

## The Limitations of Regulatory Oversight on Online Video

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*If there are no fresh starts in history, if the future is made from fragments of the past, then the discourse of entitlement in an information society will draw on images of information that were produced in a society where information bore a very different relationship to technology, to power, to wealth, a different relationship even to our own bodies. To put it another way if history is collage, then we need to look at the available picture, scissors, and paste.<sup>1</sup>*

### INTRODUCTION

To understand the current regulatory status of online video by the Canadian Radio-Television and Telecommunication Commission (CRTC) one must appreciate that it is a story not unlike that found on a mid-afternoon soap opera: glamorous media and technology companies, essential to a melodramatic plot, are its players who are in constant conflict with one another about the regulation of the medium. For the audience as consumers the fate of online video is unclear, as there always seems to be another episode of regulatory consideration. Online video, or what the CRTC calls over-the-top (OTT), can take on many forms: from downloaded to streaming video, and from short video clips to longer-format pieces such as feature films. It is further differentiated from traditional television programming as content is provided on websites and is made available solely through access to a broadband Internet connection. Despite the need for a broadband connection, changes in hardware technology mean that OTT content may be viewed through a variety of devices including: a PC, mobile phone, handheld tablet, or even a traditional television that uses external hardware to link to Internet services.

While online video has remained subject to the CRTC's new media exemption order<sup>2</sup> its exempt status is continually reviewed by the Commission. Review happens regularly as the historic dialogue between the regulatory, traditional television broadcasters, and Internet-based media companies shows. Key to these discussions is the supposed threat that online video presents to the broadcaster's business model. During these regulatory episodes, the CRTC has stated that the new media exemption order for online video providers exists because the current use of these

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<sup>1</sup> James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society*, (Cambridge, MA: Harvard University Press, 1996), at x.

<sup>2</sup> CRTC, *Broadcasting Regulatory Policy 2009-329: Review of Broadcasting in New Media* (Ottawa: CRTC, 4 June 2009) online: CRTC <<http://www.crtc.gc.ca/eng/archive/2009/2009-329.htm>> [*Policy 2009-329*].

services by Canadians does not yet have “a negative impact on the ability of the system to achieve the policy objectives of the *Broadcasting Act*.”<sup>3</sup> Yet implicit in statements by the CRTC about its interest in oversight of this sector, is that regulation of online video content providers will likely occur at a future time when the threat of online video exceeds its usefulness for the broadcasting industry. Little discussion by the Commission, or the parties, focuses on whether it is appropriate to regulate this form of media. In April 2012 the CRTC decided to delay its next fact finding exercise on OTT, but stated it would continue to monitor developments in the industry and launch another exercise at a future date when warranted.<sup>4</sup>

This paper will assess the current regulatory framework of online video and argue that the regulation of online video by the CRTC is a treacherous endeavor as it involves redefining essential elements found in broadcasting and telecommunications law in Canada. Regulatory action by the Commission may cause greater uncertainty and discord in the law that governs communications. Further, current “likeness” tests used by the CRTC to determine the aptness of entities for regulation, including assessing threats to the regulated industry as well as similarities between new and traditional services, do not adequately reflect the regulatory mandate of the Commission. In the discussion on how, or whether, online content such as video should be regulated, the original underpinnings of the legal justification for the regulation of broadcast or telecommunications entities is lost. It is hoped, by reintroducing these justifications for regulation into the legal discourse, that the difficulties of regulating online video can be seen.

Discussion in this paper focuses on the factors, attributes, and elements of telecom and broadcast regulation in Canada. Part I of this study briefly outlines the history of online video regulation in Canada to date. In Part II speculation as to how online video might be regulated, based on prior decisions of the CRTC, is presented. Part III considers the challenges of applying the *Broadcasting Act* to new media entities in order to create a regulatory framework for online video. Part IV looks at judicial decisions related to broadcast law that may be used to define the nature of the service, and therefore limit the application of the *Broadcasting Act* to specific types of technology. Part V examines the legal justification for the regulation of broadcast and telecommunications in Canada, as well as in other countries with similar regulatory frameworks, such as the United States. Finally, Part VI presents various legal difficulties for justifying the regulation of online video as a broadcast entity.

## I. ONLINE VIDEO REGULATION IN CANADA

### (a) First Impressions: 1999

With the growth in popularity of the Internet among Canadians beginning in

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<sup>3</sup> CRTC, *Results of the fact-finding exercise on the over-the-top programming services* (Ottawa: CRTC, 2011) online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports/rp11110.htm>> [*Fact-Finding Results*].

<sup>4</sup> John Traversy (Secretary General), *Commission Letter* (Ottawa: CRTC, 16 April 2012) online: CRTC <<http://www.crtc.gc.ca/eng/archive/2012/lb120416.htm>>.

the 1990s,<sup>5</sup> the CRTC wished to bring clarity to the status of new media entities for the purposes of regulation. This status was first considered by the CRTC in 1999. In *Public Notice CRTC 1999-84 New Media*,<sup>6</sup> the Commission first set out to define the nature of new media, its status in Canada, and the goals of regulation. At that time the CRTC segmented various online digital technologies categorically for the purposes of regulation under the *Broadcasting Act*.<sup>7</sup> The Commission found that online digital content might be termed broadcasting in cases where content “consists only of audio, video, a combination of audio and video, or other visual images including still images that do not consist predominantly of alphanumeric text.”<sup>8</sup> As well as excluding the possibility of regulating general web pages, the Commission also decided not to include user-generated content in defining new media.<sup>9</sup>

The 1999 policy document further outlines that the definitions of “broadcasting” and “programming” in the *Broadcasting Act* are technologically neutral providing for the possibility of regulation.<sup>10</sup> Despite OTT’s lack of transmission or receiving device, the Commission held that the *Broadcasting Act* did not contemplate the use of any particular technology:

Further, the Commission considers that the particular technology used for the delivery of signals over the Internet cannot be determinative. Based on a plain meaning of the word, and recognizing the intent that the definition be technologically neutral, the Commission considers that the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user’s apparatus) by means of the Internet involves the “transmission” of the content.<sup>11</sup>

The above statement is the extent of the legal analysis produced by the CRTC on the technological neutrality of the *Broadcasting Act* in the 1999 document. The brevity of this statement stands in sharp contrast to the extensive discussion by the Supreme Court of Canada about technological neutrality of the *Copyright Act*, to be discussed in greater depth below in Part IV.

<sup>5</sup> See, for example, Paul Dickinson & Jonathon Ellison, *Canadian Social Trends Catalogue No 11-008: Plugged into the Internet* (1999) online: Statistics Canada <[http://www.statcan.gc.ca/kits-trousses/pdf/social/edu04\\_0118a-eng.pdf](http://www.statcan.gc.ca/kits-trousses/pdf/social/edu04_0118a-eng.pdf)> at 2.

<sup>6</sup> (Ottawa: CRTC, 17 May 1999) online: CRTC <<http://www.crtc.gc.ca/eng/archive/1999/pb99-84.htm>> [*Public Notice 1999-84*].

<sup>7</sup> *Broadcasting Act*, SC 1991, c 11.

<sup>8</sup> *Public Notice 1999-84*, *supra* note 6 at para 35.

<sup>9</sup> *Ibid* at paras 41–46. In this section the CRTC states that user-customized content is excluded from regulation as this content is not created for public consumption, differentiating it from online video. This is further clarified in later CRTC documents where content is “created by Canadians in their individual capacity.” See footnote in CRTC, *Broadcasting and Telecom Notice of Consultation CRTC 2011-344: Fact Finding exercise on the over-the-top programming in the Canadian broadcasting system*, (Ottawa: CRTC, 25 May 2011) online: CRTC <<http://crtc.gc.ca/eng/archive/2011/2011-344.htm>> [*Notice 2011-344*].

<sup>10</sup> *Ibid* at para 38.

<sup>11</sup> *Ibid* at para 39.

