



WING TIPS

Getting to Grips with Digital Convergence

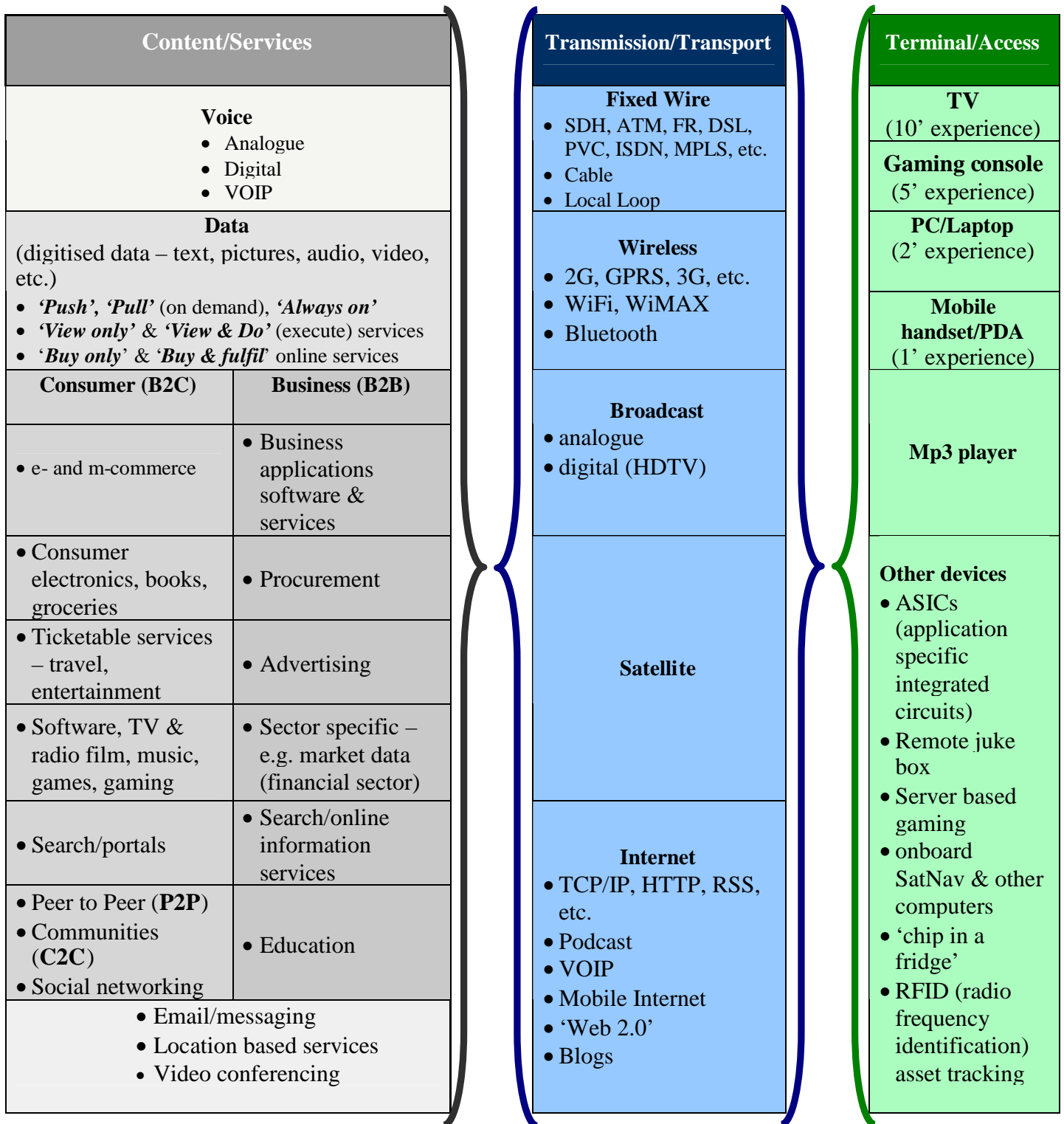
Back in the run up to 2001, conferences where lawyers waxed knowledgeable about the legal implications of convergence were two a penny; the only snag was, convergence wasn't really happening. Now, when convergence is everywhere, and on an epic scale, no one seems to be talking about it much. What is it, and what does it mean for lawyers?

