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**Convergence, Complexity and Luddites: The Interactive
Digital Media World**

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Abstract

The advent of digital technology has changed the Canadian media landscape over the past 20 years. These changes stress the legal and regulatory assumptions and precepts. For lawyers the practice of law was once a relatively genteel profession with clearly defined areas of practice where one could excel. The size of the Canadian market meant that often a lawyer needed to master more than one subject area to generate a financially viable practice.

This economic reality provides Canadian practitioners with an advantage for handling digital media. We have a built in propensity to see the big picture.

Digital technology changes everything about the media world and Canadian regulators, business enterprises, and the legal profession are struggling to find their way.

It is our premise that an understanding of the legal and policy issues relating to digital technology starts with a review of its constituent elements starting at the bits. Our view is that an understanding of these basic elements establishes the framework for making sense of the complex value chains that are evolving.

The regulatory regime has served Canada well but it now time for a rethink of the major statutes especially the Broadcasting Act.

This paper examines these changes and their impacts and asks some of the questions that we will need to answer to preserve a Canadian presence in the media landscape. We also make some policy recommendations for change.

Note: The comments herein are those of the authors alone.

A. Introduction

The organizers of this conference have asked us to discuss how the changing media and technology environment is changing and how this impacts the practice of law. Each of the writers of this paper suffers from a perspective that is founded more in business than in law practice. Both of us have past lives in private practice but our recent experience is as corporate counsel and/or in operating roles with companies that create and distribute content to customers. So our view often can be more as a client than as counsel.

Our perspective is coloured by this as we really don't know that much about what it is like to be in private practice these days, though one of us is starting to find out. Our paper is therefore about the changes in media both on a macro and micro level and what impacts these have on elements of the law and policy.

The focus of the analysis is on the regulated businesses of television and radio and how they are impacted by the so-called new media¹. Technological revolutions have always brought about regulatory change. The printing press, telephony, radio, television and cable all had or have regulatory regimes which evolved in response to them.

It is more than arguable that digital media had not yet seen any remotely clear framework for its evolution. This despite the fact that the early impact of digital technology was to change the traditional television broadcasting and production businesses in two significant ways:

1. Digital compression enabled the delivery of more channels of traditional linear television. This increased the number of Canadian services and also allowed the introduction of more foreign services to the Canadian market. Today the large BDUs deliver hundreds of linear channels to Canadian homes.
2. Digital editing technology and video capture reduced the technical costs of high quality production and newsgathering. This greatly reduced the barriers to entry to the production business. However it did not reduce the cost of talent or intellectual property. The costs of these elements have increased.

¹ The term “new media” was first coined with the launch of websites and even the CRTC has established a definition based on this just three years ago. That said the term was probably first used in the early 90's. Two decades probably means that the newness has worn off and the NetGen (see below) know of no other world. So the current media are not “new” to them. Our view is that it is probably time to give this term a rest and we use digital media or digital interactive media as a more appropriate substitute.

These changes had a great impact on the broadcasting industry but they were incremental.

The second phase of the introduction of digital media was the popularization of the media tools and the birth of interactivity. We are now in an era of transformational and very disruptive change due to the application and use of digital interactive media by both professional and a rapidly emerging amateur class of content creators and disseminators. Ordinary people are quickly learning how to use this technology. Of course this technology is also changing other sectors of the Canadian economy as well. Media is no longer the exclusive province of media companies. For example, many media advertisers and other business entities have become producers and distributors of content with the goal of marketing their products and services directly to their customers. These technologies also impact virtually all aspects of the broadcasting business – the market, the supply chain, internal operations, human resources and content. Digital media are not discrete from the analog world. They are co-mingled and inseparable.

The readers of this paper are well aware of all of this.

Some observers have tried to describe the impact of these new technologies by applying the term convergence. This has become a charged term of art with implied meaning. The view is that businesses are converging with notorious impacts that can and should only be met by adapting and modifying current laws and policies², and doing that to the minimum extent absolutely necessary. In our view these observers are the Luddites of the digital era. They focus on the impacts on labour and traditional media companies without really understanding what is actually taking place. And like the Luddites who fought against technologies of the 19th century, this group are not opposed to the technology per se, but simply want (and often need) the old rules to apply to the value chain. The original Luddites were supported by cultural figures such as Lord Byron and Mary Shelley so they were not all bad. We expect that the modern Luddites won't have the same legacy.

In the midst of all this, Canadian media are seeking ways to remain relevant in the digital world. Of course the challenge of Canada has always been the

² For this perspective on convergence see this article in the Canadian Encyclopedia where the author characterizes the term as follows: *The strategy allows companies to reduce labour, administrative and material costs, to use the same media content across several media outlets, to attract increased advertising by providing advertisers with package deals and one-stop shopping for a number of media platforms, and to increase brand recognition and brand loyalty among audiences through cross-promotion and cross-selling. At the same time, it raises significantly the barriers to newcomers seeking to enter media markets, thus limiting competition for converged companies.* See:

<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0009695>

fact of our small population located beside the largest media infrastructure on the planet. And even as traditional media and regulators have tried to adapt, new players have emerged that dwarf even the largest global media players.