Despite this determination, in this same 1999 decision the CRTC decided that OTT would not be subject to regulatory oversight under the *Broadcasting Act*. What would become labeled as “the new media exemption order” by the CRTC was not term dependent but was to be reviewed regularly by the Commission.<sup>12</sup> The only suggestion made about a limited time period of application by the CRTC was that the exemption might end when online services compete directly with traditional broadcast services, thereby limiting the ability of broadcasters to meet the objectives of regulation set out in the *Broadcasting Act*.<sup>13</sup> At the time the CRTC also reviewed the benefits to Canadians of online video including: creating an alternative source for information, developing regionally unique programming, and producing bilingual content. These benefits were felt to outweigh the need for regulation which would only require new media companies to create similar content.<sup>14</sup> Subsequent to the initial 1999 *Notice*, the CRTC issued an official policy in *Public Notice 1999-197 Exemption order for new media broadcasting undertakings*.<sup>15</sup>

#### **(b) Reconsidering Policy: 2009**

The 1999 exemption order was reviewed by the CRTC ten years later in *Broadcasting Regulation Policy 2009-329, Review of broadcasting in new media*.<sup>16</sup> The 2009 review was initiated because of changes in the new media environment, as was previously noted by the Commission in the *2006 Report on the Future Environment Facing the Canadian Broadcasting System*,<sup>17</sup> including the growth of home access to the Internet by Canadians and the availability of higher quality video online.<sup>18</sup>

Like the 1999 assessment, in 2009 the Commission determined that the new media exemption order should remain in place.<sup>19</sup> However, reading the 2009 policy document more closely reveals a heightened awareness by the broadcasting industry about OTT and the threat it might pose to regulated broadcast undertakings. While parties remained unsure about effect of online video on the broadcast industry in 1999,<sup>20</sup> in 2009 technological advances meant that a threat was clearly per-

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<sup>12</sup> *Ibidat* para 51.

<sup>13</sup> *Ibid* at para 96. The CRTC notes considerations as to the direct competition between these services ought to include: the cost of exhibition devices, the general appeal of the service offerings, customers’ willingness to pay, as well as PC and Internet access penetration rates.

<sup>14</sup> *Ibid* at para 48.

<sup>15</sup> CRTC, *Public Notice 1999-197: Exemption order for new media broadcasting undertakings* (Ottawa: CRTC, 17 December 1999) online: CRTC <<http://crtc.gc.ca/eng/archive/1999/PB99-197.HTM>>.

<sup>16</sup> *Policy 2009-329*, *supra* note 2.

<sup>17</sup> CRTC, *Report on the Future Environment Facing the Canadian Broadcasting System* (Ottawa: CRTC, 14 December 2006) online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports/broadcast/rep061214.htm>>.

<sup>18</sup> *Policy 2009-329*, *supra* note 2 at para 9–11.

<sup>19</sup> *Ibid* at para 21.

<sup>20</sup> *Public Notice 1999-84*, *supra* note 6 at paras 73 and 90.

ceived.<sup>21</sup> Such a threat, parties argue, could cause disruption in traditional television broadcasting industry, which might require regulatory intervention to recast the balance of the system. Here, although not fully defined, parties suggest that disruption of the system may result in the inability of the privately held television broadcasters to fulfill the requirements of their license, with a particular emphasis put on the potential effects on the finances of broadcasters by shifts in viewership to online video formats. As viewership shifts to online entities, so too might advertising revenues leaving traditional television broadcasters with less income from which to produce and broadcast Canadian content programming as required under their terms of license. Although the Commission rejected the notion, stating that evidence of a real threat to the Canadian broadcasting industry was not clear,<sup>22</sup> media organizations were able to successfully insert into the public record recognition by the Commission that such a threat may be used to assess the need for regulation in future.

The CRTC reaffirmed in 2009 that licensing and regulation of online video must take place in a manner that furthers the intents of the *Broadcasting Act*,<sup>23</sup> and highlighted a number of areas for future study and consideration such as: the promotion of Canadian content online, the need for stronger measures to assess the impact of online video, and the need to develop a national digital strategy.<sup>24</sup>

### (c) Witness to Urgency: 2011

As the 2009 policy review confirmed the intent of the Commission to reconsider exemption orders every five years,<sup>25</sup> what then led to a reconsideration only two years later in 2011? In *Broadcasting and Telecom Notice of Consultation CRTC 2011-344*,<sup>26</sup> the CRTC lays out its intent to respond to the needs of the Canadian broadcasting industry. With a clear tone of urgency the Commission summarizes recent changes in the Canadian broadcast environment: programming from the Internet can be accessed without subscription to cable or satellite television services,<sup>27</sup> the price points of online video services are increasingly attracting a Canadian audience,<sup>28</sup> new business models for online video providers are becoming successful,<sup>29</sup> and concern was expressed by key industry players about developments in OTT.<sup>30</sup> This led the CRTC to state: “there has been increasing evidence that broadcasting in new media may have an impact on the Canadian broadcasting

<sup>21</sup> *Policy 2009-329*, *supra* note 2 at para 22.

<sup>22</sup> *Ibid* at para 22: “Based on the record of the Proceeding, the Commission does not consider that broadcasting in new media currently poses a threat to traditional broadcasting licensees’ ability to meet their obligations.”

<sup>23</sup> *Ibid* at para 23.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at para 26.

<sup>26</sup> *Supra* note 9.

<sup>27</sup> *Ibid* at para 3.

<sup>28</sup> *Ibid* at para 4.

<sup>29</sup> *Ibid* at para 5.

<sup>30</sup> *Ibid* at para 8.

system in the near future.”<sup>31</sup> Unlike statements in 1999 and 2009, the Commission’s *Notice 2011-344* did not invoke the need for regulation to fulfill objectives under the *Broadcasting Act*, but instead focused on industry concerns in its call for comments. The tone in 2011 almost takes for granted the threat of online video — it now seems to be apparent. The Commission’s function seems simply to be to manage this threat on behalf of the television industry.

It is surprising then that five months later, in the resulting report, the CRTC concludes, as in 1999 and 2009, that the exemption order for new media should continue as proponents of a regulatory approach were unable to provide evidence of how online video was harming traditional broadcasters’ ability to fulfill their obligations under the *Broadcasting Act*.<sup>32</sup> Instead, the report notes, traditional broadcasters are engaging with audiences through online video themselves, and online video is providing Canadians with a diversity of programming such as allowing independent producers the ability to reach new audiences.<sup>33</sup> Unlike the resultant reports of 1999 and 2009, no mention is made of an actual threat to Canadian broadcasters by OTT. Instead mentions of change, transformation, and uncertainty are seen as a challenge to the business models of traditional broadcasters.<sup>34</sup> Despite the urgency of tone in *Notice 2011-344*, the report is much less anxious about the state of Canadian broadcasting in light of actual developments.

However, from 1999 to 2011 statements by the CRTC about the status of regulation for online video took a decided turn to consider industry perspectives on the regulatory environment alongside legal and regulatory considerations created by mandate under the *Broadcasting Act*. This industry focus may be the result of greater emphasis by the Commission on industry deregulation and a heightened importance for coordination with external government bodies to create consistent regulatory policies or de-regulate where possible.<sup>35</sup> Focus on industry worries over the past 12 years has forced the Commission to become more responsive to industry needs over purely legal or regulatory concerns.

## II. SPECULATING ON REGULATION

If regulation of OTT were to take place, what might it look like? Although the CRTC has never been clear about its vision for the regulation of online video, because of the nature of online video technology it seems unlikely that regulation would take place in exactly the same manner as with traditional broadcasters. This difference is particularly relevant for the provision of Canadian content requirements, which, it is assumed, would be part of any regulation of a broadcasting entity as it is a key obligation for broadcasters under the *Act*.<sup>36</sup> As the regulator has

<sup>31</sup> *Ibid* at para 2.

<sup>32</sup> *Supra* note 3 at “Conclusion”.

<sup>33</sup> *Notice 2011-344*, *supra* note 9.

<sup>34</sup> *Ibid*.

<sup>35</sup> See, for example, Competition Bureau, *CRTC/Competition Bureau Interface Bulletin* (Ottawa: Competition Bureau, 2001) online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01598.html>>.

<sup>36</sup> *Supra* note 7, s 3(1)(d), (e).

acknowledged the consumer driven on-demand characteristics of online video,<sup>37</sup> it seems likely that the form of regulatory oversight applied might be borrowed from the regulation of video on demand (VOD) services that operate on a similar premise. In a 1997 decision, the CRTC required VOD providers in Canada to fulfill Canadian content obligations by reserving “shelf space” in their video libraries for Canadian programming.<sup>38</sup> It might be expected that online video providers also fulfill similar requirements.

