public utility. The Court held that the terms "franchise" or "certificate" or "any other form of authorization" as provided by the 1935 Constitution, is qualified by the phrase "for the operation of a public utility."[100] Hence, an entity may come into being without the necessary franchise, after which it may be granted the privilege to *operate* as a public utility.

In the case of *Tatad v. Garcia*,[101] the EDSA LRT Corporation, Ltd., a foreign corporation incorporated and existing under the laws of Hongkong, was awarded the contract to construct the EDSA LRT III. Once the EDSA LRT III is constructed, the company, as lessor, will turn it over to the Department of Transportation and Communication (DOTC), as lessee, for the latter to operate the system and pay rentals for said use. Petitioners who are Senators of the Republic, questioned the legality of such an arrangement, arguing that the EDSA LRT III is a public utility, whose ownership and operation is limited by the Constitution to Filipino citizens and domestic corporations, not foreign corporations like the respondent company.

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[98] DISINI & TORRAL, *supra* note 29, sec. 42.

[99] 93 Phil. 333 (1953).

[100] People v. Quasha, 93 Phil. 333, 338-339 (1953).

[101] G.R. No. 114222. April 6, 1995, 243 SCRA 436.

The Supreme Court held that what is proscribed by the Constitution is the award of the *operation* of a public utility to persons other than citizens or domestic corporations or associations at least sixty *per centum* of whose capital is owned by citizens.[102] To wit:

> Sec. 11. No franchise, certificate, or any other form of authorization for the *operation of a public utility* shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least *sixty per centum* of whose capital is owned by such citizens,....[103] (emphasis supplied)

The Court stated that there is a clear distinction between the "operation" of a public utility and the "ownership" of the facilities and equipment used to serve the public. Ownership is defined as a relation in law by virtue of which a thing pertaining to one person is *completely* subjected to his will in everything not prohibited by law or the concurrence with the rights of another.[104] Ownership of such facilities and equipment, on the other hand, is *limited* by the Charter so that such cannot be operated and used to serve the public as a public utility unless the operator has a franchise.[105] "While a franchise is needed to operate these facilities to serve the public, they do not by themselves constitute a public utility. What constitutes a public utility is not their ownership but their use to serve the public."[106]

Thus, the right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used therefor.[107]

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[102] Tatad v. Garcia, G.R. No. 114222, April 6, 1995, 243 SCRA 436, 453.

[103] CONST., art. XII, sec.11.

[104] Tatad v. Garcia, G.R. No. 114222, 6 April 1995, 243 SCRA 436, 453, *citing* II TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 45 (1992), *in turn citing* Scialoja.

[105] Tatad v. Garcia, G.R. No. 114222, 6 April 1995, 243 SCRA 436, 453 *citing* Arizona Eastern R.R. Co. v. J.A. Matthews, 20 Ariz 282, 180 P. 159, 7 A.L.R. 1149 (1919); United States Fire Ins. Co. v. Northern P. R. Co., 30 Wash 2d. 722, 193 P. 2d 868, 2 A.L.R. 2d. 1065 (1948).

[106] Tatad v. Garcia, G.R. No. 114222, 6 April 1995, 243 SCRA 436, 452, *citing* Iloilo Ice & Cold Storage Co. v. Public Service Board, 44 Phil. 551, 557-558 (1923).

[107] Tatad v. Garcia, G.R. No. 114222, 6 April 1995, 243 SCRA 436, 453.