There is a new monster in town that will be more difficult to control than was Shelley's Frankenstein. For example, the market capitalizations of Google and Apple dwarf those of the large US-based media conglomerates. Netflix is closing in on their financial scale and already dwarfs most Canadian media companies. At home RIM has become a national champion and a virtual BDU. Meanwhile the gaming industry in Canada is capturing markets and consumer attention from traditional players yet remains relatively beneath the radar. There is nothing inherently wrong with this except to the extent that we don't account for these realities in crafting our regulatory regimes. These digital content entities have amassed the scale to develop the new products and to aggregate the intellectual property to both dominate and define certain markets. For example, Apple's technology is arguably establishing barriers to entry not entirely dissimilar to analog monopolies of not very long ago.

B. How technology is changing the value chain.

To understand all of this we start with a micro analysis.

The analog value chain was relatively simple from a legal, regulatory and operational perspective. However to predict how the media environment might evolve and what the associated impacts might be, one must also understand the core attributes of digital interactive media:

1. Bits:

Analog media are made up of a variety of elements (e.g. film, videotape, paper books, etc.) and constrained delivery structures (e.g. limited radio spectrum). The digital world is made up of bits. It is these combinations of ones and zeros that make up every digital file. These bits are arranged in files or databases that are easily networked through a variety of means. The key point here is that all bits are the same. So the core element of all digital media is the same.

However, it is the application technologies and the means of delivery that present the variations from a legal and policy perspective. For example it may seem curious to some that the matter of spectrum allocation continues to maintain a dominant presence given that the use is no longer for

broadcast uses per se. However, on deeper examination, should the fact that digital uses of spectrum may be point to point really change the underlying policy need to determine who gets access and on what terms?

2. Copy ease & plasticity:

Bits are easily copied and each copy is identical. The one-millionth copy is of the same quality as the first. Combinations of bits are also easily adaptable – they are very plastic. In the good old analog days the media player device³ used to “use” the work. Today it can also reproduce it and even be a “factory” of copying. Our language now includes terms such as “mash-up” to describe this.

Digital copying and manipulation also raise ethical issues that go beyond mere protection of economic and artistic rights. Media companies need to educate employees on ethical issues as well as matters such as pure copyright. The technical freedom with which our new tools allow any one us to manipulate digital bits to express ourselves is not yet matched by legal freedoms altering the fundamental of intellectual property law, and is not likely to be. That is why as lawyers watching media probably not a day goes by without our wondering about some questionable use of manipulated content which conveys a novel meaning unintended by the creator of the “original bits”.

The acrimonious debate over Bill C-32, the so-called *Copyright Modernization Act*, is a fascinating reflection of our collective uncertainty about the policy and ethical treatment of copy ease and plasticity. At a time when copying and adaptation are made easy there are learned observers who argue for even more protections for those who would use other owners’ works without permission. Across the divide are those who argue that the bill does not go far enough in protecting works. On the consumer level people now believe that if they can buy a bundle of bits then they should be able to use it as they please. They also are smart enough to know that because content is now all digital bits, generally speaking the limitations preventing them from doing what they want with a bundle of digital bits they may have purchased is merely a matter of finding the right technology solution. The technological capacities have changed the ethical construct. Satellite piracy in the 80’s was the canary in the coal mine and we should have paid better attention to the psychology at play. Today copyright law has joined the highway speed limits as something that people notice but sometimes or always ignore.

A close examination of the two positions above suggests that they may well be irreconcilable. An example of a technical methodology for a truce lies in

³ For example the record or early disc players versus the PC and iPad of today.

the direction increasingly taken in Blu-Ray movies where in one package that is sometimes priced a bit higher you will get a a Blu-Ray disc, a DVD and a password allowing digital download.

These rights challenges (and opportunities) for media companies will spread to other sectors as 3D printing technologies take hold⁴. With these devices the replication of objects will be possible in ways that were unimaginable just years ago.

For practitioners, the business of clearing copyright has become almost herculean. Clearance has become a risk management project in some cases. Lawyers and policy makers need to find a way to protect the bits from unauthorized use while at the same time fostering creativity and innovation. The authors believe that this is not an insurmountable task but it will require a strategic approach that is not necessarily fully reconcilable with populism. That said, we would predict as likely an increasingly trend towards a legal approach that prioritizes the “wholeness” of the content bits across multiple platforms , as opposed prioritizing each platform and technology as a separate scheme with separate payments.

Until we arrive at the critical time of digital unity and transparency, which with technology not stopping its advancements will probably never fully arrive, rights management becomes an ever more significant issue. One must track and protect one’s rights while at the same time ensuring that infringement of others’ rights does not occur. Tariffs and administration become complex and expensive. Digital rights management or DRM is a term with a variety of meanings and controversies and is discussed further below. Semantics and taxonomy become everyday challenges for lawyers seeking to interpret and craft contracts.⁵ Billable hours increase, but because they generally do so protecting against the negatives as opposed to creating a positive, these legal tasks no feel particularly value based from a client perspective. “Necessary evils” are a dubious source of premium billings.