Related is the issue of program acquisition and development in Canada. As the *Broadcasting Act* requires that all regulated entities contribute to the creation and presentation of programming,<sup>39</sup> it seems likely that financial contributions from online video providers might be necessary. Currently regulated broadcasters pay for the acquisition of Canadian content programming in order to fulfill this mandate,<sup>40</sup> but whether online video providers would be expected to undertake acquisitions in the same manner, or whether financial contributions would be expected to help fund the production of Canadian content, remains unclear. Another issue that remains unclear with regard to the potential regulation of online video entities includes whether requirements would be issued to ensure the provision of services for disabled persons as required under the *Broadcasting Act*.<sup>41</sup> Regulatory consideration is particularly unclear on how any costs to online media companies might be borne by consumers, assuming regulatory action were to have associated costs for compliance.

Perhaps the biggest issue facing the regulator is what types of online entities might be termed broadcasters as it is not at all apparent what websites might be subject to the *Broadcasting Act*. For example, might a website with one video available be an online broadcaster, or must it be a website where the majority of content is video? Are websites that have both user generated and professional content subject to regulatory oversight or not? Of concern is the effect regulation may have on the development of the online industry, particularly among innovative firms. This is particularly true where regulation is applied in a manner creating discrepancies in the legal treatment of seemingly similar internet-based firms.<sup>42</sup> Regulation may result in increased monitoring costs, as well as greater editorializing of content, which can adversely affect innovation by firms in the sector.<sup>43</sup> Overall how online video would be regulated by the CRTC remains highly speculative.

<sup>37</sup> *Public Notice 1999-84*, *supra* note 6 at para 39.

<sup>38</sup> CRTC, *Public Notice CRTC 1997-83: Licensing of New Video-On-Demand Programming Undertakings* (Ottawa: CRTC, 2 July 1997) online: CRTC <<http://www.crtc.gc.ca/eng/archive/1997/PB97-83.htm>> at para 25. This was done at a ration of one Canadian program to every ten international programs.

<sup>39</sup> *Supra* note 7, s 3(1)(d).

<sup>40</sup> CRTC, *Canadian Program Certification*, online: CRTC <[http://www.crtc.gc.ca/eng/info\\_sht/tv11.htm](http://www.crtc.gc.ca/eng/info_sht/tv11.htm)>.

<sup>41</sup> *Supra* note 7, s 3(1)(p).

<sup>42</sup> Jack Goldsmith & Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford: Oxford University Press, 2006) at 159.

<sup>43</sup> *Ibid* at 160.

### III. ISSUES FOR REGULATING OTT WITHIN THE *BROADCASTING ACT*

An important consideration, as evidenced in the above discussion of what regulation might look like for online video companies, is the application of the *Broadcasting Act* itself in an online environment. Although the 1999 policy statement from the Commission deemed the *Broadcasting Act* technologically neutral,<sup>44</sup> other considerations such as the nature of the system, the designation of online entities as broadcasters, and the goals of the *Broadcasting Act* make it necessary to assess the applicability of regulation online.

#### (a) “A single system”

Section 3(2) of the *Broadcasting Act* states: “It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.”<sup>45</sup> The concept of the single system for online video is legally and technologically troublesome from a definitional standpoint.

The concept of Canadian broadcasters forming a single system can be traced back to the Fowler Committee of 1964, who had the task of advising the Trudeau government on updates to the *Broadcasting Act* and the future role for the regulator.<sup>46</sup> In their final report the Fowler Committee made the argument that despite the growth of private broadcasters in Canada, there remained a public duty and public obligations across all broadcasters regardless of their ownership.<sup>47</sup> As such, both private and public broadcasters had public obligations to be fulfilled under their licenses in the single system for broadcasting.<sup>48</sup> Justification for the single system concept developed because all broadcasters in Canada had to access, and make use of, the publicly owned spectrum in order to broadcast. The notion of the single system first set out by the Fowler committee is still evoked today by the CRTC when discussing the need for consistency of regulation across broadcasting entities.<sup>49</sup>

The concept of the single system is much harder to apply to online video. Because the words of the *Broadcasting Act* only give authority to the CRTC to regulate where a service may be deemed to be a broadcast, it is necessary to consider whether the technology upon which OTT is built is the same as that of a

<sup>44</sup> *Public Notice 1999-84*, *supra* note 6 at para 38.

<sup>45</sup> *Supra* note 7, s 3(2).

<sup>46</sup> CRTC, *CRTC origins: history and chronology* (2008) online: CRTC <<http://www.crtc.gc.ca/eng/backgrnd/brochures/b19903.htm>>.

<sup>47</sup> Marc Raboy, *Missed Opportunities: The Story of Canada's Broadcast Policy* (Montreal: McGill-Queen's Publishing, 1990) at 162.

<sup>48</sup> *Ibid.* This notion is reflected in the public nature of spectrum allocation possible under the licensing regime to be discussed below.

<sup>49</sup> See for example: CRTC, *Broadcasting Notice of Public Hearing CRTC 2008-11-1 The role of community broadcasters* (Ottawa: CRTC, 22 January, 2008) online: CRTC <<http://www.crtc.gc.ca/eng/archive/2008/n2008-11-1.htm>>.



broadcaster. Not only is the allocation of public spectrum that underlies justification for broadcast regulation not present online, another challenge to regulation is the nature of property that creates Internet connectivity. As author Craig McTaggart outlines in his paper “A layered approach to internet legal analysis,” the Internet can be seen as a series of interconnected layers of legacy telecom technology that create the functionality of the Internet as consumers understand it to operate.<sup>50</sup> These layers each have a specific role to produce, operate, and generate the applications and content carried over the Internet.<sup>51</sup> At each layer innumerable companies own, create tools or operate to support the functionality of systems.<sup>52</sup> The nature of the Internet therefore is fundamentally different than the older monolithic system of telephony. As McTaggart states:

For most of the history of the telephone, the user could only use it for one purpose — voice telephone calls. While it may seem trite, this limitation, and the structural reasons for it, become significant when contrasted with the open, layered data networks of the Internet. So long as one company was in complete control of all aspects of the telephone network, its use was narrowly defined.<sup>53</sup>

Like the differences between the Internet and the telecommunications system, the single system nature of broadcasting is not comparable to the architecture of the Internet. Because of the nature of the technology supporting OTT services — where the content, applications and infrastructure of the Internet are interlinked in terms of its architecture — any regulatory action is much more penetrating across a variety of providers and technologies than the “single system” concept connotes.

### **(b) Goals of the Broadcasting Act**

The goals of the *Broadcasting Act* are outlined under “Declarations” in section 3(1)(a)–(t).<sup>54</sup> Inconsistencies and contradictions are apparent between many of these declarations: for example, it is hard to resolve how a broadcast system should both “encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity,”<sup>55</sup> while being drawn from a variety of sources including international ones.<sup>56</sup> Likewise, some of the declarations provide difficulties for the ability of the regulator to license online video.

Among areas of difficulty are: the need for broadcasters to be Canadian owned,<sup>57</sup> provisions for the broadcast and financial contributions necessary to cre-

<sup>50</sup> Craig McTaggart, “A Layered Approach to Internet Legal Analysis,” (2003) 48:4 McGill LJ 571.

<sup>51</sup> *Ibid* at 574.

<sup>52</sup> *Ibid* at 574.

<sup>53</sup> *Ibid* at 574-575.

<sup>54</sup> *Supra* note 7, s 3(1)(a)–(t).

<sup>55</sup> *Ibid*, s 3(1)(d)(ii).

<sup>56</sup> *Ibid*, s 3(1)(i)(ii).