In that case, the LRT Consortium was not enfranchised to operate a public utility. The contract was for it to deliver possession of the LRT system by way of lease for 25 years, during which period the DOTC shall operate the same as a common carrier and the company shall provide technical maintenance and repair services to DOTC.[108] Technical maintenance would consist of providing (1) repair and maintenance facilities for the depot and rail lines, services for routine clearing and security; and (2) producing and distributing maintenance manuals and drawings for the entire system.[109]

In another case, *Kilosbayan, Incorporated v. Guingona*,[110] the Contract of Lease entered into by the Philippine Charity Sweepstakes Office (PCSO) and the Philippine Gaming Management Corporation (PGMC), was questioned before the Supreme Court. The Court held that the purported lease was actually a joint venture agreement entered into in violation of the provisions of the Charter of PCSO.[111] It was said that the arrangement was in effect a *lease of franchise to operate* the lottery system to the PGMC, which has not been allowed by law. Such arrangements consisted of the manner of rental, which was not at a fixed amount but at a certain percentage of the gross receipts, the part where the PGMC binds itself to bear all risks if the ticket sales were insufficient to pay the entire prize money, and the fact that only after the term of the contract, which was eight (8) years, that the PCSO personnel would be ready to operate the lottery system, for it would take eight (8) years for the technology transfer to be completed. In effect, the Court said, for the entire duration of the contract, it was PGMC which would be actually operating the lottery system, **not** simply the *lessor of the equipment*. The Court held that the arrangements between the parties are "unusual in a lessor-lessee relationship but inherent in a joint venture."[112]

This ruling would imply that contract of lease *per se* is not obnoxious to the operation by a franchisee. The Court seems to have distinguished contract of lease of equipment from contract of lease of franchise; the latter being expressly proscribed.

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[108] Tatad v. Garcia, G.R. No. 114222, 6 April 1995, 243 SCRA 436, 454, pursuant to their Revised and Restated Agreement, Secs. 3.2, 5.1 and 5.2.

[109] Tatad v. Garcia, G.R. No. 114222, 6 April 1995, 243 SCRA 436, 453 pursuant to the Revised and Restated Agreement, Annex F.

[110] G.R. No. 113375, 5 May 1994, 232 SCRA 110.

[111] Kilosbayan, Incorporated v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110.

[112] Kilosbayan, Incorporated v. Guingona, G.R. No. 113375, 5 May 1994, 232 SCRA 110.

Interestingly, in *Kilosbayan, Incorporated v. Morato*,[113] the subsequent Equipment Lease Agreement (ELA) entered into by the same parties above, was upheld by the Supreme Court. The ELA provided that the PGMC lease its online lottery equipment and accessories to the PCSO in consideration of a rental equivalent to 4.3% of the gross amount of ticket sales derived by the PCSO from the operation of the lottery which in no case shall be less than an annual rental computed at P35,000 per terminal in commercial operation. In the operation of the lottery, the PCSO is to employ its own personnel. The term of lease is eight (8) years, and upon the expiration thereof, the PCSO has the option to purchase the equipment for the sum of P25 million pesos.

The Court observed that the PGMC is now assured of a minimum rental and the fixing of a certain percentage of the gross receipts is not offensive to contract of lease, as the lease of space in commercial buildings may involve the payment of a certain percentage of the receipts in rental.[114] The Court cleared that it was not so much the fixing of the rental at percentage that invalidated the Contract of Lease in the prior case, but the proviso that the PGMC bears all the risk of loss from the operation of the lottery.[115] Such proviso was indeed eliminated in the ELA, and the PCSO now bears the risk of all losses because the operation would be completely in its hands, employing its own personnel, bearing the costs of maintenance and necessary repairs excepting only those involving breach of warranty.[116] Hence, the Court upheld the validity of said Equipment Lease Agreement.

This latter decision then confirms what was speculated in the first case – that the contract of lease per se is not prohibited in the operation of a franchise – that there is distinction between a contract of lease of franchise and a contract of lease of equipment.

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[113] G.R. No. 118910, 17 July 1995, 246 SCRA 540.

[114] Kilosbayan, Incorporated v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 568.

[115] Kilosbayan, Incorporated v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 568.

