

Appendix 5

Emerging Trends in the TV Rights Landscape

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Canadian Association of Broadcasters
L'Association canadienne des radiodiffuseurs

Executive Summary

1. The purpose of this study is to examine the television program rights implications of the future environment facing the Canadian broadcasting system.
2. As a starting point for discussion, a historical view of program exhibition practices is useful. In recent years, a typical high end Canadian drama or MOW would have been exhibited in Canada over various broadcast windows as follows: pay TV window of 12 to 18 months, a conventional broadcast window of 3 to 5 years (with several runs), a specialty service window of 2 to 3 years (also with a number of runs), then an afterlife on other specialty services or non-prime time conventional TV.
3. Experience has taught the producer that the more ways she can divide up these rights, the more “sales” she can make, and consequently the more money she can make. For their part, broadcasters have generally been content to license the appropriate window for their particular platform (or platforms) only, rather than purchase more rights than they can monetize. A natural back and forth on the number of runs, the size of the window and price has been the practice for decades.
4. However, today, both the producer and the broadcaster are acutely aware that the technology-driven, changing environment is fundamentally altering the once relatively stable marketplace for program rights. The producer sees “ancillary rights” associated with new platforms -- VOD, Mobile, Internet etc -- as new revenue centres and seeks to sell them off separately, or, at least receive incremental license fees.
5. Broadcasters, on the other hand, view new or additional platforms as sources of audience fragmentation which invariably produce revenue threats if exploited by others. For the most part, new platforms have not represented “new” revenue for broadcasters and, if anything, have served only to decrease the revenue from traditional platforms. When these new platforms do somehow generate modest revenue, it serves only to recoup some of the losses on the traditional platform and does not generally cover the increased costs of administration. Consequently, given that the majority, if not all, of these “ancillary rights” have yet to generate incremental net revenue, broadcasters generally seek to acquire them as part of the traditional broadcast licence at little incremental cost, or, in the alternative, exclude such ancillary rights and expect to pay lower licence fees for the traditional broadcast rights.
6. Canadian cultural policy has for decades largely succeeded in ensuring a separate program rights market in Canada, the primary purpose of which for broadcasting has been to ensure that Canadian broadcasters are able to acquire foreign programming, and use the profit margins they produce to cross-subsidize the production and acquisition of domestic programming. Without this cross-subsidy, far less money would be available for Canadian programming, and barring significant increases in government subsidy, far less of it would be produced. The cross subsidy is much less valuable in French Canada but does exist in both markets.

7. In today's environment, U.S. producers and rights holders can go directly to Canadian consumers via unregulated Internet and mobile platforms rather than go through a Canadian broadcaster "middleman". Should such a scenario take hold, in whole or in part, Canadian broadcasters, Canadian producers and creators could all suffer potentially irreparable harm.

Trends in Ancillary Rights

8. In TV program terms, "ancillary rights" refers to the rights to all platforms other than the main "broadcast" platform(s). Historically such platforms were essentially restricted to "publicity and promotions"... using likenesses, clips etc. for promotion of the channel and/or program.
9. Today, ancillary rights include a number of non-traditional TV platforms, that may be seen by rights holders as potentially, if not increasingly, very lucrative. They can include:
 - Internet promotion rights. Usually defined as short (e.g. 15 second) clips for use in all media, or "no more than 3 minutes per hour of programming".
 - Internet streaming and download rights.
 - Rights to mobile phone exhibition, including (in some cases) editing rights (e.g. to make "mobisodes").
 - Video-on-demand (VOD). Note that this is increasingly being treated as a distinct broadcast right, but some older contracts still exist that treat VOD as ancillary.
 - Other media. May or may not be specifically defined but could include "satellite radio", other forms of mobile exhibition (DVB-H, DMB etc.).
10. The precise nature of rights actually granted has always been, and is only becoming, more confusing. This is not surprising given that in negotiating a multi-year licensing deal, technological change makes it impossible to predict exactly what new platforms and what new consumer uses will emerge or be relevant. However, using recent history as our guide, there is no doubt that more significant change is on the horizon as digital content creation, distribution and consumption, continue to be fuelled by leaps and bounds in technology developments.
11. Moreover, the fear of piracy (whether in the form of unauthorized viewing, copying or distribution) is never far from the minds of rights holders. Just as each new technology presents potential new markets, the exploitation of these technologies also presents new opportunities for abuse. This perhaps explains the reluctance of many rights holders to move into new areas of distribution.

