

two solitudes consulting

Exploring the convergence and collision of traditional and new media

Re: Public Notice CRTC 2008-44

Call for comments on the scope of a future proceeding on

Canadian broadcasting in new media



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Introduction

1. This submission is authored by Alan Sawyer, Principal Consultant, Two Solitudes Consulting.
2. Two Solitudes Consulting¹ was founded in 2006 and specializes in the analysis of the simultaneous convergence and conflict between the traditional and new media worlds. As such, we wish to offer the Commission the benefit of our research and analysis of the media world as it stands today and some of our projections for the evolution and revolution it will undergo in the coming years. We respectfully present our analysis to the Commission in the role of a disinterested third party.

Scope of comments

3. Our primary focus in this submission will be television content, although many of the same principles we will discuss apply equally to radio. Although gaming and other forms of interactive media are a very important part of the new media world and the Canadian new media economy, we believe that, at this time, they are beyond the scope of the Commission's intended analysis and accordingly we have not commented on these forms of media.
4. New media is comprised of both the medium and the message and both have changed.
5. The medium (in most cases, the Internet) is new and unlike its radio-wave-based predecessors. By its very nature, it is usually not a one-to-many distribution mechanism, unlike all traditional television distribution mechanisms.
6. The message (the content) is both like and unlike the content with which we are very familiar. In the case of television-related content, we have a mix of the old and the new. We have full episodes being made available by way of alternative distribution channels but we also have new forms of TV-related content and some of it has levels of interactivity and audience participation that were impossible with conventional television.
7. In the new media world, the medium and the message are complexly intertwined and will become increasingly so going forward as new levels of interactivity emerge.
8. At the risk of over simplification, we'll say that the medium is the purview of the Telecommunications Act while the message is the purview of the Broadcasting Act. From the Commission's statements and questions, we have inferred that the main focus of the current

¹ Two Solitudes Consulting is a division of Assyst Consulting Inc.

process is to review the state of new media as it pertains to the objectives of the Broadcasting Act.

9. Accordingly, we will put the emphasis on the message rather than the medium in our submission. That being said, we encourage the commission to consider the medium and the message in a holistic manner at this time including the all-important issue of fair and reasonable access to the message by way of the medium (i.e. net neutrality). If the Commission opts not to examine net neutrality at this time, we strongly encourage it to do so in a separate in-depth formal proceeding before making any decisions regarding new media.
10. Our submission will focus on the following areas:
 - a. [interpretation of current new media practices within the definitions and scope of the Broadcasting Act, 1991](#)
 - b. [our view of the future of the media world and the implications this may have on public policy](#)
 - c. [answers to the four questions posed by the Commission](#)

Executive Summary

11. The definitions provided by the *Broadcasting Act, 1991* are very broad and give the Commission considerable latitude. The broad definitions work to the Commission's benefit by allowing it to explore options with respect to new and evolving technologies but, at the same time, create difficulty in determining the effective and reasonable scope of the Commission's mandate. The vague definitions contained within the Broadcasting Act have the potential for unintended consequences if applied to the new media world without very careful consideration. This document explores these problematic definitions in [detail](#) within the main document body.
12. As an example, the distinction between broadcasting and retail distribution was traditionally very clear. However, increasingly, within the realm of both rental and sales, physical distribution is giving way to digital distribution and that is not specifically excluded from being "broadcasting" by any of the definitions within the act.
13. The vague wording of the Broadcasting Act, 1991 provides no meaningful parameters as to what should or should not be considered broadcasting. The Broadcasting Act could be applied to a vast array of new media activities, and the Commission would seem to be within its authority to do so. However, for every rule the Commission might define there'd be many exceptions. Defining intent is easy, defining workable definitions for "new media broadcasting" will be nigh on impossible. And, should the Commission succeed in such an endeavour, savvy businesses and consumers, aided by ever-changing technology, won't take long to find a way around things that they find too restrictive.
14. The New Media Exemption Order has been effective in allowing Canadian companies to easily explore new media, and this is consistent with the Act's objectives as outlined in Sections 5(2)(f) and (g). At the same time, though, the door has been left open for foreign entities to provide new media broadcasting services to Canadians.
15. Traditionally we deal with closed "networks" (cable, satellite, MDS and telco-IPTV). Jurisdiction for the Commission is clear. In the new media world, though, much content is available to Canadian consumers wherein the originating computer (in essence, the transmitter) is located beyond Canada's borders. In the evolving world of alternative delivery channels for content, we need to consider matters from a global perspective and consider a myriad of transmission technologies and channels.
16. Canadian consumers have grown accustomed to having access to Internet content at the discretion of the content distributor not the discretion of the regulator. There would be an inevitable and significant consumer backlash to the imposition of any restrictions on the ability to consume the foreign content that they can today.
17. While today the Commission considers the traditional Canadian broadcasting system, the Internet, and wireless platforms to be discrete entities, we believe that in the not-so-distant

future these distinctions will cease to exist. The implications of this are profound. We will have one unified system, offering content from around the globe, and the Commission will need to address this in a holistic manner.