<sup>57</sup> *Ibid*, s 3(1)(a).

ate Canadian content programming,<sup>58</sup> the requirement that broadcasts be of a high standard,<sup>59</sup> and all broadcasters under the *Act* must take responsibility for the programs they broadcast.<sup>60</sup> This latter responsibility is especially difficult for online video websites that allow individuals to upload their own personal video content. Consumer-oriented production, whether by individual or professional producers, and distribution mechanisms intrinsic to these Internet platforms, means that constant monitoring of all contributed content on a worldwide basis is next to impossible to complete in real-time. Such inaction is not meant to excuse websites from ignoring offensive or illegal content, but unlike the editorial approach taken with traditional broadcast media, online media are much more user-oriented so that until notification of objectionable material occurs little response from website owners can be expected. Further, the need for Canadian ownership provides an enormous difficulty for regulation where content is widely available globally through the Internet. In response to *Notice 2011-344* a suggestion was made that under Canadian law Internet sites without physical assets in Canada may be regulated if they have a substantial connection to Canada;<sup>61</sup> however, the ability to establish such a connection over all websites hosting online video is tenuous. As broadcasting policy has been described by the Supreme Court, the ownership structure of broadcasters is essential to the system: “Canadian ownership and control of the broadcasting system should be a base premise”.<sup>62</sup> The inconsistency with which such a principle may be applied on a global basis makes regulation potentially inconsistent across the variety of firms that operate, and may inhibit growth among regulated Canadian firms in the sector over international competitors.

As was recognized most recently in the 2011 fact-finding report,<sup>63</sup> the CRTC has acknowledged that some aspects of online video also further the goals of the *Broadcasting Act*. This includes effects such as: enhancing innovation consistent with the need for the broadcasting system to be adaptive to technological change,<sup>64</sup> increasing the content created by Canadians that is shared through the Internet,<sup>65</sup> and increasing the exposure of Canadians to multicultural programming.<sup>66</sup> Other areas where online video seems to be contributing to Canadian broadcast goals include exposing Canadians to regional and rural issues,<sup>67</sup> as well as an increasing

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<sup>58</sup> *Ibid.*, s 3(1)(e).

<sup>59</sup> *Ibid.*, s 3(1)(g).

<sup>60</sup> *Ibid.*, s 3(1)(h).

<sup>61</sup> See Peter S Grant, Television and Radio Artists, *Appendix 4 Joint Submission of ACTRA, APFTQ, CMPA, DGC and WGC in response to B/TNOC 2011-344: Enforcement of CRTC Jurisdiction over Foreign OTT Services*, online: ACTRA <[http://www.actra.ca/main/wp-content/uploads/BTNOC-2011-344\\_OTT\\_APPENDIX-4\\_Peter-Grant.pdf](http://www.actra.ca/main/wp-content/uploads/BTNOC-2011-344_OTT_APPENDIX-4_Peter-Grant.pdf)>.

<sup>62</sup> *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, ¶47.

<sup>63</sup> *Fact-Finding Results*, *supra* note 3.

<sup>64</sup> *Broadcasting Act*, *supra* note 7, s 3(1)(d)(iv).

<sup>65</sup> *Ibid.*, s 3(1)(e).

<sup>66</sup> *Ibid.*, s 3(1)(d)(iii).

<sup>67</sup> *Ibid.*, s 3(1)(i)(ii).

the number of online programs featuring aboriginal Canadians.<sup>68</sup> Hence, it is not at all clear that unregulated online broadcasting is having a detrimental effect on Canadian content or broadcasting in Canada from the perspective of the availability of programming.

While the CRTC has declared the *Broadcasting Act* to be technologically neutral, upon further investigation it is not clear that the declarations of the *Act* are applicable to online environments as is made clear in some judicial discussions of broadcasting and the nature of the internet.

#### IV. ONLINE VIDEO AND JURISPRUDENCE

##### (a) Lack of Clarity through Judicial Decisions

Turning to the courts for legal interpretation of the applicability of the *Broadcasting Act* to other media, including OTT, is apt to leave a researcher disappointed. Although the ability of the CRTC to regulate online video under the *Broadcasting Act* was raised in *Reference re Broadcasting Act* (2010), the Federal Court of Appeal refused to answer the question and instead decided the case based on other considerations.<sup>69</sup> Justice Noël, for the court, states:

To be clear, neither the assumption that “broadcasting” takes place on the Internet nor the underlying findings made by the CRTC are in issue in this proceeding with the result that the Court in answering the referred question cannot be viewed as making any pronouncement with regard to the assumption or any of these findings.<sup>70</sup>

Therefore, certitude about the authority of the CRTC to regulate online video in Canada has not been determined at law; however, other Federal Court and Supreme Court of Canada decisions can help to draw a line between what may be called broadcasting and what is not.

##### (b) Judicial Interpretations Related to Broadcasting

Although the courts in Canada have shied away from directly addressing the authority of the CRTC to regulate online video, a clear trend historically related to questions of broadcast law is to consider the technology needed to create a “broadcast.” In doing this courts have looked at the transmission and reception of electromagnetic waves, or radio waves, to determine whether an entity is a broadcaster and whether that entity should be regulated at the federal or provincial level of governance. Here the courts have traditionally used the transboundary nature of radio waves to reinforce the need for federal jurisdiction over the industry. Only recently, with the advent of the Internet, have courts started to consider other elements to define the nature of a broadcaster such as the control of an entity over programming. In either case, it seems speculative to include online video providers as inherently subject to CRTC regulatory authority based on these prior decisions.

<sup>68</sup> *Ibid*, s 3(1)(o).

<sup>69</sup> *Reference re Broadcasting Act*, 2010 FCA 178, ¶31–33 [*Reference re Broadcasting Act*, FCA].

<sup>70</sup> *Ibid* at para 33.

(i) *Broadcasting and the Importance of Electromagnetic Waves*

For the courts, the transmission and reception of electromagnetic radio waves has come to be a key feature of broadcasting, which has been used to define the nature of the industry and determine which bodies have regulatory oversight of it. In a 1931 Supreme Court of Canada decision,<sup>71</sup> later affirmed by the Privy Council in 1932, the court found that the federal government's authority to regulate radio-communications could be found because:

the broadcasting of message in a province or in territory of Canada, has its effect in making the message receivable as such, and is also effective by way of interference, not only within the local political area within which the transmission originates, but beyond, for distances exceeding the limits of a province, and that, consequently if there is to be harmony or reasonable measure of utility or success in the service, it is desirable, if not essential, that the operations should be subject to prudent regulation and control.<sup>72</sup>

In this case the reception and transmission of radio waves beyond the borders of any one province, helped define the nature of the broadcast medium as being extra-provincial requiring federal oversight and regulation of the industry.

The Privy Council further states the provinces' argument:

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate.<sup>73</sup>

Here the transmission and reception of electromagnetic broadcasting waves has been used by the Privy Council to define the broadcast medium and to determine what types of broadcasting activities might be applicable to federal regulation. Constitutionally then, the technology creating broadcasts supported the need for a federal body to oversee the regulation of the industry.

Likewise in 1978, hearing two constitutional challenges<sup>74</sup> about the regulation of cable companies, the Supreme Court cited the reception of broadcasting signals by cable companies as key to determining regulatory authority. In this way cable companies required a similar technology to receive broadcasts sent through electromagnetic radio waves which they then redistributed through coax cable wires to consumers. In *Capital Cities*, the antennae needed by Rogers Cable TV Limited to receive signals from the United States helped the court determine that cable television was not unlike that of traditional over-the-air television as both required similar technologies to receive signals, although the redistribution of programming to

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<sup>71</sup> *Regulation & Control of Radio Communication in Canada, Re*, [1931] SCR 541 at 546.

<sup>72</sup> *Regulation & Control of Radio Communication in Canada, Re*, [1932] AC 304 [*Radio Reference*].

<sup>73</sup> *Ibid* at 314-315.

<sup>74</sup> *Capital Cities Communications Inc v Canadian Radio-Television & Telecommunications Commission*, [1978] 2 SCR 141 and *Dionne v Quebec (Public Service Board)*, [1978] 2 SCR 191.

consumers differed. In *Dionne v Quebec (Public Service Board)* the need for an antennae by cable companies in order to receive signals for redistribution to consumers was essential to determining whether an entity should be regulated by the CRTC.<sup>75</sup> Although the court emphasized that it was the service, and not the means of distribution that must be considered to determine regulatory authority, the court limited their determination to television broadcasting and not to the wider audio-visual medium.<sup>76</sup> Hence, the need to access and use spectrum for broadcasting signals has remained a key element justifying government intervention and regulation.