3. Equivalence:

Content made up of bits also becomes equivalent. A newspaper database is essentially no different than a television program or photograph. They are aggregations of bits. In the analog world we treated them differently from a regulatory and business perspective. But if they are all bits then why are websites not regulated while specialty TV licensees have a mountain of

⁴ See: http://en.wikipedia.org/wiki/3D_printing

⁵ Note the battle between Time Warner Cable and TV networks over its right to stream channels to tablet devices. http://www.nytimes.com/2011/03/29/business/media/29ipad.html?_r=1&ref=timewarnercableinc

obligations? It is clear that bits might properly attract protection in a walled community but in an Internet context they probably don't lend themselves to traditional regulatory prescriptions. The practical impact of the growth of the volume of content and the number of creators is that it cannot be regulated in traditional ways.

We observe that the volume of digital platforms and media segments may be overwhelming the policy regimes that we have in place. Copyright tariff hearings go for months talking about payment obligations for transactions that took place years ago. Lawyers struggle with contracts that include terms that define technologies that no longer exist or other ones that were not even around a year ago.

Meanwhile rights returns fall off in established markets we know and understand while valuations involving digital platforms are often an exercise in crystal ball gazing. Lawyers can get caught becoming advocates for rights nomenclatures which turn out to have no economic basis.

4. Compactness:

Digital media are compact. Vast amounts of data can be stored or easily transported to single or multiple users of this data. We now can easily access “jump drives” that can hold 400 full length high definition films. This also translates to 1,200 standard format films or 2,000 hours of television or 250,000 songs. A USB key or thumb drive can download a 1.9GB high definition feature film in 60 seconds and hold 256 GB of data. Archivists such as Library and Archives Canada can foresee digitizing and making available all of the collected wisdom ever produced in Canada: every film, song, book, magazine, newspaper or memo. This would yield an unprecedented resource of knowledge for the benefit of Canadians, but would undermine and ultimately bypass traditional business models for the distribution of such content.

The capacity to remember, organize and search raises major issues relating to privacy. If all of our searches on Google or our Facebook posts are remembered forever and available to all, how are the cultural mores and standards by which we measure each other changing? How must they change? Or will we simply try and control our images through www.reputation.com?

5. Networks and the death of distance:

Databases are networked in a variety of ways. The Internet is one example of an open standard digital network. The transport of digital media is relatively much easier than with analog works. The consumption of digital interactive media by Canadian consumers can be relatively borderless.⁶

In this regard the development of networks and the ease of transmission have shrunk the importance of geography. We now have RAI and BBC in Canada providing diversity but also competing with Canadian licensees like never before. These traditional linear channels have an incremental impact on our markets. But this is the tip of the iceberg.

The death of distance is having a profound impact on many areas of law. For example, defamation practitioners are watching Conrad Black's action against Richard Breeden. If he succeeds at the Supreme Court of Canada in establishing the jurisdiction of the Ontario courts over a report made in the United States, Canadian courts may see an increase in forum shopping. Though these issues have always existed a growth area for the bar would result if we didn't change our defamation laws to allow for greater latitude for commentary consistent with other western jurisdictions. Fortunately recent Supreme Court of Canada decisions seem to be moving in that precise direction (for example see *Grant v. Torstar Corp.* 2009 SCC 61).

Databases can have a variety of forms depending on application software and the manner in which they are populated. The early web sites simply pushed content (usually text with limited images) through low bandwidth Internet-enabled pipes. These websites are merely databases with the navigation tools to connect to the Internet. The real action in the digital world today is utility in the form of applications (apps) to provide utility (e.g. search), social media (Facebook or YouTube), and many varieties of broadband content delivery (e.g. iTunes, and other legal or pirate operations).

⁶ It is possible to regulate and constrain networks as was the case in China for journalists covering the Olympic Games or in Turkey where that government restricts access to YouTube. That said, the notion of doing so is antithetical to democratic ideals.

C. The Challenge

The combination of these attributes means that Canadians can access content from every part of the planet in unheard of volumes. The digital interactive platforms that exist on the Internet create disruptive change. For example, each day people watch hundreds of millions of videos on YouTube and upload hundreds of thousands of videos; 35 hours of video is uploaded to YouTube every minute.⁷ The Hollywood studios were once the largest content creators in the English-speaking world. One commentator has now characterized the annual output of Hollywood as a “rounding error” in the total amount of content now available.⁸ Canadian production is even further dwarfed by this ever-expanding universe of content.

Similarly in radio, the transition to digital has meant increased competition. But just as today’s technology no longer respects borders, it also no longer respects the assumptions of scarcity on which the regulatory model is based. First, consumers now have an ever-growing array of choices of audio content, including, but not limited to:

- conventional AM or FM radio;
- audio services;
- digital terrestrial radio;
- satellite/subscription radio;
- the Internet, on computers, or on portable devices that can or will be able to receive wireless broadband due to Wi-Fi initiatives being undertaken in Toronto and other urban centres;
- iPods and other similar portable devices;
- radio over cell phones; and
- peer-to-peer networks that enable listeners to also become programmers.