18. Canadian content quotas don't make sense in a world of unlimited choice and an absence of scarcity. That's not to say that Canadian content becomes any less important, nor that government financing and incentive programs should disappear – in fact, in the face of global competition and the absence of a protected and controlled system, these are more important than ever.
19. Consumers have many content choices today and these will only increase in number. We don't believe that regulators should inhibit this. The emerging world often better serves the interests of the consumer than the conventional one – and better addresses many of the cultural objectives of the Broadcasting Act. Ethnic and niche audiences can be addressed to a degree that is impossible within the capacity limitations that exist today in all conventional distribution mechanisms. The barriers to entry have fallen and any Canadian can tell a story and distribute it. And when Canadians are enabled to tell stories, many of the stories they tell are of a Canadian nature.
20. Canadian media companies will need to compete within a global content ecosystem against content from around the world. The transition won't be easy, and we will fail if not adequately supported by government. We don't believe that regulatory measures are a tenable or reasonable approach. Rather, we believe that Canada should focus on incentive-based approaches and industrial policy initiatives to ensure that Canadian's have the greatest possible chance of success. Does that mean a continuation of a subsidized content creation industry? *Absolutely.* Does it mean a long-term continuation of the broadcast-centric models upon which we really today? *Certainly not.*
21. The emphasis needs to be on enabling Canadians to tell stories, and create and sustain jobs within the Canadian economy. The methods we use need to focus on perpetuating the *message*, not preserving the status quo for a single *medium*. We need to wean ourselves off of the existing broadcast-centric model and move to a platform-independent model that combines economic stimulation and financial subsidy.
22. The Commission may wish to consider a new “new media broadcaster” license class that is offered on a voluntary opt-in basis, providing benefits to licensees (for example, possibly access to CTF funds) while at the same time imposing reasonable obligations. That being said, it would be important that the resulting administration burden imposed on both licensees and the Commission be minimal and also that such a system would not put those who choose not to opt in at a significant disadvantage.

23. Some ISPs are performing traffic shaping activities that have the potential to interfere with a consumer's legitimate access to online content. While perhaps necessary (at this time), the Commission should ensure that these are not done in such a way that consumers are denied fair and reasonable access to online content.
24. Some ISPs are implementing bandwidth caps that may deter consumers from viewing TV content over the Internet.
25. In Canada, at a corporate enterprise level, the major Internet Service Providers (ISPs) are also Broadcast Distribution Undertakings (BDUs). A proliferation of broadcast content that is available by way of the Internet could undermine the profitability of BDU operations. The Commission should ensure that potentially conflicting interests within combined ISP-BDU operations don't cause the consumer to suffer.
26. New media platforms have great potential to augment the experience for hearing- and vision-impaired consumers and indeed have the opportunity to provide more sophisticated services for these consumers than exist today in the conventional television world through closed captioning and described video. In a previous evaluation we observed that most new media programming, both in Canada and the United States, largely disregarded the needs of these audiences and does a disservice to those who have impaired hearing or vision. This creates a formidable barrier to their enjoyment of new media broadcasting content. We recognize that the Commission is conducting separate investigations into this subject but would encourage the Commission to be sure to consider these needs and the new opportunities that exist to address them as part of any new media policy decisions, too.
27. It is not uncommon for broadcasters to obtain exclusive and far-reaching rights with respect to new media for the broadcast properties that they also license. Exclusive licensing of content is valid competitive behaviour. However, when an entity obtains exclusive rights to a property but does not use them, that is anti-competitive behaviour and does a disservice to consumers by denying them access to content.
28. While broadcaster broadband streaming is becoming more common, and may satisfy the wants of some consumers, others want access to content in a more flexible manner and it is incumbent upon the industry to address these consumers' needs. If a broadcaster does not wish to make the content available in other ways they should not obstruct this by precluding others from having the opportunity to service these consumers.
29. Such practices also do a disservice to the content creators and others in the value chain. Money is being left on the table to the detriment of the producers and everyone else who has an interest in the potential revenue including the actors, directors, as so on.

30. Through new media channels the opportunity for Canadians to consume content from and interactively connect with other cultures, both on a domestic and international basis, has accomplished more in this regard than could ever have been possible in the current distribution world. Care must be taken to preserve the benefits that new media has made possible in this area.
31. The code of ethics developed by the Canadian Association of Broadcasters (CAB), and as administered by the Canadian Broadcast Standards Council (CBSC), has been effective within the traditional broadcast world. In the new media world, no equivalent Canadian body exists to guide and influence content originating within Canada. The Commission may wish to consider the implications inherent in this.
32. Keeping the domestic market open to Canadian companies provides an environment that fosters experimentation and innovation that can be applied to the world stage. The Commission must not inhibit Canadians from using new media to tell stories. Closing or unduly restricting the market will drive Canadian new media companies to forego the domestic market. Without a viable domestic market, companies will either fail to innovate or will only do so in their quest to succeed in foreign markets and, in doing so, tell stories that aren't Canadian in nature.
33. Licensed Canadian broadcasters need to be able to leverage new media opportunities in order to remain relevant and reach audience segments that have tuned out from conventional distribution; at the same time, we can't allow licensed broadcasters to use new media to do an end run around the Broadcasting Act's cultural objectives. The responsibilities and conditions of license that apply to broadcast licensees should, to the extent reasonable and practical, extend to the new media world – with the caveat that in doing so we must balance the need for responsible cultural conduct for the benefit of the country with the simultaneous need for licensees to develop and grow their presence in alternative delivery channels in order to compete against a global influx of new media content.
34. The examination being undertaken by the Commission of "new media broadcasting" should be done with recognition of the fact that the "new media" world of today is an interim and transient state and that today's discrete distribution methods will increasingly converge. A holistic examination of all "broadcast" activity is therefore indicated.