(ii) *Broadcasting and Control*

In the most recent consideration by the Supreme Court of Canada related to the *Broadcasting Act*, the court considered whether an Internet Service Provider (ISP) may be regulated under the *Act* when providing an end-user with video content.<sup>77</sup> This was an appeal of the decision by the 2010 Federal Court of Appeal discussed earlier in this section.<sup>78</sup> As the Federal Court of Appeal decided not to address the question of the CRTC's authority related to the regulation of online video, the Supreme Court of Canada also made no findings on this issue. In their decision, however, the Supreme Court looked instead at the issue of control over programming as it related to broadcasting and ISPs. Giving weight to the concept of control was a significant shift away from prior court decisions defining broadcasts by examining the technology involved to create audio-visual images, as discussed above, but consistent with other copyright liability findings related to ISPs.<sup>79</sup>

In a decision delivered by the court, a finding is made that aspects of broadcast law and principles do not apply to ISPs because of a lack of control: "There was no questioning in *Capital Cities* of the fact that the cable television companies had control over content. ISPs have not such ability to control the content of programming over the Internet."<sup>80</sup> The Supreme Court, however, does not define control in this case, but rather, refers to prior decisions about the nature of an ISP as a conduit to information which cannot be liable for consumer actions as found in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers (CAIP)*. In their decision control seems to relate to the inability of an ISP to dictate programming to a consumer so that ISPs act only as a conduit to content and do not actively control what a consumer might watch.

If the concept of control were to be applied more broadly to broadcast law, however, this presents an interesting new challenge for determining CRTC authority to regulate OTT. This is because the degree of control that online video provid-

<sup>75</sup> *Ibid.* See also *Capital Cities Communications Inc v Canadian Radio-Television & Telecommunications Commission*, *supra* note 74.

<sup>76</sup> *Dionne v Quebec (Public Service Board)*, *supra* note 74 at 197.

<sup>77</sup> *Reference re Broadcasting Act*, 2012 SCC 4 [*Reference re Broadcasting Act*, SCC].

<sup>78</sup> See *supra* note 69.

<sup>79</sup> See, for example, *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427, 2004 SCC 45 [CAIP].

<sup>80</sup> *Reference re Broadcasting Act*, *supra* note 77 at para 9.

ers have over content viewing is not absolutely clear. Although online video providers, as the hosts of content online, clearly have capacity over the content, they seemingly lack real control over what is viewed. This is because of the nature of the medium where viewers most often chose the content they wish to view, with little to no editorializing of content into a formalized schedule of programming. In the world of user generated web content, control becomes all the more diminished as users create the content that is hosted by the website. These video providers are often unable to initially review the content before it is posted on a public site, meaning that their control over what is viewed is greatly reduced.

(iii) *What the Courts Say about Online Media*

The tenuous links between OTT and traditional broadcasting are made even more apparent when considering court statements about the nature of the Internet. Following a series of decisions which first determined that telephone companies acted as a neutral conduit for the transmission and reception of messages among users,<sup>81</sup> the courts have treated Internet services likewise as a conduit for communications. This has generally been determined as telecommunications companies and ISPs do not provide a form of communication that is for the general reception by the public as broadcasters do.<sup>82</sup> Although the full scope of Internet-related court decisions cannot be summarized here, two significant and recent court decisions will be noted below.

Consideration of the nature of the Internet has most readily happened in court proceedings related to Intellectual Property. In *ITV Technologies Inc v WIC Television Ltd*,<sup>83</sup> a Federal Court of Appeal case considering a dispute over trade marks, the court recognized that broadcasting and online video are distinct activities.<sup>84</sup> This decision, however, was considered within the context of trademark law where the nature of the use of a business name was at issue, necessitating drawing out the differences between different types of activities for specific purposes related to the trademark. It, therefore, may not be the most apt assessment of technology for the purposes of defining broadcast entities.

The nature of copyright has also helped define some of the differences between broadcast and Internet technologies. This was done chiefly in early Supreme Court decisions in *CCH Canadian Ltd v Law Society of Upper Canada (CCH)* and *CAIP*. In both cases communications to the public made possible through telephone-based technology were defined and considered. While the technology used in *CCH* and in *CAIP* was different, the Supreme Court applied the neutral conduit model to the transmission of copyrighted communications.<sup>85</sup>

The concept of the neutrality of technology is considered in *Entertainment Software Assn v Society of Composers, Authors & Music Publishers of Canada*

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<sup>81</sup> *Electric Despatch Co v Bell Telephone Co* (1891), 20 SCR 83.

<sup>82</sup> *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [CCH]. Also cited in *Reference re Broadcasting Act*, FCA, *supra* note 69 at para 23.

<sup>83</sup> 2005 FCA 96.

<sup>84</sup> *Ibid* at paras 41–43.

<sup>85</sup> See *CCH*, *supra* note 82 at para 127 and *CAIP*, *supra* note 79 at para 101.

(2012),<sup>86</sup> part of the Supreme Court's decision in the so-called copyright pentology of cases. Here the technological neutrality of the *Copyright Act* is emphasized. Justices Abella and Moldaver for the court state that a "communication" under section 3(1)(f) the *Copyright Act*<sup>87</sup> must be technologically neutral.<sup>88</sup>

In writing their decision the Supreme Court makes clear that amendments to the *Copyright Act* defining the communication of works, related to a performance right, from "radio communication" to "telecommunication" allowed for an expanded definition.

In this context the replacement of the words "radio communication" with "telecommunication" should be understood as merely expanding the means of communicating a work — that is, from radio waves ("by radio communication") to cable and other future technologies ("to the public by telecommunication"). In our view, by substituting the word "telecommunication" in 1988 Parliament did not intend to change the fundamental nature of the communication right, which had for over 50 years been concerned with performance-based activities. Instead, Parliament only changed the means of transmitting a communication.<sup>89</sup>

This interpretation by the Supreme Court of Canada may have implications to the interpretation of the *Broadcasting Act*; however, its exact effects are not clear. In their decision the court seems to indicate that the form of the communication is not important, but it is simply necessary to see that a communication did take place. An open question then is whether statements such as those above might be used to interpret the *Broadcasting Act* as being primarily about any form of audio-visual communications, regardless of the technology that supports it. Perhaps online video might be included as a form of broadcasting if "communications" are said to be technologically neutral? The CRTC itself stated that the *Broadcasting Act* should be interpreted in a technologically neutral manner in creating the new media exemption rule.<sup>90</sup> Accepting such an interpretation, however, seems to neglect the intended purpose of the *Broadcasting Act* and, perhaps, fails to recognize the differences between the two Acts.

As the Supreme Court has pointed out in its prior decisions on broadcasting the technology that supports a broadcasting service is essential to defining this service.<sup>91</sup> The *Broadcasting Act*, itself, rests governance over the industry by the CRTC upon the transmission and reception of electromagnetic waves carrying audio or audio-visual content.<sup>92</sup> It is, therefore, more difficult to see how the technology supporting the medium may be completely ignored with regard to the interpretation of the *Broadcasting Act*. The *Copyright Act* is also fundamentally different in that it is the content by a creator that is being protected in law and not the provision

<sup>86</sup> 2012 SCC 34 [*Entertainment Software Assn.*].

<sup>87</sup> *Copyright Act*, RSC 1985, c C-42, s 3(1)(f).

<sup>88</sup> *Entertainment Software Assn.*, *supra* note 86 at para 5.

<sup>89</sup> *Ibid* at para 25.

<sup>90</sup> See discussion above *supra* note 11.

<sup>91</sup> See, as discussed above, *Radio Reference*, *supra* note 72; *Capital Cities*, *supra* note 74; and *Public Service Board*, *supra* note 74.

<sup>92</sup> *Supra* note 7, s 3(1)(b).

of a service as in broadcasting. As is pointed out in the *Public Service Board* case noted above, the various systems of provision that create broadcasting entities cannot be considered exclusively but the nature of the service must also be considered: “In all these cases, the inquiry must be as to the service that is provided and not simply as to the means through which it is carried.”<sup>93</sup> The nature of the legal concept at issue, therefore, seems to restrict an expanded interpretation of communication.