While this paints a picture of growing fragmentation and of a changing audience, it is useful to understand how the current technological transition is different, both in nature and in scope, from technological changes in the past. What is happening today is not analogous to the change from AM to FM – it is very different, with very different implications.

Until very recently, the radio business operated on an assumption of universal access to and by consumers, within a defined geographic area. In other words, if a consumer purchased a radio, he or she was able to tune in to

⁷ YouTube Fact Sheet, www.youtube.com/t/press.

⁸ Kevin Kelly; *Becoming Screen Literate*; New York Times, November 21, 2008.

all of the stations on the AM or FM band that could be received in that geographic area.

Today, however, both of those assumptions – universal access and defined geography – are being challenged. As new digital alternatives are introduced, consumers are not always able to tune across all platforms but, in many cases, they now are able to tune across greater (or even unlimited) geography.

For example, the satellite/subscription radio services require new receiving units for consumers. Those units, generally, can receive AM and FM, but only one of the two satellite subscription services. Consumers purchasing radios capable of receiving digital terrestrial radio also get AM and FM, but not the ability to receive either of the satellite services. And devices that might receive audio services over wireless broadband may or may not also receive some of the other platforms. The same can be said for television or video as well as, for example, the Apple iPad and the RIM Playbook and other such devices utilize different technologies.

Perhaps surprisingly some of the old-fashioned concerns about natural monopolies have not gone away even in the context of digital distribution abundance. As a result we have regulators on both sides of the border wrestling with the subject.⁹

At the same time, the consumer's relationship to audio content has changed, perhaps more dramatically than anything else in the business. Portable radios date, in practical terms, to the 1950s with the introduction of transistor radios. Those portable devices were able to receive audio content that had been formatted and packaged by radio stations. By the 1980s, the portable device of choice for young people was the "Walkman" or a similar device. For the most part, those devices were able to play content that had been packaged by someone else.

Today, however, the portable device of choice is an iPod or a smart phone, and the content is no longer packaged by a radio station or a record company – it is packaged by the consumers themselves. And consumers now are creating their own broadcasts – called "podcasts" – that can be received by

⁹ See for example the CRTC decision on VOD rights (*Complaint by TELUS Communications Company against Videotron Ltd. under section 6.1 of the Pay Television Regulations, 1990*).

Complaint by Bell Canada against Videotron Ltd. under section 6.1 of the Pay Television Regulations, 1990 and section 9 of the Broadcasting Distribution Regulations and against TVA Group Inc. under section 15 of Television Broadcasting Regulations, 1987) and the FCC on the Comcast-NBC purchase (see Appendix "B")

their peers via the Internet. These pods can be unique or they can be compilations of material. The so-called mash-up has become a term of art.

That transition from industry-packaged to consumer-packaged – and consumer-created – is one of the fundamental consequences of new technology, and one of the fundamental challenges that radio and related industries, such as record labels, will need to face going forward.

Radio websites stream content that is both audio and video. They use professional and amateur content on their sites. So radio websites can have the same types of combinations of bits that our television sites have. The branding and type of storytelling may vary but the form of the content is the same – bits arranged into text, photographs, audio or video.

Consider also the simple communications tool called e-mail. We don't tend to think of e-mail as "media." This method of communication does not often get considered when the changes in the system are assessed. We tend to focus on delivery of programs. But e-mail is enormously capable and it does it all. We send and receive text messages, audio and video files, photographs, graphics and anything else that is digital in nature.

In so doing e-mail changes the value chains we depend upon to realize our financial and regulatory goals but it effectively is out of reach of any regulatory purview.

How does the Canadian media system manage the transition to a purely digital environment? Spectrum scarcity remains an issue for radio and for linear television. Access to carriage remains an issue for Canadian operators as well. Content is easier to make with digital technology and Canadians may dominate Facebook.com with homemade content but the creation and marketing of high quality content remains an expensive challenge. The size of the Canadian market and its increasing fragmentation exacerbates the problem. Fair access to content also remains as a public policy issue even in an age of abundance.

As the technology changes so does the consumer. Canadians demand a system that will provide them with content anywhere, anytime and through a variety of devices. This is driven by the demographic changes in our society. The new generations of Canadians think of media much differently than their parents do:

Net Gen kids growing up looked at computers in the same way boomers look at TV. Boomers don't marvel at the technology or wonder how television transfers video and audio through thin air, we simply watch the screen. TV is

a fact of life. So it has been with Net Geners and computers. And as technology relentlessly advances each month, young people just breathe it in, like improvements in the atmosphere.¹⁰

This demographic group is made up of people who were born between 1977 and 1997 and who make up roughly a quarter of our population. Coupled with the so-called Generation X (people born between 1965 and 1976) they represent nearly half of all Canadians. These are the people who grew up with the Internet at school, at home and now on their belt.