*** END OF EXECUTIVE SUMMARY ***

*** BEGINNING OF DOCUMENT BODY ***

Interpretation of current new media practices within the definitions and scope of the Broadcasting Act

35. In order to contemplate what the scope of new media broadcasting should be from the Commission's standpoint, it is essential first to explore what the existing definitions could be interpreted to encompass. The Commission did this in 1999, but much has changed since then that necessitates, as the Commission is clearly aware, a complete re-thinking of things.
36. The definitions provided by the *Broadcasting Act, 1991* are very broad and give the Commission considerable latitude. The broad definitions work to the Commission's benefit by allowing it to explore options with respect to new and evolving technologies but, at the same time, create difficulty in determining the effective and reasonable scope of the Commission's mandate. The vague definitions contained within the Broadcasting Act have the potential for unintended consequences if applied to the new media world without careful consideration.

Broadcasting

37. Beginning with the definition of *broadcasting*², it's clear that the wording "other means of telecommunication"³ can be interpreted to include program content transmission that is communicated over networks including the open public Internet. The inclusion of radio waves encompasses private wireless networks including those operated by Canada's licensed wireless operators.

Broadcasting Receiving Apparatus

38. The definition of *broadcasting receiving apparatus*⁴ is extremely vague. Obviously, it includes television sets with built-in tuners and the set-top boxes in common use today for services such as digital cable and satellite TV. It could also encompass personal computers (PCs), personal digital assistants (PDAs), cell phones, and many other devices. Specialized built-for-purpose set-

² "broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place [BA 1991 Section 2(1)]

³ "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system [BA 1991, Section 2(2)]

⁴ "broadcasting receiving apparatus" means a device, or combination capable of being used for the reception of broadcasting [BA 1991 Section 2(1)]

top boxes such as Vudu⁵, or Apple's Apple TV product, would also meet the vague definition found within the Act.

Program

39. In the traditional broadcasting environment, with established gatekeepers who are dependent upon audience size to attract advertising dollars or upon compelling content to attract subscribers, content that doesn't meet minimum quality standards never gets to air. Amateur content, except when encompassed within a professionally produced program, doesn't see the light of day either. The Act, accordingly, does not address the issues of production quality or distinguish between amateur and professional content.
40. As defined within the Act, a program⁶ can encompass virtually any audio-video content that is not predominantly textual in nature. Nothing in the definition limits the nature of the content, nor does it in any way imply that the content must be professionally produced, or meet any subjective or objective quality measures. Amateur content, such as is found on sites like YouTube, is not specifically excluded by the definition.

Transmission

41. One key word is not defined in the Act: *transmission*. While, the Act does define "programming undertaking" as an activity involving "the transmission of programs", the word transmission itself is not defined. While the program undertaking⁷ definition would appear to encompass the transmission of content over the Internet and to mobile devices, the nature of the transmission remains undefined.
42. When the Broadcasting Act, 1991, was passed, the word transmission, when considered in the context of television, was a straightforward and obvious concept that did not require elaboration. It meant, in practice, the one-to-many real-time communication of content directly by a *broadcast undertaking* or by way of a *broadcast distribution* undertaking (BDU) to a *broadcast receiving apparatus*.

⁵ Vudu is a movie-on-demand service available in the United States. See www.vudu.com for more information.

⁶ "program" means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text [BA 1991, Section 2(1)]

⁷ "programming undertaking" means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus [BA 1991, Section 2(1)]