## V. LEGAL UNDERPINNINGS OF BROADCAST AND TELECOMMUNICATION REGULATION

At the heart of the 1999 *Public Notice* by the CRTC is the implication that regulation is inevitable when OTT services outpace traditional broadcast services.<sup>94</sup> Such a justification is the result of the Commission’s interpretation of their duties under the *Broadcasting Act*. However, the legal underpinnings of broadcast law, as discussed by the Supreme Court of Canada, are not found in the “likeness” of services, but in the technology supporting the service of broadcasting. Below further discussion will enhance and draw out the differences between the legal justifications for regulating the broadcast and telecommunications industries in Canada.

### (a) Historic Broadcast Regulation and the Nature of the CRTC’s Legal Authority

The history of regulating broadcasting in Canada is the history of reactionary responses to perceived threats. Throughout this history a primary concern has been ensuring Canadian control and ownership of broadcasters in order for Canadian content to be produced.<sup>95</sup> This was the initial response of the Canadian government to an influx of broadcasting signals transmitted into Canada during the 1920s from the United States.<sup>96</sup> Such was the concern of the Aird Commission’s *Report of the Royal Commission on Radio Broadcasting* in 1928, when recommendations were made to create a Canadian public broadcaster and to create rules to ensure Canadian content would be carried through the broadcast medium.<sup>97</sup> In 1958 the Board of Broadcast Governors was created under the new *Broadcasting Act*, which would oversee the regulation of both private and public broadcasters in Canada.<sup>98</sup> Later in 1968 the Canadian Radio-television Commission, a forerunner to the CRTC, was created.<sup>99</sup>

The legal justification that allows the CRTC to regulate public and private

<sup>93</sup> *Public Service Board*, *supra* note 74 at 197.

<sup>94</sup> *Supra* note 6 at para 38.

<sup>95</sup> Michael Dewing, *Publication No 2011-39E — Canadian Broadcasting Policy* (Ottawa: Parliament of Canada, February 2012), online: Library of Parliament Research Publications <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-39-e.htm#a2>>.

<sup>96</sup> *Ibid.*

<sup>97</sup> John Aird, *Report of the Royal Commission on Radio Broadcasting* (Ottawa: Canada, 1928).

<sup>98</sup> Dewing, *supra* note 95.

<sup>99</sup> *Ibid.*



broadcasters in Canada is the need for government oversight to manage spectrum through which broadcasts are carried. This idea is vested in the “single system” approach to regulation discussed above. At its core the federal government has the ability to regulate broadcasting in Canada under section 91 of the *Constitution*, which, although not granting legislative authority directly over the industry, gives the federal government powers over related industries for communications such as the postal service, the military, and shipping.<sup>100</sup> As communications, like the railways and the postal service, have a national dimension government management and oversight is required of spectrum allocations. The idea of the national dimension of broadcasting was affirmed in *Regulation & Control of Radio Communication in Canada, Re.*<sup>101</sup> This is also reflected in section 3(1)(b) of the *Broadcasting Act*:

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.<sup>102</sup>

An equally important justification, also articulated in American law,<sup>103</sup> is that spectrum is limited. Using basic economic principles it is possible to identify spectrum as a good of inelastic supply; price has no effect on the ability to supply the good, but licensing may provide a controlled approach to access spectrum. Because of its limited nature, spectrum is defined as a public good, which the government oversees and manages on behalf of the Canadian people. Historically the legal justification for the regulation of public goods can be found where some commodities bring benefits that are greater to a society if distributed more equitably through management and licensing of private entities by government bodies.<sup>104</sup> Such management is necessary to prevent excessive consumption by private parties.<sup>105</sup> Historically in the United States, excessive consumption occurred where broadcasters competed for broadcast frequencies causing disruption to programming.<sup>106</sup> Historically in Canada, broadcasters competing for the attention of Canadians were not only domestic broadcasters, but American broadcasters as well.<sup>107</sup> Inherent in this

<sup>100</sup> *Constitution Acts, 1867*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(5), (7), (10).

<sup>101</sup> *Supra* note 71 and *supra* note 72. Note further discussion of the significance of this case occurs above.

<sup>102</sup> *Supra* note 7, s 3(1)(b).

<sup>103</sup> See Ithiel de Sola Pool, *Technologies of Freedom*, (Cambridge, MA: Harvard University Press, 1983), at 132; *Red Lion Broadcasting Co v FCC*, 395 US 367 [*Red Lion Broadcasting*].

<sup>104</sup> Robert Baldwin & Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 1999) at 13.

<sup>105</sup> *Ibid* at 14.

<sup>106</sup> See *Red Lion Broadcasting* for discussion of the effects of excessive consumption and justification of spectrum management by Federal Radio Commission, *supra* note 103 at para 395.

<sup>107</sup> *Reference re Broadcasting Act, FCA*, *supra* note 69.

justification are the two related regulatory assumptions: a shortage of spectrum and an almost unlimited appetite for frequencies by broadcasters making self-regulation difficult for the industry.<sup>108</sup>

In Canada the nature of spectrum as a public good is also tied up with a cultural identity, so that the management of spectrum should ensure that Canadian values are reflected through broadcast programming. By allowing private and public broadcasters the privilege to access spectrum via a licensing system, certain regulatory requirements may be imposed on broadcasters such as obliging them to show Canadian content. The need for “Canadianness” overrides other public concerns about which parties can access these finite resources as the requirement to express a national cultural identity is considered reflective of the national public interest. The secondary nature of freedom of expression in the regulation of broadcasting is a common feature found in other jurisdictions: among countries with strong broadcasting policies most do not give citizens the individual right to produce programming and access the broadcast system due to the limited nature of spectrum.<sup>109</sup> One of the aims of the *Broadcasting Act* is to overcome this by declaring that programming should expose audiences to various ideas and voices based on regional and cultural identities.<sup>110</sup>

#### **(b) Regulating Telecommunications**

In Canada, as elsewhere, the justification for regulating the telecommunications industry is fundamentally different than the reason for regulating broadcasting. Yet the history of the impetus and motivation to regulate is similar — fear of American control. Like broadcasting, fear of American private investment in the Canadian telecommunications industry prior to the twentieth century pushed government to regulate.<sup>111</sup> In particular, a lack of interest among American telecom operators in serving rural Canada, anti-competitive activity as well as general pricing concerns created the justification for regulation and Canadian ownership of the industry.<sup>112</sup> Creating a monopoly of regional telecommunications companies came to dominate Canadian policy from 1906 until 1993,<sup>113</sup> when international developments including trade agreements led to the deregulation of the industry and

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<sup>108</sup> Pool, *supra* note 103 at 135.

<sup>109</sup> *Ibid* at 108.

<sup>110</sup> *Supra* note 7, s 2(1)(i). Also see CRTC, *Broadcasting Public Notice CRTC 2008-4: Diversity of Voices* (Ottawa: CRTC, 15 January, 2008), online: CRTC <<http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm>>.

<sup>111</sup> Monica L Auer, “Foreign Ownership in Canadian Telecommunications” in Marita Moll & Leslie Regan Shade, eds, *The Internet Tree: The State of Telecom Policy in Canada 3.0* (Ottawa: Canadian Centre for Policy Alternatives, 2011) at 47.

<sup>112</sup> *Ibid* at 47-48.

<sup>113</sup> CRTC, *Canadian Telecommunications Policy Review Discussion Paper* (Ottawa: CRTC, 17 August 2005), online: CRTC <[http://www.crtc.gc.ca/eng/publications/reports/t\\_review05.htm](http://www.crtc.gc.ca/eng/publications/reports/t_review05.htm)> at para 16 [*Policy Review Discussion Paper*].

opened telecommunications to greater competition.<sup>114</sup>

A legal justification for regulation of telecommunications, unlike broadcasting, can be found in the need to guarantee freedom of expression through the medium.<sup>115</sup> This concept is reinforced through judicial decisions interpreting the role of the telecommunications services companies as neutral conduits, who simply facilitate point-to-point communications. This is established in the *Electric Despatch Co* case, noted above.<sup>116</sup> Hence, a public interest in governmental oversight through regulation happens in order to guarantee interconnection with no disruption of communications.<sup>117</sup> This ideal is reflected in section 7 of the *Telecommunications Act*,<sup>118</sup> which outlines the objectives of the *Act* including:

- (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
- (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
- ...
- (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada.<sup>119</sup>

The need for interconnection meant that, initially, telecommunications in Canada was undertaken as a monopoly service; regulation of services occurred because of market failures to deliver the necessary scope of services without government oversight.<sup>120</sup> Through time, as deregulation occurred and monopolies gave way to a more competitive market for communications services, the continuing need for regulatory oversight has been justified with a view to ensuring the public interest in interconnection, as well as the reasonable pricing of telecommunications services.<sup>121</sup> Like broadcasting, however, such a concern about interconnectivity is also routed in reaffirming “Canadianness” by establishing physical connections among Canadians through the communications system.