This point was eloquently made by the Minister of Canadian Heritage and Official Languages in a recent speech:

As the youngest member of the Cabinet and a typical Canadian, I thrive on digital technology. I am an avid consumer of your products. My computer, my Blackberry, my iPod, my PVR — they are an integral part of my life. I am a multi-platform, multi-tasking guy, who wants information in real-time.

I am more loyal to the content than to the technology or the station. Canadians like me want HD content. We want interactivity and we want mobility.

Not to put too much emphasis on my age, but being born in 1976, I have never known a world without colour TV and multi channels. Computers have always been a part of my life.¹¹

In this context, perhaps the use of the term “new media” by Canadian regulators can be understood as a telling illustration of why many Canadians might think that their governments do not understand their world.

So the fundamental challenge remains for Canadians. How do we continue to gather the resources to compete on a global basis to ensure that Canadian stories continue to be told?

The problem is that the current regulatory regime mandates have become confused, cloudy and ineffectual. Each new business and technological challenge is met with incremental regulation coupled with new fees, tariffs and reporting requirements. The regulatory regime is desperately trying to manage value chains that are rapidly disappearing. We are sensitive to the pressure on the policy makers. Too often the debate is coloured by tweets,

¹⁰ Tapscott, Don; *Grown Up Digital – How the net generation is changing your world*; McGraw Hill Toronto, 2009 at page 19.

¹¹ Honourable James Moore, Minister of Canadian Heritage and Official Languages, in a speech to the Annual Conference of the International Institute of Communications, Canadian Chapter, Ottawa, Ontario, December 2, 2008.

blogs, polls and other uninformed passion rather than knowledge and careful consideration of the issues.

Although not related to digital technology per se, the decision of the Federal Court of Appeal on the value for signal reference¹² is an illustration of how complex matters of copyright and regulation have become. The majority of two judges found that the CRTC had the requisite jurisdiction to establish a value for signal regime. However Justice Nadon dissented and stated:

“Contrary to the exhaustiveness of statutory copyright law, the CRTC, through the Order, is attempting to create a royalty that is essentially the same as the royalty Parliament has, in effect, forbidden in paragraph 31(2) (d) of the Copyright Act. Given this conflict between the Copyright Act and the CRTC’s Order, the CRTC’s enactment must give way.”¹³

The real world result is that regulated Canadian media companies are subject to a complex array of rules that inhibit our capacity to compete and innovate.

Canadians embraced pirate and gray market satellite dishes while the regulatory regime established laws and policies to govern them. They succeeded in barring the entry of foreign BDU’s and reduction of some illegal reception. The real solution however was the improvement of the Canadian system through growth of the content offered. There is a real lesson to be learned from this.

Canadian consumers often feel that their infringements of intellectual property laws are justified. Apple iTunes has changed some of that paradigm but it will not save the multi-national record label business.

Meanwhile we face the huge challenge of managing digital rights. It is true that some of the barriers to entry with respect to the production of high quality content have been reduced. This drives the success of YouTube and related sites. However the creation of professional content has a new challenge established by digital interactive media. We need to utilize technology to track and protect our rights. This requires huge seven figure investments in technology and in training of our employees to use it. For lawyers it means going back to the basics of contract and copyright terms, semantics and even a visit to Charles Darwin’s taxonomy of the species to assist in organizing these concepts.

¹² Federal Court of Appeal, February 28, 2011, Docket A-113-10, Citation: 2011 FCA.

¹³ Ibid at paragraph 85.

D. The evolution of content/carriage regimes

At this point in the discussion it may be helpful to take a brief look backwards at the underlying rationales which applied to previous content/carriage revolutions. Understanding them will help us understand that there is no shame and considerable precedent for crafting new policy directions when faced with fundamentally disruptive technological advancements. We need to learn from but not be too enamoured with the past. To put it crudely, pouring old wine into new bottles won't make it taste any better.

So what were the policy responses in the past?

1. First Origins - The Printing Press:

A markedly “paternalistic” statutory regime in England created Boards to regulate and license those who operated printing presses. The root concern appeared to be that presses could fall into the “wrong hands” with resulting social unrest among the lower classes. For a fuller exposition, see John Milton’s “Areopagitica” which was in a speech to the British Parliament against this regulatory regime.

2. The Radio Phase:

This regime was “nationalistic” in origin. The Aird Commission Report of 1932 is an illustration of this.

3. The Television Phase:

As TV evolved so did the rationale for its regulation, which can be seen as “culturalistic” (sic). The 1986 Caplan- Sauvageau Report on Broadcasting Policy allows one to count the ways. From the 1970’s through to the end of the 1980’s, television was ever-increasingly required to be an instrument of, and the main support for a regulatory vision that had a cultural vision of Canadian content as its apotheosis. This belief system was based on control of the launch of linear channels through mechanisms such as ownership limits and spectrum control. The catch from our current time-frame is that those mechanisms are not holding up particularly well..

4. The Cable Phase:

Cable and other methods of signal carriage came to the fore as notions of free trade became popular internationally and slowly began being implemented in

our hemisphere. Our policy framework become progressively more “industrialistic” (sic) as a result, not least because of concerns regarding the long term viability (and advisability) of the so called “Cultural Exemption” to our Free Trade agreements with the U.S. and Mexico. The role of competition and the free market were stressed, all the while trying not to lose sight of both order and balance. The rhetoric behind this policy direction can be found in and around the work done in the mid-1990’s by the Information Highway Advisory Council (“IHAC”).