43. Since 1991, though, the world has changed and the concept of transmission with respect to *program* content has changed, too. One-to-one distribution of content (sometimes referred to as unicasting) is common now through BDU-based Video-On-Demand (VOD) offerings. One-to-one distribution is very much the norm in Internet-based content delivery (although some broadcasters do one-to-many simulcasting of their broadcast programming on the Internet).
44. Traditionally, with real-time distribution, real-time consumption was the norm. While time-shifting by way of VCRs, DVRs and Media Centre PCs has been an option, it still required the recording device to record in real-time, in concert with the incoming real-time signal.
45. Within this store-then-view paradigm, the transmission and the viewing experience are decoupled. It is possible, therefore, to choose between real-time, faster-than-real-time and slower-than-real-time transmission models.
46. Streaming is generally analogous to the traditional real-time broadcast model while downloading tends to be an asynchronous activity in which reception and viewing are temporally separated (decoupled).
47. Because the Act does not give us a definition of *transmission* with which to work, and because the common usage of the word would include the delivery of downloadable content over a network, we can consider that the usage of the word transmission, within the Act's definition of broadcasting, could be said to include downloading.
48. From a technical perspective, a fine line exists between downloading and streaming. Both involve the transmission of encoded audio-video content from one computer to another⁸. In both cases, the content generally is stored on the receiving device, in its entirety or in small amounts to serve as a buffering mechanism. Consumption of streaming is generally done in a real-time manner, although consumers can 'pause' streaming content and continue it at a later time. In many such situations, the transmission continues through to the end of the content and the un-viewed content is stored on the receiving device until it is viewed.
49. Rules that differentiate between content that is considered to be streamed versus that which is considered to be downloaded will be difficult to define and enforce. The technical distinction is between the two is blurry and operators can manipulate their usage of various transmission technologies to their own best advantage with respect to any rules they must follow or in order to avoid having to comply with any such rules.

⁸ We must view the definition of "computer" in a broad and inclusive sense and include not only stand-alone personal computers but also built-for-purpose devices including hybrid set-top-boxes, gaming consoles, Internet-enabled TV sets, and mobile phones and PDAs.

Business models

50. It is important to note that the Act specifically does not address business models so we can interpret that it could extend to any free, advertising supported, subscription, pay-per-view / *a la carte* or paid download model (and variations and combinations thereof). That being said, it must therefore be noted that the Act does not differentiate between paid and free content, nor does it differentiate between a consumer's one-time right-to-consume and time-limited or other restricted licenses. For that matter, perpetual licenses (perceived by the consumer as the purchase of content) aren't excluded either. Activities that would be viewed as content rental and purchase aren't differentiated from free, pay-per-view or *ad hoc* content acquisition in the Internet world.

Broadcasting versus retail distribution

51. Traditionally, the distinction between broadcasting and retail distribution was very clear. When consumers acquired content with a perpetual viewing license, they did so by purchasing a copy of the content on physical media. These were retail activities and were clearly outside of the scope of the Act as they did not involve the transmission of content. Likewise, when a consumer rented content, he/she did so by way of a physical DVD or VHS tape and that, too, could not be construed to be broadcasting. However, increasingly, within the realm of both rental and sales, physical distribution is giving way to digital distribution – and in that model the content is indeed transmitted to the consumer – and such an activity is not specifically excluded from being “broadcasting” by any of the definitions within the act.

52. The situation created by downloading and the fact that digital distribution is obviating the need for physical media is quite problematic in that it becomes very difficult to define precisely where broadcasting ends and retail begins.

53. We realize, of course, that the Commission has no intention of interfering with retail activities, nor does it appear to be interested in User-Generated Content – but the Commission will be hard-pressed, we believe, to define parameters that clearly separate broadcasting from retailing and “broadcast content” from other audio-visual content.

Theatrical movies

54. The Broadcasting Act has always concerned itself with television content. Movies only become of relevance to the Commission when they are broadcast on television and, in effect, become television content. That is to say, when presented in theatres (“public exhibition”) or distributed for sale or rental through retail channels, movies have been exempt from the Commissions’ scrutiny. Today, though, in Canada we are seeing the early days of direct-to-consumer digital distribution of movies through services including Apple’s iTunes and the Bell Video Store. While

these examples are download-based services, other services such as Vudu (vudu.com) in the United States stream movies (and TV shows) to consumers over their broadband connection to a special-purpose set-top box – there’s every reason to expect that such services will make inroads into Canada in the future. Is any of this broadcasting? Is all of this broadcasting? It’s certainly food for thought.

Interpretation Summary

55. We can see from the discussion above that the vague wording of the Broadcasting Act, 1991, provides much latitude to the Commission but provides no meaningful parameters as to what should or should not be considered broadcasting.
56. From a simple transmission point of view, though the Act doesn’t provide a definition of the word, it appears clear that the Internet and mobile networks could be considered as being transmission vehicles for the intent of the Act.
57. Clearly, much activity exists today on the Internet and, to a lesser extent, mobile networks, that meets the definition of a broadcast undertaking. The range of activity this encompasses, though, is extremely broad. It would be easy to say that broadcasters’ broadband sites that stream broadcast content do indeed constitute broadcasting and that YouTube’s streaming of amateur content does not, but the Act doesn’t provide the framework to justify this position. Furthermore, while the Commission has indicated that its interest lies with high-quality professionally produced content, the yardsticks by which we might determine quality don’t exist. We can’t arbitrarily apply technical measurements such as image format (e.g. 480i through 1080p) from the conventional world as new media content is often presented by way of alternative delivery channels in lower-resolution (but still fit-for-purpose) formats. Qualitative assessments would be equally arbitrary and it would be an unmanageable task to assess vast amounts of content.
58. A definition for “professionally produced content” is also problematic. Do we measure it on the actual ability to monetize the content and thereby receive some form of remuneration, or is the intent (or hope) to monetize (whether successful or not) sufficient to indicate professional production? Or would we define it based on the involvement of one or more recognized guilds, unions, associations or funding agencies – whose purview may not even extend to new media pure play initiatives.
59. As seen, too, the Act doesn’t provide insight for dealing with emerging business and distribution models, and those that are already in place today, in the new media world. If a consumer pays to watch an episode of a television program, is that a broadcasting or a retail activity – or both? Does the answer change dependent upon whether the content is downloaded as opposed to streamed? Does the answer change based upon the duration of the license that is granted to

the consumer and, if so, what's the demarcation point that differentiates a broadcasting activity from a retail one?