It is important to note the differing principles that have historically provided justification for regulating for the two industries: while the facility that allows broadcasting to occur, spectrum, is designated a public good in Canada, the privatization of telecommunications has meant that regulatory oversight of the industry occurs to ensure the public interest in the connectivity of services. In the case of regulated wireline telecommunications services there is no public good involved

<sup>114</sup> Stephen Clarkson, “Telecoms: From Regional Monopolies to Global Oligopolies” in *Uncle Sam and Us: Globalization, NeoConservatism and the Canadian State* (Toronto: University of Toronto Press, 2002) at 169–185.

<sup>115</sup> Pool, *supra* note 103 at 233.

<sup>116</sup> See discussion at *supra* note 103.

<sup>117</sup> *Ibid* at 19.

<sup>118</sup> *Telecommunications Act*, SC 1993, c 38.

<sup>119</sup> *Ibid*, s 7(a), (b), (e).

<sup>120</sup> Baldwin & Cave, *supra* note 104 at 10.

<sup>121</sup> *Policy Review Discussion Paper*, *supra* note 112.

and deregulation has meant that telecommunications facilities are all privately owned. Such differences become significant when considering the legal justifications for the CRTC's ability to regulate online video.

## VI. ISSUES FOR REGULATING OTT WITHIN THE LEGAL JUSTIFICATION FOR *BROADCAST REGULATION*

Because of the public interest in telecommunications services and the oversight necessary to manage spectrum as a public good, regulation of these industries has been widely accepted in Canada. As regulators begin to exert their authority on new forms of technologies and communications, the question should be asked as to whether the legal justifications for regulating old media are present in these new mediums and, if not, how new justifications for government action may be established. Yet, this is a question rarely asked in the public policy debate on OTT in Canada.<sup>122</sup>

### (a) Spectrum and OTT

The CRTC considers the management of spectrum allocated to broadcasting as one of its on-going duties. For example, one of the rationales for the switch from analogue to digital signals for over-the-air broadcasters was the need to compress analogue signals into digital formats so that spectrum may be used more efficiently.<sup>123</sup> The assumption of limited capacities and the need for management, however, has been suggested as myth-making by some authors who believe it is only used to justify government action in the sector.<sup>124</sup> The unevenness with which entities using spectrum are regulated is perhaps evidence of the myth; while strong public service obligations are imposed on licensed broadcasters, the wireless mobile industry has had few similar requirements imposed on its industry despite the use of public spectrum. Yet, as discussed above, despite changes in technology the need for spectrum has always played a crucial role in determining the ability of the CRTC to regulate the industry.<sup>125</sup>

In the digital online world justifying regulatory action based on a shortage of spectrum seems inappropriate, as the Internet is limited only by the capacity of the network and not by access to a public good. The limits of broadband networks is an

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<sup>122</sup> For example no mention of spectrum is made in a 2008 review of new media research by the CRTC. See, CRTC, *Perspectives on Canadian Broadcasting in New Media* (Ottawa: CRTC, June 2008), online: CRTC <<http://www.crtc.gc.ca/eng/media/rp080515.htm>>.

<sup>123</sup> CRTC, "Why has Canada switched to digital television?" *Canadian local over-the-air television stations converted to digital television* (Ottawa: CRTC, 31 August 2011), online: CRTC <[http://www.crtc.gc.ca/eng/info\\_sht/bdt14.htm](http://www.crtc.gc.ca/eng/info_sht/bdt14.htm)>.

<sup>124</sup> Pool, *supra* note 103 at 135.

<sup>125</sup> See, for example, *Dionne v Quebec (Public Service Board)*, *supra* note 74 at 197-198. Also see *Capital Cities Communications Inc v Canadian Radio-Television & Telecommunications Commission*, *supra* note 74. These cases are discussed in detail above.

issue widely dealt with in telecommunications regulation, but not broadcasting.<sup>126</sup> Although the lack of spectrum necessary for OTT has been acknowledged by the CRTC,<sup>127</sup> this did not inhibit their determination that online video was apt for regulation. Based on a closer reading of the policy documents, it seems that justification for the regulation of OTT comes from the implied threat to the Canadian broadcast industry that online video may pose.<sup>128</sup> As redefined by the CRTC this threat to the Canadian broadcast system creates the possibility of regulation in the public interest. Yet, in broadcast law regulation is only justified where there is public interest in the provision of the public good. With OTT no public good is apparent.

Actions by the CRTC to regulate other Internet protocol-based applications perhaps provides insight into the regulator's interest in OTT. An interesting foil to the debate of OTT is the regulation of peer-to-peer voice applications available through the Internet from providers such as Skype. In an early decision on how voice over Internet protocol (VOIP) services would be regulated in Canada, the CRTC differentiated between VOIP services that functioned like a home telephone and those that required a computer.<sup>129</sup> Any potential similarities that peer-to-peer voice services through a computer had to traditional landline telephony were dismissed and this dismissal formed the basis upon which the Commission undertook no regulatory action:

Until recently, generally available voice communication services using IP only allowed subscribers to make and/or receive calls from a computer and communications could only take place when all parties to the call used the same telephony application software. These services, referred to as "peer-to-peer" (P2P), do not connect to the Public Switched Telephone Network (PSTN) and do not generally use telephone numbers that conform with the North American Numbering Plan (NANP).<sup>130</sup>

Interestingly the CRTC was at least in part incorrect in their assertion that peer-to-peer applications do not connect to the PSTN, as it is possible to make a telephone call from a computer-based application to a home telephone.<sup>131</sup> Essential to the CRTC's decision to regulate some services and not others for the voice mar-

<sup>126</sup> For example see CRTC, *Telecom Regulatory Policy 2011-703: Billing practices for wholesale residential high-speed access services* (Ottawa: CRTC, 15 November 2011), online: CRTC <<http://www.crtc.gc.ca/eng/archive/2011/2011-703.htm>>.

<sup>127</sup> *Public Notice 1999-84*, *supra* note 6 at para 25: "In addition, the Commission considers that, due to the nature of the networks that comprise the Internet, spectrum scarcity is not an issue and the development of high bandwidth infrastructure is proceeding at a relatively rapid pace, although its deployment appears to be proceeding more slowly."

<sup>128</sup> For example, *Policy 2009-329*, *supra* note 2 at para 22.

<sup>129</sup> CRTC, *Telecom Public Notice CRTC 2004-2: Regulatory framework for voice communications services using internet protocol* (Ottawa: CRTC, 7 April 2004), online: CRTC <<http://www.crtc.gc.ca/eng/archive/2004/pt2004-2.htm>>.

<sup>130</sup> *Ibid* at para 3.

<sup>131</sup> Although it may not have been possible in 2004, it is possible today to have a telephone number conforming to NANP. For an example see Google, *Google Voice — Features* (2011), online: google <<http://www.google.com/googlevoice/about.html>>.

ket was the “likeness” of VOIP services to traditional telephony.<sup>132</sup>

Similar to VOIP services, online video too is subject to a “likeness” test in the policy documents on OTT in terms of the threat posed by online video providers to traditional television distribution services.<sup>133</sup> Yet, likeness does not form the legal basis for regulatory action. As the Supreme Court has made clear in its decisions involving the *Broadcasting Act* it is instead necessary to look at the nature of the service provided and the underlying technology upon which that service is based to assess the applicability of the *Broadcasting Act* to an entity. Little evidence of such an assessment by the CRTC can be found in the policy documents.<sup>134</sup>

### (b) The Public Interest, Freedom of Expression and OTT

The other common line of reasoning found among regulators internationally when they wish to impose regulation on an industry is general concern about the public interest.<sup>135</sup> In doing so the justification for public interest regulation would include the idea that regulation was necessary to achieve certain publicly desired results in circumstances where the market would fail to yield these.<sup>136</sup> In regulatory directives and in law, the government of Canada and the CRTC articulate the importance of the public interest for ensuring quality Canadian broadcasting services as it relates to broadcast distribution undertakings.<sup>137</sup> In the US, the ability of the Federal Communications Commission (FCC) to create and enforce obscenity, indecency, and profanity standards<sup>138</sup> is the public interest in keeping broadcasts free from the potential of harm to audiences.<sup>139</sup> Likewise, for the CRTC to regulate online video a public interest in doing so might be articulated and form the basis of regulatory action.