The policy framework was that we could control the discrete elements of distribution, content packaging, and content creation. The latter would be subject to distribution incentives, price supports, and financing in the form of funds, grants, and tax credits. An underlying unstated assumption was that a discrete Canadian market could be maintained for foreign rights. This started to erode with the introduction of foreign channels such as RAI. Of course digital media are presently smashing this assumption to smithereens.

It can be observed from the above as a general principle that where a new policy rationale has come into existence for a new technology, that rationale would eventually be applied equally to the preceding technologies. Usually not entirely comfortably or appropriately, but that is a story for another day.

E. The question begged: what should “The Digital Phase” regime have as its cornerstone?

We now arrive armed with historical context to consider how digital content and distribution ought to be dealt with. Perhaps an appropriate threshold question would be “What is needed for Canadian digital content to be successful in the current digital world?”

The hallmarks of this new world are apparently very low barriers to entry when it comes to both creation and distribution of content, seemingly no barriers to distribution, and a pervasive internationalism. Of course each of these statements is misleading in its own way. Most great content is expensive to produce. There are still barriers to distribution. Consumer interest starts from the local perspective as much content does not travel very well. The other stark reality is that Canada starts from its notorious small domestic base but now it is massively fragmented. Financing content is as important as it ever was.

Based on the above, the answer is probably fairly clear - our digital age public policy, if it is to support Canadian endeavours and content, will need to be fundamentally based on what results in the most compelling creative product. That is because in the content playing field that has emerged, it is only compelling content (broadly defined) that seems to be successful in attracting a substantial following. What is equal parts fascinating and frightening is that of the myriad factors which Canadian policies have considered when looking at content, it's hard to argue that the creative freedoms which are the sine qua non of compelling content have in truth ranked all that highly.

Instead our policy focus has been on subjects such as diversity, access, terms of trade, and creating shelf space on linear platforms. The response to digital change is to attempt to adapt the rules that sort of worked in the 1980's to the digital environments of 2015. This is buttressed by buckets of cash for the allegedly destitute. The notion of "independence" still trumps success in the policy and cultural drawing rooms of this country. We are mired in the old-wine in new bottles trap. Our view is that digital media represents a new kind of drink and a new kind of consumption. Our rules need to adapt quickly.

The policy filters that we suggest may first appear as all too simple:

1. "What impediments to the creation of Canadian content must be removed?"
2. "What measures must be taken to encourage the most compelling Canadian creative product?"

This is the lens through which we ought to filter our policy considerations of digital media. In our view that lens must be paramount for Canadian creative products to succeed in the digital age.

F. What we need to do.

With all this in mind here are some suggestions as to where we go from here:

1. ONE: Embrace the merits of fostering a Canadian-owned but globally competitive industry.

- Recognize that we compete in the world market in TV, radio and digital media even at home.
- Recognize that the emergence and dominance of digital technology means that all of our existing rules need to be re-examined.
- The Government of Canada and its agencies must adopt a digital strategy for Canada. This strategy must not attempt to be all things for all people. We need to focus our thinking and our efforts and real directional choices need to be made. Meanwhile a digital strategy must include a primary focus on content elements.
- Establish a panel of experts to develop the digital policy framework in the same manner as was done for the telecommunications sector.
- Don't load up Canadian players with new rules and reporting obligations as unregulated foreign players with much larger financial capacity increasingly directly compete with us. In this regard we note subsection 5(2) (g) of the Broadcasting Act still has relevance. It requires that the regulatory system be sensitive to the administrative burden placed on broadcasters.
- Align our rules to global markets. Don't create rules as if we are still a sheltered market.
- Don't confuse the change in our market with the sources of capital and control. There is no need to change the foreign

ownership rules for broadcasting and content companies. We can raise the money here.

- Don't forget that what consumers want is content that resonates with their local experience. The focus on policy has been on the so-called programming of national importance. It is time to look at local news, actuality and public affairs as an endangered species as well.

2. TWO: Increase the probability of success of the Canadian media industry by encouraging the creation of larger and stronger enterprises.

- Recognize that we need scale to compete. If RIM can be a major world player then more traditional Canadian media companies should equally be allowed the right to achieve scale as well.
- Re-assess the Competition Bureau's definitions of market in the context of the digital interactive media paradigm.
- Eliminate the affiliate linkage carriage rules which simply serve to limit our ability to launch new services that Canadians want to watch, when originally the intent of those rules was actually to encourage the creation of new Canadian services.

3. THREE: Develop a Canadian industrial strategy that supports the creation of high quality Canadian content from all Canadian producers including producers that are affiliated to Canadian broadcasters.

- Foster the creation of compelling content rather than trying to control who makes it. Canada's media companies should not face barriers to creating and distributing the high quality Canadian content that is contemplated by the *Broadcasting Act*. We can and must create a viable content production industry and the beneficiaries will be Canadian viewers, writers and performers, and the economy as a whole
- Assess the access to funding mechanisms in this context.
- Re-examine local content provision as a national priority.