60. In conclusion, while the Broadcasting Act could be applied to any of the new media activities discussed, and the Commission would seem to be within its authority to do so, the parameters aren't provided to do so in any meaningful way. For every rule the Commission might attempt to define there'd be many exceptions. Defining intent is easy, defining workable definitions for "new media broadcasting" will be nigh on impossible. And, should the Commission succeed in such an endeavour, savvy businesses and consumers, aided by ever-changing technology, won't take long to find a way around things that they find too restrictive.

Canadian broadcasting versus broadcasting in/into Canada

Licensed entities and exemptions

61. The traditional domain of the Commissions' activities has been that of licensed entities – specifically, those involved in broadcast undertaking and distribution undertaking. Entities engaging in these activities without a license, unless specifically exempted, are "guilty of an offence"⁹.
62. In the conventional world, licensed "broadcast undertakings" are conventional and specialty services and their activities involve "programming undertaking" either directly by way of over-the-air transmission or indirectly through "distribution undertakings". "Distribution undertakings" are cable, satellite, MDS and telco-IPTV operators who aggregate and distribute the signals of broadcast undertakings.
63. In the new media world, though, we find that activities that could reasonably be considered to be broadcast undertakings are being done by both CRTC-licensed broadcasters and by unlicensed entities. The 1999 New Media Exemption Order protects these unlicensed participants from the punitive provisions of the Act that otherwise apply to unlicensed activities.
64. Most if not all licensed Canadian broadcasters engage in distribution of program content over the Internet and/or mobile carrier networks to some degree. These activities are also covered by the 1999 New Media Exemption Order and, therefore, requirements for Canadian content

⁹ Broadcasting without or contrary to license; Broadcasting Act, 1991, Section 32(1).

and other conditions of licence would not seem to be enforceable with respect to the content distributed in these manners.

65. The New Media Exemption Order has been effective in allowing Canadian companies to easily explore new media, and this is consistent with the Act's objectives as outlined in Sections 5(2)(f) and (g). At the same time, though, the door has been left open for foreign entities¹⁰ to provide new media broadcasting services to Canadians.
66. In the traditional world, broadcasting in Canada meant, for the most part, broadcasting by Canadian corporations. While foreign services have increasingly been permitted distribution in Canada, section 10 (1) (g) has allowed the Commission to use its discretion in determining which services would be permitted. Cross-border "leakage" of over-the-air broadcasts has, of course, always been a reality, too, but the scope and impact of this is limited by the strength of the signals.
67. Today, though, Canadians have access to new media content from around the globe and much of this content could be construed to represent "programming undertakings".
68. Canadians are denied access to a lot of content, though, through the practice known variously as geo-fencing, geo-gating and geo-blocking. As the Commission well knows, this practice has been initiated by media companies and is in no way the by-product of regulatory policy. It is purely a voluntary practice, driven by monetary and content licensing concerns. We can't assume, though, that this policy will continue forever and need to consider the potential implications of foreign (and in particular U.S.) broadcasters and producers distributing content directly to Canadians. Although in most cases this would not be "Canadian content" it would still potentially constitute broadcasting in (or into) Canada.

The Global Village

69. The Broadcasting Act, 1991, defines the "broadcasting policy" for the "Canadian broadcasting system" and, indeed, in the conventional world we do have a "system" to which policy can be applied.
70. Increasingly in the evolving world of alternative delivery channels for content, we need to consider matters from a global perspective and consider a myriad of transmission technologies and channels.

¹⁰ Those operating from a base outside of Canada as well as those who don't meet the Broadcasting Act's foreign ownership requirements.

71. This becomes problematic, though. Traditionally we deal with closed “networks” (cable, satellite, MDS and telco-IPTV). Jurisdiction for the Commission is clear. In the case of radio waves, the point of origin is the determining factor for regulatory jurisdiction. In the new media world, though, much content is available to Canadian consumers wherein the originating computer (in essence, the transmitter) is located beyond Canada’s borders. While the signal does travel within Canada en route to the recipient, and the receiving apparatus is located within Canada, we must question whether this constitutes a foreign or domestic transmission – that is, is it within the jurisdiction of the Commission? For that matter, if the content is being distributed by way of a multi-node distributed Content Delivery Network (CDN), it’s possible that some Canadians will be serviced by a node located within Canada while others will access a closer U.S.-based node. Arguably, then, if the Broadcasting Act is to be relevant in the new media world, its effective jurisdiction may need to be defined in terms of point-of-reception rather than point-of-origin.