Convergence is a classically humpty dumpty word, with a different meaning for almost everyone who articulates it.

In business terms, it's Moore's Law (computer power doubling every 18 months) bringing about the coalescence of four previously distinct industries – media/entertainment; software and computing; consumer electronics; and communications. A bit more analytically, if you view it from left to right as content, transmission and terminals, then it is convergence within, and between, each stack, along the lines of the diagram over.

For content and services, convergence is the digitisation of information; for transmission, it's broader bandwidth as wire, wireless, broadband, satellite and the Internet all get faster and intersect; and for terminals, it's chips with everything. Put together, you have a volatile, fast moving and creatively destructive mix. The internet continues to drive the pace of change. Having 'disappeared down a thousand foxholes' after the .com bust, it is now old enough for leading companies like Google, Yahoo, amazon.com, eBay and expedia to have matured without a prior life offline. 'Web 2.0' - 'the internet as a platform'; 'software as a service'; 'you control your own data'; 'participation not publishing' – will drive structural change at an increasingly faster pace, forcing businesses to adapt more quickly to survive and thrive. Business is placing big bets on eventual outcomes as the contours of a newly converged world start to emerge: this is the context in the UK for BSkyB buying Easynet and NTL buying Virgin Mobile and in the USA of eBay buying Skype, for example.

Elements of Digital Convergence



Commercial and corporate law

Commercial and corporate lawyers will need to get to grips even faster with new patterns of business, operations and deals, and the way the agreements reflecting them are put together and documented. Web advertising, the power of search, the move from perpetual software licences sold through distribution to subscription licences

sold direct – all these reflect the evolution of business patterns and the contract forms that underlie them.

Intellectual property law

Second, intellectual property law, always struggling a step or two behind the evolution of technology, has to keep up increasingly quickly. Patenting software and other new techniques have taken on an increasingly frenetic pace, especially in the USA, as businesses seek to gain advantage. Data – the raw material of the converged world, but peculiar and elusive stuff in legal terms – becomes increasingly valuable. What legal wrappers – copyright, database right (in the EU, only), confidentiality, bailment - can you put around information to protect and exploit it? Expect this to come before the courts and the legislators increasingly frequently. The EU review of the database directive, recently eviscerated by the European Court of Justice in the William Hill case, and the Gower Review of Intellectual Property in the UK point the way.

Regulatory

Thirdly, convergence lawyers face more regulation, and in more forms. Data privacy has risen to the top of the agenda in today's security conscious world and will stay there. Consumer protection rules have adapted to the online world. Communications convergence means the coming together of broadcasting (traditionally content-based) and telecoms (traditionally infrastructure-based) regulation. Issues such as whether a mobile operator should be regulated as a broadcaster where TV is streamed over mobile will continue to play themselves out. And as digitisation and the internet shape and change industries like travel and financial market data, regulation of those entire sectors adapts: think of the Markets in Financial Instruments Directive (MiFID) going through EU Member States' legislative processes right now.

Competition law

Fourthly, competition rules evolve to take account of the newly market powerful businesses that convergence is creating, raising searching questions. When the risks of business failure are so high but the rewards in the digital world of network effects so great, what's the right balance to strike between muzzling and encouraging powerful, innovative businesses? How do you measure whether prices are too high or competitors are being excluded from a particular market? Where technological and market change is so rapid and fundamental, how do you measure durable market power? What yardstick do you measure by – effect on consumers or on other suppliers?

One thing is for certain for lawyers in the technology space – the range and depth of work in this field has never been so stimulating.



To learn more about more about this issue and how you can protect your business, email Richard Kemp at Kemp Little LLP at Richard.kemp@kemplittle.com