[116] Kilosbayan, Incorporated v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 567, 569.

a. Contract of lease of equipment defined

The next logical step would now be to define the metes and bounds of this legal concept. As defined in the Equipment Lease Agreement[117] in the case of *Kilosbayan, Incorporated v. Morato*, "equipment" includes "technology, intellectual property rights, know-how processes and systems."[118]

A contract of lease is defined by the Court as a "consensual, bilateral, onerous and commutative contract by which one person binds himself to grant temporarily the use of a thing or the rendering of some service to another who undertakes to pay some rent, compensation or price."[119] As the Court propounded, a contract of lease may call for some form of collaboration or association between the parties as regards the lease of the equipment, but it would be untenable to contend that such collaboration and association is what the Charter of the PCSO proscribed as joint venture. Moreover, it was argued that even if the PCSO bought the equipment, it would still need the assistance of the PGMC in the initial phase of the operation.

Perhaps to be able to arrive at a clearer picture, there is need to define "operation" vis-à-vis "equipment," the latter being defined as including "technology, intellectual property rights, know-how processes and systems." However, there is nothing in the two cases that may help in this aspect. This distinction and delineation is important considering that this could extend to the construction of the Constitutional proscription on the grant of franchise to operate public utilities in general.

As argued by the petitioner in the two cases, the PCSO had neither funds of its own nor the expertise to operate and manage an on-line lottery. All it had to offer was a franchise to operate. On the other hand, PGMC had the facilities and the expertise. By defining contract of lease of equipment as involving some degree of collaboration in matters including technology, intellectual property rights, know-how processes and systems, there appears to be left only a thin line between a contract of lease of equipment and a contract of lease of franchise, if at all.

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[117] Kilosbayan, Incorporated v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 570.

[118] Kilosbayan, Incorporated v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 570

[119] Kilosbayan, Incorporated v. Morato, G.R. No. 118910, 17 July 1995, 246 SCRA 540, 570, *citing* 5 PADILLA, CIVIL CODE 611 (6th ed. 1974).

b. On the viability of the spin-off approach

It would seem still premature to make a pronouncement as to the constitutionality of this proposed method. At the outset, though, it could fairly be said that, in view of the existing jurisprudence as discussed above, the spin-off method is even less liberal than the operation of a franchise through a contract of lease of such magnitude as was allowed in the PCSO case. The E-Commerce Act provision merely mentions telecommunications "physical infrastructure," which normally and ordinarily refers to material manifestations of the technology, compared to the definition of equipment in that case.

And even granting that the Supreme Court restricts the definition of "equipment" and the extent of the collaboration between lessor and lessee regarding operation of franchises, the matter is still available as argument in favor of spinning off to the extent that a broadcast or cable TV company may utilize the equipment of a telecommunications company by way of lease.

B. On combinations in restraint of trade or unfair competition

The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.[120]

The Charter also provides for a similar proscription for the mass media, to wit:

> The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.[121]

"Monopolies" would include majority cross-ownership or tri-media ownership in the different forms of mass media.[122] Ownership refers to control and majority means fifty percent plus one. However, tri-media ownership *per se* need

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[120] CONST. art XII, sec. 19.

[121] CONST. art. XVI, sec. 11(1).

[122] JOAQUIN BERNAS, S.J., THE INTENT OF THE 1986 CONSTITUTION WRITERS 1166-1168 (1995 ed).

not be harmful. Congress was left with the prerogative to determine the situations where it could be harmful, and hence, pass a legislation, regulating multiple ownership or control.[123]

This discussion is important in lieu of convergence, which could happen not merely for technology, but more so in ownership of these vital industries. Multiple and cross-ownership is seen as more advantageous in realizing the benefits the economies of scale. The implications of multiple ownership of these entities vis-à-vis national interest in keeping control of monopolies and combinations in restraint of trade, remains to be seen.

IV. GOVERNMENT REGULATION AND CONVERGENCE

Owing to the view that the telecommunications industry requires economies of scale, it has been viewed as a natural target for a monopoly. Hence, the traditional practice is to subject it to intense government regulation. Until the end of the 1970s, the sector was perceived to be a natural monopoly.[124] Mass media, specifically broadcast media, has also been regulated both with respect to content and in the technological sense especially with spectrum allocation and interference.[125] Computing and information technology has been relatively free of such state intrusions[126] except for general rules such as those relating to consumer rights. With respect to content and ownership, mass media has been the most regulated while information technology the least.