Foreign ownership

72. For good and valid reasons, at least as it applies to traditional broadcasting, the Broadcasting Act states, in section 3 (1) (a), that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians”. The 1999 New Media Exemption Order has allowed foreign entities to “broadcast” content to Canadians over the Internet. In the absence of the exemption order, these entities would have been considered to unlicensed broadcasting undertakings. If the exemption order was to be rescinded, and existing services not be otherwise exempted, such broadcast activities would become a violation of the Act.
73. Canadian consumers have grown accustomed to having access to Internet content at the discretion of the content distributor (i.e. it is the distributor’s decision whether or not to service the Canadian market), not the discretion of the regulator. There would be an inevitable and significant consumer backlash to the imposition of any restrictions on the ability to consume the foreign content that they can today. For that matter, consumers would rebel against any regulatory action that prevented them access to any new media content, current or future.
74. On a simple level we could say that we’ll preserve foreign ownership requirements in traditional media but waive them for new media. Before doing so, we need to consider whether this puts domestic broadcasters at any sort of competitive disadvantage in their new media efforts in comparison to those services that are not subject to foreign ownership policy at all.
75. As the boundaries between traditional and new media blur, and networks become increasingly integrated, policies that differentiate between “new media” and “traditional media” may become increasingly problematic.

The future of the media world

76. It is our opinion that the media world of the not-too-distant future will bear little resemblance to that which we know today. Today's discrete and disparate networks (for example, the Internet, cable and telco-IPTV networks and wireless services) will be bridged, and content that is available today through a specific network will become available through any network. The consumer – and technology – will determine the most appropriate and cost-efficient delivery path to a given device at a given time. While today's built-for-purpose networks like cable TV are able to distinguish their services from the general-purpose best-effort-delivery Internet because of their ability to provide Quality of Service (QoS) management, the capabilities and capacities of the Internet and wireless networks will, in time, increase to the point that today's QoS differentiation will become meaningless in the context of even a high-definition television signal.
77. Content to which a consumer has legitimate access will be available seamlessly at any time, at any place, and on any device – and by way of any network.
78. How (or if or when) this future unfolds will vary considerably from country to country. It depends to a great degree on local regulatory policy and copyright laws, as well as how various guilds, unions, content vendors, etc. embrace (or fight, or encumber) the concept.
79. We're already seeing the tip of the iceberg through early adopters of rudimentary *ad hoc* technology. Devices like the Slingbox make consumers television content available to them on any Internet-enabled device, be that a computer, PDA, or cell-phone – or another Internet-connected TV set. Devices like Apple TV bring content from the Internet to the TV. Increasingly, computers are connected to TV sets and TV sets are being built with Internet connectivity. The world in which the sole purpose of the TV set is to consume broadcast content is already winding down. The world in which other devices (computers, mobile devices) allow consumers to consume TV content is upon us already. And what today is the realm of early adopters will soon become the mainstream norm.
80. The implications of this are profound. While today the Commission considers the traditional Canadian broadcasting system, the Internet, and wireless platforms to be discrete entities, these distinctions will cease to exist. We will have one unified system, offering content from around the globe, and the Commission will need to address this in a holistic manner. There will be no "new media", there will be no "mobile television" and, unless the Commission alters this "natural" evolution, there won't be a distinct Canadian broadcast system. Rather, Canadian media companies will compete on an open playing field with their global counterparts – and that, arguably, may be a good thing.
81. While Canadian distributors will remain as a commercial conduit to content, their protected status within today's broadcast system will be eroded. Their value proposition will lie in the

convenience they offer consumers as content aggregators and their abilities to help Canadian audiences find and consume content – including local and culturally-relevant content.

82. For professional content creators, too, things will change. Canadian content quotas don't make sense in a world of unlimited choice and an absence of scarcity. That's not to say that Canadian content becomes any less important, nor that government financing and incentive programs should disappear – in fact, in the face of global competition and the absence of a protected and controlled system, these are more important than ever. The shift, though, should be to a carrot from a stick, to incentives and away from regulation.
83. Consumers have many content choices today and these will only increase in number. We don't believe that regulators should inhibit this. The emerging world often better serves the interests of the consumer than the conventional one – and better addresses many of the cultural objectives of the Broadcasting Act. Ethnic and niche audiences can be addressed to a degree that is impossible within the capacity limitations that exist today in all conventional distribution mechanisms. The barriers to entry have fallen and any Canadian can tell a story and distribute it – whether they find an audience is another matter, but that's an issue for the market to decide. And when Canadians are enabled to tell stories, many of the stories they tell are of a Canadian nature.

Answers to the four questions posed by the Commission

What Is The Scope Of New Media Broadcasting?