4. FOUR: Recognize that private media enterprise success is what will lead to a stronger cultural system, not the current system of progressive fees, conditions and tariffs.

- Establish the conditions that will allow for companies to grow the value of Canadian content. We can't tax and tariff our way to content success but success will in fact mean a greater contribution to meeting policy goals. Companies that are financially weak can't build the Canadian content system.
- In TV regulation, set aside conditions of license other than Canadian Content and spending.

5. FIVE: Allow Canadians to experiment.

- Create a regulatory attitude that fosters experimentation. Allow new forms of Canadian content to find markets without the need to jump expensive and cumbersome regulatory hurdles first.
- Investments in digital rights management technologies and their implementation should be eligible for Canadian Programming Expense (CPE) credit.
- Fortify the infrastructure: capital investments in towers and other digital broadcasting technologies should be eligible for accelerated capital cost tax treatment as well as government funding.
- Encourage the inclusion of FM receivers in mobile telephone units to provide Canadian local radio with an opportunity to stay relevant to Canadian listeners.

6. SIX: Recognize that our small market requires that government continue its support of research and development in intellectual property.

- Establish training as an R&D priority.
- Establish a formal education system for government regulators to allow them to keep up with the rapid pace of change. Couple this with the creation of digital media research and training centres aligned with existing institutions across Canada.
- Preserve funding of CMF and Telefilm Canada.
- Increase production tax credits. under the CAVCO guidelines. Reduce the provincial and other industrial tax credits for production.
- Allow for investment tax credit in rights management semantics and taxonomy processes.
- Pay more attention to the “D” side of R&D.

APPENDIX A:

Section 3 of the Broadcasting Act follows. It is useful in the sense that it covers so many bases as to almost be a Public policy version of the famed Rorschach Test where the beholder reveals his or her psychological makeup in choosing their own interpretation. As such and precisely because of its laundry list qualities which can be helpful at least in identifying many policies which would need to be held up to scrutiny in terms of their appropriateness for the digital age:

- (1) It is hereby declared as the broadcasting policy for Canada that
- (a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;
 - (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;
 - (c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;
 - (d) the Canadian broadcasting system should
 - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
 - (ii) encourage the development of Canadian expression by providing a **wide range of programming** that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
 - (iii) through its programming and the employment opportunities arising out of its operations, **serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society,** and
 - (iv) be readily adaptable to scientific and technological change;
 - (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

(g) the programming originated by broadcasting undertakings should be of high standard;

(h) all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast;

(i) the programming provided by the Canadian broadcasting system should

(i) be **varied and comprehensive**, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,

(ii) be drawn from local, regional, national and international sources,

(iii) include educational and community programs,

(iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and

(v) include a significant contribution from the Canadian independent production sector;

(Boldness is added.)

Is the current policy able to realize on these goals? Are these goals sufficient to ensure a Canadian presence in the digital media landscape?

In our view the answer to both questions is no.

Appendix B:

FOR IMMEDIATE RELEASE:
January 18, 2011

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FCC GRANTS APPROVAL OF COMCAST-NBCU TRANSACTION

Washington, D.C. -- Today, the Federal Communications Commission grants—with conditions and enforceable commitments—approval of the assignment and transfer of control of broadcast, satellite, and other radio licenses from General Electric Company (GE) to Comcast Corporation. The approval will allow GE and Comcast to create a joint venture involving NBC Universal, Inc. (NBCU) and Comcast. An Order further explaining the Commission’s reasoning and the conditions and commitments will be issued shortly.

The Commission's decision is based on a thorough review of the record, which includes extensive data and voluntary commitments from the applicants, as well as thousands of comments from interested parties and public input received at a public forum held in Chicago. Based on this review, the Commission has determined that granting the application, with certain conditions and contingent upon enforceable commitments, is in the public interest.

As part of the merger, Comcast-NBCU will be required to take affirmative steps to foster competition in the video marketplace. In addition, Comcast-NBCU will increase local news coverage to viewers; expand children's programming; enhance the diversity of programming available to Spanish-speaking viewers; offer broadband services to low-income Americans at reduced monthly prices; and provide high-speed broadband to schools, libraries and underserved communities, among other public benefits.