It was said that there were strategic reasons for nurturing monopolies. One is that monopoly would allow sufficient network to generate economies of scale. Next would be that a monopolistic structure avoids market segmentation and permits the building of a network that is integrated and national in scope. And last, it is convenient to impose on the monopolist the obligation of universal service.[127]

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[123] *Id.* at 1168.

[124] Abrenica, *supra* note 41 at 1.

[125] D. Gregg, *Opening the International Television Market to Greater Program Diversity*. 14 N.C.J. INT'L & COM. REG. 240 (1989).

[126] *Id.*

[127] *Id.*

During the 80s, however, the technological advances that resulted in the drop in cost of telecommunications services, paved the way for privatization, liberalization and deregulation of the industry.[128]

From the regulatory perspective, there used to be clear distinctions between the three in terms of treatment of ownership and control, content regulation and the public interest objectives involved.[129] With the advent of convergence, however, it became difficult to discuss where one industry begins and ends.[130]

A. Twin Requirements of Franchising and Licensing

At the outset, it is to be noted that the Constitution does not prohibit *the mere formation* of a public utility corporation without the required proportion of Filipino capital.[131] The Supreme Court has ruled in the case of *People v. Quasha*[132] that the moment for determining whether a corporation is entitled to *operate* as a public utility is when it applies for a franchise, certificate, or any other form of authorization for such purpose.[133]

The 1987 Constitution itself has laid down the requirement of a franchise to operate a public utility or a broadcast media. The authority to issue licenses is lodged at present with the National Telecommunications Commission.

B. Traditional Approach to Regulation

It should also be noted that there is at present a distinction in the approach to regulation. The telecommunications sector is carrier-regulated, i.e., controls are placed on market entry, pricing and technical standards to ensure interconnection and interoperability of the system, while broadcast media is

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[128] *Id.*

[129] Abrenica, *supra* note 41 at 1.

[130] *Id.*

[131] JOAQUIN BERNAS S. J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1045 (1996).

[132] 93 Phil. 333 (1953).

[133] People v. Quasha, 93 Phil. 333 (1953).

focused on content vis-à-vis freedom of speech and expression.[134] The computer industry, on the other hand, operates on a free-market environment.[135]

C. Perceived Shortcomings of Present Regulatory Framework

It is apparent that these interfacing developments aiming for technological convergence necessitates regulatory reforms.[136] Hitherto, the different sectors have had to maintain distinct technologies, architectures and pricing mechanisms.[137] Separate franchises are required for each, although there is no explicit limitation on cross-ownership. [138] Eventually however, the envisioned multimedia network will have to have its own legal, technological and economic regime.

At present, the regulation of the telecommunications and broadcast industry is housed in one entity - National Telecommunications Commission. As it is, there are issues about delineating these two industries from each other - between infrastructure and content. The regulation of the broadcast industry has been upheld by the Supreme Court in a series of cases already, justifying the double requirements of licensing and franchising.[139] The issue delved more on the freedom of speech and expression of the broadcast industry. The issue about licensing the use of the airwaves was almost incidental to the main function of broadcasting, which is the transfer of information and expression through these airwaves.

Precisely, the technical nature of broadcast media causes entanglement with the traditional telecommunications sector. Broadcasting involves the conversion of vibrations from one voice or other inputs into electrical signals, which vary accordingly in strength and frequency, and which are amplified as they are transmitted onto a carrier wave.[140] Telecommunications, on the other hand,

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[134] Abrenica, *supra* note 41 at 167.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 179 and as provided in Rep Act No. 7925 (1995).

[139] Oliver Reyes, *Patrolling the Electromagnetic Spectrum: A Critique of State Regulation of the Broadcast Media in the Philippines*, 73 PHIL. L. J. 793 (1999).