84. As demonstrated in our [preceding examination](#) of the terminology defined within the Broadcasting Act, 1991, it's clear that we can't garner much benefit from attempting to define boundaries around audio-video content on the Internet or mobile networks from these definitions.
85. In fact, there are few, if any, obvious parameters that the Commission will be easily able to define to arrive at definitions. The Commission must consider that the Internet is a global "broadcasting system". Certainly, the Commission needs to examine not only activities that originate within Canada but also those that penetrate into the country from outside. It must consider the fact that while the foreign Internet broadcasters create major challenges to a historically protected domestic industry, we, too, benefit from the Internet's unprecedented reach and access to global audiences.
86. The important question is not how we define the scope of new media broadcasting – the scope of new media broadcasting is global and unlimited. The important question is: "how will we position Canada and Canadians to attain maximum individual, industrial and cultural benefits from new media broadcasting?"
87. The examination being undertaken by the Commission of "new media broadcasting" should be done with recognition of the fact that the "new media" world of today is an interim and transient state and that today's discrete distribution methods will increasingly converge. A holistic examination of all "broadcast" activity is therefore indicated.

Are Incentives Or Regulatory Measures Required For The Creation And Promotion Of Canadian New Media Broadcasting Content?

88. As stated previously, we believe that in the emerging world of global content, and one in which the concepts of "new media" and "traditional media" will merge, Canadian media companies will need to compete within a global content ecosystem against content from around the world. The transition won't be easy, and we will fail if not adequately supported by government. That being said, we don't believe that regulatory measures are a tenable or reasonable approach. Rather, we believe that Canada should focus on incentive-based approaches and industrial policy initiatives to ensure that Canadians have the greatest possible chance of success. Does that mean a continuation of a subsidized content creation industry? *Absolutely*. Does it mean a

long-term continuation of the broadcast-centric models upon which we really today? *Certainly not.*

89. The emphasis needs to be on enabling Canadians to tell stories, and create and sustain jobs within the Canadian economy. The methods we use need to focus on perpetuating the *message*, not preserving the status quo for a single *medium*. We need to wean ourselves off of the existing broadcast-centric model and move to a platform-independent model that combines economic stimulation and financial subsidy.
90. Today it's not feasible to evaluate funding applications by producers on a project-by-project basis and, through the CTF broadcaster envelope system, the broadcasters effectively vet potential content to determine what is worthy of being broadcast (and, thereby, what is worthy of funding). Going forward, we need to find a workable way of accomplishing the same vetting process that will address today's world of disparate media distribution channels and tomorrow's unified world, and both must recognize that content can be of value and worthy of funding without being tied to specific distribution platform(s).
91. How? Certainly part of the emphasis must be on developing and maintaining an infrastructure that promotes the creation and distribution of Canadian content.
92. Perhaps, too, part of the answer lies within the Commission's ability to define new classes of broadcast licenses. The Commission may wish to consider a new "new media broadcaster" license class that is offered on a voluntary opt-in basis, providing benefits to licensees (for example, access to CTF funds) while at the same time imposing reasonable obligations. That being said, it would be important that the resulting administration burden imposed on both licensees and the Commission be minimal and also that such a system would not put those who choose not to opt in at a significant disadvantage.
93. At the moment, just as we can't provide meaningful definitions by which new media content could be practically and effectively regulated, we also can't provide meaningful definitions of what content should qualify for funding outside of the traditional broadcast system. The need is clear; the method is far from clear. Determining these answers will take time, and much consultation between industry stakeholders and government, but the process must begin sooner rather than later lest we be left behind and lose our audience.

Are There Any Barriers To Accessing Canadian New Media Broadcasting Content?

Access to broadband content

94. Some ISPs are performing traffic shaping activities that have the potential to interfere with a consumer's legitimate access to online content. While perhaps necessary (at this time), the Commission should ensure that these are not done in such a way that consumers are denied fair and reasonable access to online content. As stated in the [Scope of Comments](#) section, we strongly encourage the Commission to consider the issue of net neutrality in a holistic review of new media that encompasses both the medium and the message rather than focusing on the message alone.
95. Some ISPs are implementing bandwidth caps that may deter consumers from viewing TV content over the Internet.
96. With one of the world's highest broadband penetration rates, access to new media is widespread in Canada. That said, though, the issue of digital inclusion still exists, but will lessen over time. The Commission should be mindful of this and develop policies that make new media content available to as many Canadians as possible.

Accessibility for the hearing- and vision-impaired

97. In January 2008, we examined the state of accessibility of broadcaster broadband offerings for the hearing- and vision-impaired. New media platforms have great potential to augment the experience for these consumers and indeed have the opportunity to provide more sophisticated services for these consumers than exist today in the conventional television world through closed captioning and described video. We observed, however, that, at that time, most new media programming, both in Canada and the United States, largely disregarded the needs of these audiences. Indeed, while closed captioning was rare, we found no instances of described video at all.
98. NBC is an example of a broadcaster that does tap the benefits of new media to better serve the hearing impaired. NBC offers captioning on some programs (for example, 30 Rock) that is displayed in a window beside the video. The window displays many lines of dialogue, scrolling upward automatically with new captions appearing at the bottom. If the player is paused the text can be scrolled by the viewer to review the captions.
99. Clearly, the state of new media broadcasting (as of January 2008) does a disservice to those who have impaired hearing or vision and this creates a formidable barrier to their enjoyment of new media broadcasting content. We recognize that the Commission is conducting separate investigations into this subject but would encourage the Commission to be sure to consider these needs and the new opportunities that exist to address them as part of any new media policy decisions, too.