Regulating broadcasting in the public interest has generally been tied to the management of spectrum:<sup>140</sup> because spectrum is a scarcely available, and must be

<sup>132</sup> For the full regulatory framework consistent with the 2004 decision see CRTC, *Telecom Decision CRTC 2005-28: Regulatory framework for voice communication services using internet protocol* (Ottawa: CRTC, 12 May, 2005), online: CRTC <<http://www.crtc.gc.ca/eng/archive/2005/dt2005-28.htm>>.

<sup>133</sup> *Fact-Finding Results*, *supra* note 3. See discussion of OTT forming the basis of replacement services for cable, satellite, and IPTV services.

<sup>134</sup> The only evidence that can be found is from the 1999 policy decision on New Media, discussed extensively above, see *supra* note 11 for further details.

<sup>135</sup> For example see *Red Lion Broadcasting*, *supra* note 103 at para 380 and EC, *Commission Directive Television Broadcasting Activities*, [2007] OJ, Directive 2007/65/EC.

<sup>136</sup> Baldwin & Cave, *supra* note 104 at 19.

<sup>137</sup> See *Broadcasting Distribution Regulations* SOR/1997-555, s 51(3); and *Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order*, SOR/1995-319, preamble: “Whereas it is in the public interest to have DTH distribution undertakings licensed in Canada as soon as possible [ . . . ]”

<sup>138</sup> Federal Communications Commission, *Guide: Obscenity, Indecency and Profanity*, online: Federal Communications Commission <<http://www.fcc.gov/guides/obscenity-indecency-and-profanity>>.

<sup>139</sup> *Red Lion Broadcasting*, *supra* note 103 at para 370.

<sup>140</sup> Pool, *supra* note 103 at 123.

managed by regulatory oversight, a regulatory body may impose requirements on broadcasters that are in the public interest.<sup>141</sup> In the United States the public interest in maintaining broadcast decorum, as required of regulated licensees, was the basis of findings in the cases against broadcasters and for regulation by government in *Trinity Methodist Church, South v Federal Radio Commission*<sup>142</sup> and *Red Lion Broadcasting*.<sup>143</sup> Although there may appear to be the ability to regulate online video with a view to the public interest, in doing so the lack of public goods inherent in Internet services creates a legal problem for actions by the regulator.

This is not to say that the public interest is irrelevant to the potential regulation of the Internet. As discussed above, the public interest in ensuring the interconnection of communications services became essential to defining the role of the CRTC with regard to telecommunications. Internationally it is this same public function that is enshrined in the provision of Internet services. From an international perspective the need to guarantee the interconnection of individuals through Internet services had been tied to state obligations to ensure citizen rights. The United Nations High Commissioner on Human Rights has suggested that access to the Internet should be a human right as the medium allows for the wide dissemination of expression and users to gain access to this information.<sup>144</sup> International concern about interconnection and rights obligations occurs where governments have created laws or regulations that block access by consumers to online data and information.<sup>145</sup> Concern also occurs where governments create laws governing other areas of society that have had the unintended effect of limiting access to Internet services and freedom of expression.<sup>146</sup> Among academics the idea of ensuring access to Internet resources regardless of ISP or regional geography has been called “network neutrality.”<sup>147</sup>

In Canada the CRTC has acknowledged the importance of network neutrality in its regulation of broadband services under the *Telecommunications Act*. In its decision on the ability of ISPs to manage the data through internal Internet traffic management policies, the CRTC stated:

At the core of the debate over “net neutrality” is whether innovation will continue to come from the edges of networks, without permission. Will there continue to be rapid and uncontrolled innovation in computer communications? Will citizens have full access to that innovation? The Commis-

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<sup>141</sup> *Ibid* at 125.

<sup>142</sup> 62 F 2d 850 (DC Cir 1932).

<sup>143</sup> *Red Lion Broadcasting*, *supra* note 103.

<sup>144</sup> Frank LaRue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (United Nations General Assembly, Human Rights Council, 16 May 2011) <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)> at paras 19–21.

<sup>145</sup> William Dutton et al, *Freedom of Connection — Freedom of Expression* (Paris: UNESCO, 2011).

<sup>146</sup> *Ibid* at 6.

<sup>147</sup> Tim Wu, “Network Neutrality, Broadband Discrimination” 2:1 J (2003) *Telecomm & High Tech L* 141.

sion earnestly hopes so.<sup>148</sup>

Hence, ensuring interconnection and network neutrality seem to be at the core of telecommunications policy in the Canadian public interest.

Yet, regulation of online video through the *Broadcasting Act* could cause unintended consequences, such as limiting the access of Canadians to content inconsistent with the interconnection mandated under the *Telecommunications Act*. To build on an example discussed above, what is the effect on interconnectivity if regulated online media companies were required to ensure a certain percentage of their video libraries had Canadian content programming? If this means Canadians are blocked from accessing all content available through the OTT provider, does this limit on access contradict the interconnection required under the *Telecommunications Act*? It remains unclear as to how OTT services may be regulated in conformity with other broadcast programming in Canada under the guise of public interest, as the public interest in regulating the telecommunications industry versus the broadcasting industry are not comparable — this is in part why two different pieces of legislation govern these industries. The merging of telecommunications and broadcast into one online format challenge regulatory policy and pose problems for authority of the regulator to respond.

## CONCLUSION

The authority under which the CRTC may regulate online video entities is unclear when considering the basis of the Commissions' regulatory and legal power. As the *Telecommunications* and *Broadcasting Acts* defining the powers of the Commission retain the language of wireline telecommunications and spectrum-oriented broadcasting, it is difficult for the CRTC to move to respond adequately to technological change. This is most clear when considering that although the definitions of programming may remain neutral within the *Broadcasting Act*, these are neutral only as long as the technology upon which an undertaking broadcasts is using spectrum. Without this technology, as required under the *Act*, the CRTC retains no ability as a public authority to issue mandatory broadcasting requirements. While the CRTC may instead regulate in the general public interest of Canadians, its ability to do so is questionable, as the public interest in Internet technologies seems to be ensuring connectivity consistent with telecom principles. In creating regulations for OTT the regulator may act in a manner inconsistent with the public interest if these were to affect the Internet freedoms expected by Canadians.

A difficulty this paper points to in the potential regulation of non-traditional mediums such as the Internet is the interest of the CRTC in regulating based on threats to an industry, and on the likeness between traditional and new services. It is also argued that unlike the *Copyright Act*, the *Broadcasting Act* regulates a specific service called broadcasting and not only content, or programming, which means that it is much more difficult to see the *Broadcasting Act* as technologically neutral. Although the *Broadcasting Act* does give the CRTC the mandate to regu-

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<sup>148</sup> CRTC, *Telecom Regulatory Policy CRTC 2009-657: Review of the Internet traffic management practices of Internet service providers* (Ottawa: CRTC, 21 October 2009), online: CRTC <<http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>> at para 4.



late in a “flexible manner”<sup>149</sup> it is not clear that this flexibility provision extends beyond the industries envisioned and defined under the *Broadcasting Act*. Traditional legal justifications for the regulation of broadcasting must clearly be rethought and the essential elements of the *Broadcasting Act* giving the CRTC its power revised if control over online video is wished. As the quote by James Boyle at the outset of this paper indicates, as new technologies emerge it will be necessary for society to reconsider basic principles and the regulatory frameworks upon which the legal treatment of older technologies is based. Without these considerations, assuming the applicability of these legal frameworks to new technologies may have the unintended effect of inhibiting growth or restricting communications between individuals in society.

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<sup>149</sup> *Supra* note 7, s 5(2).