[140] *Id.*, at 796, *citing* D. LIVELY, MODERN COMMUNICATIONS LAW 202 (1991).

had moved from the Plain Old Telephone Service (POTS),[141] to include some value added services like telexes, telegraphs, data communications, etc., [142] to the present phenomenon of convergence. Essentially, convergence allows all types of information - voice, data, sounds, images and video signals - to be processed and transmitted in the form of the 'bit' streams of binary code used in computers.[143] Digital telecommunications are more capable, more accurate and more flexible and hence, tend to be less costly than the analogue type.[144] As a result, the traditional delineation of telecommunications, computing and broadcast media technologies is further blurred as these converge around a core group of digitalized technologies. [145]

Other subsectors of telecommunications have also been needing adjustments in statutory allowance. The Cable TV industry, a booming sector on its own, was heretofore classified as broadcast media, and hence subject to the limitations of such sector. What the industry now pushes for is its classification apart from media or telecomms in general, and be labeled as is, i.e., *sui generis*.[146] With the advent of convergence, however, such distinction may become moot and academic, as cable TVs may become part and parcel of just one information superhighway.

The internet industry and mobile wireless communications are also intertwined as communications and computing convergence is on the brink of nascence. The biggest players in cellular phones are into the so-called "Bluetooth"[147] technology, i.e., a wireless technology that will use one of the available and unlicensed and virtually worldwide radio bands (2.4 GHz), and which can support both voice and data. A low-power radio module is to be built into mobile computers, mobile phones, printers, fax machines, and network connection points, and these devises are enabled to communicate with each

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[141] S. GRAHAM & M. SIMON, TELECOMMUNICATIONS AND THE CITY: ELECTRONIC SPACES, URBAN PLACES 12 (1996).

[142] *Id.*

[143] *Id.* at 14.

[144] *Id.* at 17.

[145] *Id.* at 14.

[146] H.B. No. 8916. Cable TV Act of 2000.

[147] A. Seybold, *Bluetooth Technology: The Convergence of Communications and Computing.* available at <http://www.gsmdta.com/artblue.htm> last visited August 4, 2000.

other. A practical example of this technology is receiving e-mail in one's computer (unplugged), through the wireless network.[148]

One practical illustration of the hiatus in regulation is that of voice and data convergence. Many companies have set up international long-distance telephone-to-telephone services via the internet, otherwise known as voice telephony.[149]

> When a consumer initiates the service using the traditional telephone system to connect to an internet gateway, the voice is encoded for Internet Protocol (IP) packet transmission. At this point, the transmission can no longer be identified as voice; it becomes a part of a common global data stream. Near its destination, the transmission is decoded into voice format and passed onto a local connection. it is then received by the called party via the telephone. *Since the differentiation of the message as voice, data, or video is only pertinent to the sender and receiver, as these are all transmitted as bits, regulating on the basis of information content becomes impractical.*[150] (emphasis supplied)

Such voice telephony is not billed as a telephone call, rather, it is included in the use of the internet facility. Inasmuch as this practice is precluded by statute[151], it is way out of the long hand of the law to monitor and keep track.

One other illustration is with respect to cable TV. While, traditionally, cable TV has delivered traditional mass media format, the same infrastructure can now be utilized for internet use.[152]

D. Issues to be addressed in Regulation

1. Content Regulation

Our pattern of regulating content has been generally consistent with the practice of most Western countries. Our Constitution has enshrined provisions

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[148] *Id.*

[149] *Id.* at 167.

[150] *Id.*

[151] Rep. Act No. 7925 (1995).

[152] *Next revolution on the Internet: Bandwidth.* THE PHILIPPINE STAR, 22 January 1999, at 26.

enhancing freedom of speech, expression and of the press[153]. Broadcast Mass Media, however, within the framework of those freedoms are regulated with respect to content[154]. There are certain sanctions as regards libelous, indecent and seditious material. In contrast, telecommunications and information technology services are relatively highly free from content regulation[155].