ISPs are often BDUs, too

100. In Canada, and in many other locations around the world, at a corporate enterprise level, the major Internet Service Providers (ISPs) are also Broadcast Distribution Undertakings (BDUs). These entities often use the same physical network to deploy – and sell – their BDU and ISP wares. In other cases, the BDU and ISP services may be operated by way of discrete telecommunications means (for example, a BDU service via satellite may be offered by the same corporate entity that offers ISP service by way of a cable or telephone network).
101. A proliferation of broadcast content that is available by way of the Internet could undermine the profitability of BDU operations. The Commission should ensure that potentially conflicting interests within combined ISP-BDU operations don't cause the consumer to suffer.

Exclusive rights that aren't used

102. It is not uncommon for broadcasters to obtain exclusive and far-reaching rights with respect to new media for the broadcast properties that they license. Exclusive licensing of content is valid competitive behaviour. However, when an entity obtains exclusive rights to a property but does not use them, that is anti-competitive behaviour and does a disservice to consumers by denying them access to content.
103. Furthermore, we need to recognize that new media isn't a one-size-fits-all world. While broadcaster broadband streaming is becoming more common, and may satisfy the wants of some consumers, others want access to content in a more flexible manner and it is incumbent upon the industry to address these consumers' needs. If a broadcaster does not wish to make the content available in other ways (for example, by way of downloading as a retail activity) they should not lock up the rights and thus obstruct others from having the opportunity to service these consumers.
104. Furthermore, such practices do a disservice to the content creators and others in the value chain. Monetization opportunities for content exist that often aren't being exploited – money is being left on the table to the detriment of the producers and everyone else who has an interest in the potential revenue including the actors, directors, as so on.

What Other Broadcasting Policy Objectives Should Be Considered Within The Scope Of The Proceeding?

Multiculturalism

105. Many Canadians have strong ties to other cultures and past actions by the Commission have endeavoured to serve these needs, in a balanced manner and within the limited capacity of conventional distribution mechanisms, by allowing the introduction of foreign and foreign-language programming. Through so-called new media channels, though, the opportunity for Canadians to consume content from – and interactively connect with – other cultures, both on a domestic and international basis, has accomplished more in this regard than could ever have been possible in the current distribution world. Care must be taken to preserve the benefits that new media has made possible in this area.

Community standards / broadcast standards

106. In Public Notice CRTC 1988-13, as part of a regulatory reform process, the Commission shifted the responsibility for broadcast standards from itself to a model of industry self-administration.
107. The code of ethics developed by the Canadian Association of Broadcasters (CAB), and as administered by the Canadian Broadcast Standards Council (CBSC), has been effective within the traditional broadcast realm in ensuring that broadcast content deals effectively with a plethora of issues including subliminal advertising, human rights, and viewer advisories. Additional codes exist to define guidelines regarding topics including advertising to children, sex role portrayal and violence.
108. In the new media world, no equivalent Canadian body exists to guide and influence content originating within Canada. Content of foreign origin may be subject to guidelines and regulations in place in the country of origin but these are not necessarily reflective of Canadian values and standards.
109. The Commission may wish to consider the implications inherent in this since there are no new-media-specific codes of conduct available to guide new media broadcasters.

Additional Considerations and Recommendations

110. The greatest opportunities of the Internet lie in the ability it provides for innovation and for anyone to have an opportunity to have his or her voice heard. Despite the emergence of *de facto* gatekeepers, the unfettered ability to reach out to an audience with new voices and in new and innovative ways is a priceless opportunity. In that regard, it is very important that we continue to exempt the new media activities of those who are not otherwise licensed by the Commission.

111. What we call “new media” today is no longer new and is part of the current media landscape. While it will continue to evolve, it will also undergo revolutionary changes in the years to come. The Commission should take an active role in ensuring that proposed changes to Canada’s copyright laws do not adversely encumber our abilities to create a vibrant and economically viable model for new media and future media, nor should the copyright laws unduly hinder the consumer’s abilities to fairly consume content in the manner of their choice.
112. Keeping the domestic market open to Canadian companies provides an environment that fosters experimentation and innovation that can be applied to the world stage. The Commission must not inhibit Canadians from using new media to tell stories. Closing or unduly restricting the market will cause Canadian new media companies to forego the domestic market. Without a viable domestic market, companies will either fail to innovate or will only do so in their quest to succeed in foreign markets and, in doing so, tell stories that aren’t Canadian in nature.
113. Licensed Canadian broadcasters need to be able to leverage new media opportunities in order to remain relevant and reach audience segments that have tuned out from conventional distribution; at the same time, we can’t allow licensed broadcasters to use new media to do an end run around the Broadcasting Act’s cultural objectives. The responsibilities and conditions of license that apply to broadcast licensees should, to the extent reasonable and practical, extend to the new media world – with the caveat that in doing so we must balance the need for responsible cultural conduct for the benefit of the country with the simultaneous need for licensees to develop and grow their presence in alternative delivery channels in order to compete against a global influx of new media content.

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