More specifically, the conditions imposed by the Commission address potential harms posed by the combination of Comcast, the nation’s largest cable operator and Internet service provider, and NBCU, which owns and develops some of the most valuable television and film content. These targeted conditions and commitments, which generally will remain in effect for seven years, include:

- *Ensuring Reasonable Access to Comcast-NBCU Programming for Multichannel Distribution.* Building on successful requirements adopted in prior, similar transactions, the Commission is establishing for rival multichannel video programming distributors (MVPDs) an improved commercial arbitration process for resolving disputes about prices, terms, and conditions for licensing Comcast-NBCU’s video programming. The Commission is also requiring Comcast-NBCU to make available through this process its cable channels in addition to broadcast and regional sports network programming.
- *Protecting the Development of Online Competition.* Recognizing the risks this transaction could present to the development of innovative online video distribution services, the Commission has adopted conditions designed to guarantee *bona fide* online distributors the ability to obtain Comcast-NBCU programming in appropriate circumstances. These conditions respond directly to the concerns voiced by participants in the proceeding—including consumer advocates, online video distributors (OVDs), and MVPDs—while respecting the legitimate business interests of the Applicants to protect the value of their content. Among other things, the

Commission requires that Comcast and/or Comcast-NBCU:

- Provides to all MVPDs, at fair market value and non-discriminatory prices, terms, and conditions, any affiliated content that Comcast makes available online to its own subscribers or to other MVPD subscribers.
 - Offers its video programming to legitimate OVDs on the same terms and conditions that would be available to an MVPD.
 - Makes comparable programming available on economically comparable prices, terms, and conditions to an OVD that has entered into an arrangement to distribute programming from one or more of Comcast-NBCU's peers.
 - Offers standalone broadband Internet access services at reasonable prices and of sufficient bandwidth so that customers can access online video services without the need to purchase a cable television subscription from Comcast.
 - Does not enter into agreements to unreasonably restrict online distribution of its own video programming or programming of other providers.
 - Does not disadvantage rival online video distribution through its broadband Internet access services and/or set-top boxes.
 - Does not exercise corporate control over or unreasonably withhold programming from Hulu.
- *Access to Comcast's Distribution Systems.* In light of the significant additional video programming Comcast will control after the merger with NBCU—programming that may compete with third-party programming Comcast currently carries or otherwise would carry on its MVPD service—the Commission requires that Comcast not discriminate in video programming distribution on the basis of affiliation or non-affiliation with Comcast-NBCU. Moreover, if Comcast “neighborhoods” its news (including business news) channels, it must include all unaffiliated news (or business news) channels in that neighborhood. The Commission also adopts as a condition of the transaction Comcast's voluntary commitment to provide 10 new independent channels within eight years on its digital tier.
 - *Protecting Diversity, Localism, Broadcast and Other Public Interest Concerns.* The Commission is also imposing conditions and accepting voluntary commitments concerning a number of other public interest issues, including diversity, localism, and broadcasting, among others. For example, to protect the integrity of over-the-air broadcasting, network-affiliate relations, and fair and equitable retransmission consent negotiations with the joint venture, the Commission adopts a series of conditions that were independently negotiated between the Applicants and various network affiliates.

The Applicants have also made a number of additional voluntary commitments, many of which the Commission has adopted as conditions to the transaction's approval. Most of these commitments are geared towards enhancing the public interest as a result of the joint venture. These commitments include:

- *Broadband Adoption and Deployment.* Comcast will make available to approximately 2.5 million low income households: (i) high-speed Internet access service for less than \$10 per month; (ii) personal computers, netbooks, or other computer equipment at a purchase price below \$150; and (iii) an array of digital-literacy education opportunities. Comcast will also expand its existing broadband

networks to reach approximately 400,000 additional homes, provide broadband Internet access service in six additional rural communities, and provide free video and high-speed Internet service to 600 new anchor institutions, such as schools and libraries, in underserved, low-income areas.

- *Localism.* To further broadcast localism, Comcast-NBCU will maintain at least the current level of news and information programming on NBC's and Telemundo's owned-and-operated ("O&O") broadcast stations, and in some cases expand news and other local content. NBC and Telemundo O&O stations also will provide thousands of additional hours of local news and information programming to their viewers, and some of its NBC stations will enter into cooperative arrangements with locally focused nonprofit news organizations. Additional free, on-demand local programming will be made available as well.
- *Children's Programming.* Comcast-NBCU will increase the availability of children's programming on its NBC and Telemundo broadcast stations, and add at least 1,500 more choices to Comcast's on-demand offerings for children. It will provide additional on-screen ratings information for original entertainment programming on the Comcast-NBCU broadcast and cable television channels and improved parental controls. Comcast-NBCU also will restrict interactive advertising aimed at children 12 years old and younger and provide public service announcements addressing children's issues.
- *Programming Diversity.* Building on Comcast's voluntary commitments in this area, we require Comcast-NBCU to increase programming diversity by expanding its over-the-air programming to the Spanish language-speaking community, and by making NBCU's Spanish-language broadcast programming available via Comcast's on demand and online platforms. As noted above, Comcast also will add at least 10 new independent channels to its cable offerings.
- *Public, Educational, and Governmental ("PEG") Programming.* Comcast will safeguard the continued accessibility and signal quality of PEG channels on its cable television systems and introduce new on demand and online platforms for PEG content.

Action by the Commission January 18, 2011 by: Memorandum Opinion and Order (FCC 11-4). Chairman Genachowski and Commissioner Clyburn, with Commissioners McDowell and Baker concurring, and Commissioner Copps dissenting. Chairman Genachowski and Commissioners Clyburn and Copps each issuing a separate statement, with Commissioners McDowell and Baker issuing a joint statement.

MB Docket No. 10-56

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