With the advent of communications convergence there may be some thorny issues with respect to regulating content. High data transmission rates could enable the telecommunication infrastructure to feed to consumers programs, similar to those aired by radio and television companies, at virtual broadcast modes over such media like the Internet. The problem arises then as to regulating its content. The Internet, which is working at a regulation-free atmosphere, may have to be regulated.[156]

There is some impracticability into it considering that the Internet has "borderless" features resulting to state jurisdictional objections and difficulty of enforcement. Upon the other hand, to allow unregulated Internet-like broadcasts (webcasts) would severely disadvantage the existing traditional broadcast companies which have to continue operating under some state regulation.

The obvious middle ground, of trying to equalize regulation by providing some form of regulation on webcasts and reducing the regulation on the traditional broadcasts may not be acceptable either, for in that case, the webcast is inherently difficult to subject to any form of content regulation at all. One proposal is to utilize the least amount of regulation similar to what is applied to the "print" media.[157]

To recall, the print and broadcast media has since been subjected to different regulatory treatment. The differential treatment has been grounded on two assumptions -- spectrum scarcity and the "unique and pervasive influence" of

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[153] CONST. art. III, sec. 4. *See*, also, CONST. art XVI, sec. 10.

[154] *See* Pres. Decree No. 1834 (1981), Pres. Decree No. 576-A (1974), NTC Memorandum Circular No. 11-12-85, NTC Memorandum Circular No. 22-89, NTC Memorandum Circular No. 6-11-90, NTC Office Order No. 12-3-90.

[155] The Electronic Commerce Act has relevant provisions with respect to electronic transactions and electronic documents.

[156] Abrenica, *supra* note 41 at 167.

[157] T. Krattenmaker & L. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L. J. 1719 (1995).

broadcast media. In *Telecommunications and Broadcast Attorneys of the Philippines, Inc. and GMA Network, Inc., vs. COMELEC*,[158] the Court emphasized that:

> There are important differences in the characteristics of the two media, however, which justify their differential treatment for free speech purposes. Because of the physical limitations of the broadcast spectrum, the government must, of necessity, allocate broadcast frequencies to those wishing to use them. There is no similar justification for government allocation and regulation of the print media.[159]

As to the impact of the broadcast media the Court noted that "because of the unique and pervasive influence of the broadcast media, "[n]ecessarily . . . the freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper and print media."[160]

Noting the weakening of the argument as to spectrum scarcity due to technological advances, one American writer would like to "discard the inherently silly notion that freedom of speech depends on the configuration of the speaker's voicebox or mouthpiece."[161] It continues to propose that the print media model of regulation be uniformly utilized.

An underlying theme in most of these proposals is the idea of uniform regulatory treatment for the various media. Consequently, it treads into proposals of drastic overhauls towards common regulations and even common regulatory bodies.

On reflection, however, such drastic calls may have to be tempered. One reason is that technological convergence is still uncertain.[162] This is not uncommon in the technological field. When satellites came into being, copper based submarine cables were thought to be at its end. However, with the coming of fiber optics, submarine cables have been reinvigorated.[163] During the late 1980s, the French videotex system, with its Minitel terminals was seen as a success and a

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[158] G.R. No. 132922, April 21, 1998.
[159] Krattenmaker & Powe Jr., *supra* note 158.
[160] *Id.*
[161] *Id.*
[162] Waters & Lloyd, *supra* note 1.
[163] Guterl & Zorpette, *supra* note 11 at 30.

"model to be followed."[164] However, it has now been "unceremoniously supplanted by the Internet."[165] No one is likely to bet on which particular technology would be the primary carrier of the converged environment.

Second, with respect to content, there is reasonable basis to propound that what is actually being regulated is not the medium but the totality of the "communicative values."[166] Regulation seeks to preserve these "communicative values."[167] Communicative values would include user control, access, right to information, and right to privacy. In broadcast media, there is less user control in broadcast or as the Court would have it "lesser opportunity to cogitate, analyze, and reject the utterance."[168]

It is then argued that regulatory structures are based not so much on technical difference, but more on "communicative values" such as access and user control.[169] In this regard, the impact of speech to users and consumers may depend on "speaker's voicebox or mouthpiece." One needs only to remember the events in the Impeachment Trial.[170] It is believed that even if all the newspapers covered the entirety of the trial, the same result would have been achieved as the live airing of the proceedings over the radio and television.

One could easily note that even if the same information were transmitted via media such as webcasts, the extent of user or consumer choice would be infinitely different with that medium.[171] The user interface becomes significant. Unlike television where the only control left to the user is a decision to change

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[164] T. Bell, *Communications: Big Gains for Mobile Communications, Cables Bring Optical Fibers to the Home, Open Networks for Service Providers, A Boost for Videotex.* IEEE SPECTRUM. January 1988, at 43.

[165] Waters & Lloyd, *supra* note 1.

[166] H. Wright. *Law, Convergence and Communicative Values on the Net.* 7:1 J. L. & INFO. SCI. 54 (1996).

[167] *Id.* at 58.

[168] Eastern Broadcasting v. Dans, Jr., G.R. No. 59329, 19 July 1985, 137 SCRA 635, 636.

[169] Eastern Broadcasting v. Dans, Jr., G.R. No. 59329, 19 July 1985, 137 SCRA 635, 636.

[170] This refers to the Impeachment trial of Pres. Joseph Estrada where on its final day, the populace reacted swiftly to the decision of the Impeachment Court, broadcast live in several TV stations, not to open an envelope which contained evidence of certain bank transactions. The swift reaction generated rallies spontaneously and led to the then President's departure from the Presidential Palace.

[171] The analogy is made to looking for a book in "a library where all the books have been dumped on the floor with no particular order." Cited in H. Wright, *supra* at 60, which traces his citation to R. Calem, *The Network of All Networks*, NEW YORK TIMES, 6 December 1992.

channels (or turn the set off), webcasts arrive through a general-purpose personal computer with infinitely different choices for the user. With that distinction, existing regulatory regimes differentiated with respect to traditional broadcasts and webcasts may still be applicable.

If the overall impact will result into one information medium functionally approximating the effects of the other invaded medium, then that information may have to come under the regulatory regime of the invaded medium. One example is that a telecommunications company providing telephone sets with built-in TV-like device capable of communicating voice and while internet is being accessed. Suppose, further, the telecommunications company pre-programs the TV-like device to access only limited sites in the internet (webcast sites). It is submitted that in this case, the telecommunications company is conducting broadcasting activity. It would them have to be subjected to rules on broadcasting such as editorial responsibility. For here the user is confronted with limited choices enabling the device to have the same pervasive effect as television. There is less argument here for the need for some legal convergence to parallel the technological convergence. The communicative activity might as well be regulated by the existing rules and bodies.

2. Access Rules

Under existing rules, save for general rules of conduct,[172] mass media and the information services are under no obligation to provide access to the services or information that they carry or provide. In contrast, telecommunications companies are mandated to provide universal access.[173] At the present stage of technology, cable TV companies could provide their subscribers with cable

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[172] Referring to the Civil Code provisions and such other laws generally applicable and not industry specific.

[173] Rep. Act No. 7925 (1995), sec. 20 provides:

> Rights of End-Users. - The user of telecommunications service shall have the following basic rights:
>
> Entitlement of utility service which is non-discriminatory, reliable and conforming with minimum standards set by the Commission;
>
> Right to be given the first single-line telephone connection or the first party-line connection within two (2) months of application for service, against deposit; or within three (3) months after targeted commencement of service in the barangay concerned per the original schedule of service expansion approved by the Commission, whichever deadline comes later....

modems and allow them to access the Internet[174]. In turn, on the user side, voice could be transformed into binary signals, transmit over the net and re-convert the signal to voice at the other end[175]. In a sense, voice telephony is achieved bypassing the telephone company. Should the cable company be treated as a telecommunications company and thus subjected to a separate franchise requirement and to the universal access obligation? Treating it as a telecommunications company would now require an essentially broadcasting service to provide its services to its service area. On the other hand, ignoring its telecommunicative activity would give cable companies an undue advantage over telecommunications companies that have to comply (theoretically, at least) with their universal access commitments.

It may be proper to scrutinize further the activities of the cable company[176]. If it had provided dedicated devices such as a cable-TV with a built-in phone with such device automatically communicating to an internet service provider which sends back the dial tone, it could be said that a functional equivalent of the telephone has indeed been achieved. If, further, that cable TV company has made interconnection arrangements with other similar converged cable-TV companies, its activity bears little difference to that of a telecommunications company. On the other hand, if the cable-TV company has made no such effort at telephony and simply provided internet access over the same infrastructure, it has no control on a consumer which uses a general purpose device, like a PC, to perform voice operations over the Internet, there is no reason to treat the cable company as a telecommunications company.

At present, a cable-TV company which is performing telecommunications services, as in our first example above, is addressed by the existing rules and is treated as a telecommunications company[177]. It will, then, have to secure a separate legislative franchise as well comply with both universal access and interconnection obligations. Again, no such dramatic regulatory overhaul is of an apparent need. Some changes may be needed though. One is that the rules should be so stated that this type of a cable-TV company be treated as a telecommunications entity only with respect to and the extent that it operates

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[174] Destiny Cable, Inc. and Sky Cable are providing this service in selected areas.

[175] Also known as Voice over Internet Phone (VOIP).

[176] A pending bill H.B. No. 8916 seems to treat Cable TV service on the same footing as a telecommunications company with respect to foreign ownership cap. It may clash with the Constitutional limitation of 100% Filipino ownership requirement as to mass media.

[177] NTC MC No. 8-9-95.

a telecommunications service. But this change may even be effected at the level of the concerned agency by way of its rule-making or interpretative functions.[178]

V. CONCLUSION

After scrutinizing available jurisprudence and statutory interpretations, the limitation posed by the Constitutional proscription as to ownership of broadcast media and public utilities particularly telecommunications companies, in view of technological convergence, appears to have become diluted. In short, the prohibition became less restrictive. The pronouncements of the Supreme Court in the cases discussed have definitely opened a way to go about technological convergence without necessarily violating the Charter.

Whether this interpretation could go a long way without leading the legal field astray and without inflicting harm to the ideal of "Filipino ownership" of such entities remains a speculation. Whether the "fears" of the deleterious effects of such dilution of Filipino ownership on these entities is justified or not, is another matter. Whether this track we have taken is nothing but an indirect violation of the Charter, is yet another issue to tackle. For now though, the Supreme Court has made rulings on tidbits of the puzzle, and how good or nasty it looks is beside the point.

With respect to content regulation and access rules, drastic regulatory changes may not be necessary for us to be able to deal with communications convergence. This is due mainly on two reasons. While present technology may allow for convergence, its actual face with respect to the consuming market has not yet been definitively established. One cannot simply assume that a particular user interface, capable of undertaking the converged activities, will gain acceptance much less pervasiveness.

The other reason is that the regulatory goals are determined relative to the totality of *communicative values* or activity. No problem is seen, if, as a result of the use of convergent technology, the overall impact of the activity of an entity engaged in one component will result into functionally approximating the effects

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[178] An expanded role for administrative agencies may have to be allowed to enable it to prepare more responsive rules similar to the theory of "permissible interpretation" in Chevron vs. Natural Res. Def. Council 222 U.S. App. D.C. 268, 685 F. 2d. 718 *reversed* 467 US 837, 81 L Ed 2d 694.

of the other invaded component. In such a case, that activity will have to be regulated by the regulatory regime of the invaded component. Hence, existing rules, with slight and appropriate adjustments, may suffice to address the perceived hiatus in regulation.

Admittedly, there is a critical value of technological convergence to less developed countries like ours - and that is the vast channels to information that convergence opens up,[179] not to mention the benefits the consumers can avail of due to less expensive and innovative communications systems.[180] Amidst the policy discussion and arguments regarding Constitutional restrictions and regulatory reforms are the realities of the "expected" novelty as technological convergence. And one thing is definite – we are in the information age, where power resides with whoever gets information fast and first.

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[179] Abrenica, *supra* note 41, at 179.
[180] *Id.*