12. With a slate of recent U.S., and now Canadian, network announcements of TV programs being released “for free” on the Internet, that fear of piracy appears to be somewhat subsiding.
13. This trend, however, is not benefiting Canadian broadcasters as far as foreign program rights are concerned. While U.S. studios and (their often affiliated) broadcasters are beginning to make top product available over the Internet, such rights are rarely being made available to Canadian broadcasters for their websites.
14. The supposed rationale for this position is to ensure the integrity of the rights being held by U.S. rights holders in the U.S. The net effect however, is to expand the rights being held by U.S. broadcasters into Canada, while diminishing the value of those held by Canadians.
15. Mobile phone use is a new platform category that has only surfaced in Canada in the last year. There continues to be debate as to whether or not video over mobile phones constitutes “broadcasting”. While it fits many of the criteria for broadcasting (one-to-many distribution, over-the-air transmission), the Commission’s decision to treat it (like the Internet) as exempt from licensing, only makes it harder to argue that the “right” to distribute in this manner is automatically included in a traditional broadcast licence. And if not automatically included, it creates another form of bypass, as producers and foreign broadcasters can then choose to negotiate directly with mobile providers rather than Canadian broadcasters.
16. This is in fact already happening. Unable to get specific “mobile rights” and hesitant to accept the liability inherent in assuming a broadcast license includes mobile, broadcasters are hesitant to make mobile versions of channels with a lot of third party content available. This leaves a void that foreign broadcasters are more than happy to fill.

Implications for Domestic (Canadian) Production

17. The simple reality of this new and evolving rights marketplace is that the very success, if not survival, of the Canadian broadcasting system may increasingly depend on Canadian broadcasters’ access to multi-platform rights.
18. While it is still very early in the evolution of this new rights marketplace, and given that every broadcaster faces a unique set of considerations in its program acquisition strategies, examples of early exploratory negotiations between broadcasters and independent producers that have addressed meaningful multi-platform rights include:
 - More limited time windows in return for expanded platform rights. The broadcaster gets to exploit fully across all meaningful platforms for a period of time, and then either renegotiates to extend or allows the producer to exploit with others while the product is still relatively fresh; and

- Profit/revenue sharing of ancillary rights. In many cases, neither the broadcaster nor the producer has any idea what the revenue potential is of internet, VOD or mobile rights.
19. Recently, there have been emerging interventions from government bodies such as the Canadian Television Fund (CTF) in the creation of disincentives for the acquisition of multiplatform rights by broadcasters -- insisting on a “cooling off period” and “separate negotiations” for “non-broadcast rights”. The effect can be to limit broadcasters’ ability to even obtain (time period) exclusivity and preclude the use of ancillary rights against them.

Implications for Foreign Programming

20. Generally, foreign sales (pre-sales or co-production) are essentially an afterthought for many foreign producers. In fact, while foreign sales, which are more or less expected, are a potentially important source of revenue they are unlikely (certainly, in respect of any one territory) to materially affect the rights offered. Thus the norms and practices of the domestic/originating market -- and its rights definitions of time, platform, and/or territory -- will largely prevail.
21. Only domestic laws and regulation of an ‘importing’ market can either alter the norms of foreign jurisdictions in regards to program rights practices or change what would otherwise be in the best economic interests of foreign producers/broadcasters.
22. Today, given (a) the relative strength of Canadian broadcast platforms over unregulated/ancillary platforms now available and (b) the relative strength of Canadian cultural laws and regulations in support of Canadian broadcast platforms, the value of Canadian broadcast rights still, for the most part, significantly exceeds that of Canadian unregulated/ancillary platforms.
23. However, this situation could change in the very near future given:
- Unregulated Internet and mobile platforms have the potential to grow exponentially and generate more and more significant revenue;
 - U.S. producers/broadcasters will be in a position to “go direct” to Canadian viewers through unregulated platforms, rather than go through a Canadian broadcaster “middleman”; and
 - A “tipping point” may be reached with the internet and other unregulated platforms that allows complete and effective bypass of Canadian broadcasters
24. This would then result in a breakdown of the Canadian rights market that would significantly erode support for Canadian content by eroding the cross-subsidy essential to its support, at least in the English market.

Shoring up Measures that Protect the Integrity of the Canadian Rights Market

25. By design, Canadian cultural policy over the last 70 years has developed an increasingly interconnected web of laws and regulations in support of Canadian “broadcast” platforms and a distinct and vibrant Canadian rights market.
26. The cornerstone of that web was the passage in 1932 of founding legislation for the CBC (and precursor of the *Broadcasting Act*), the “Canadian-Radio Broadcasting Commission”.
27. Succeeding governments -- Conservative and Liberal alike -- have with unanimity built on that first piece of legislation, preserving and enhancing Canada’s ability to maintain a distinct and vibrant broadcasting system, right through the 1991 *Broadcasting Act*, and the cultural exemption in FTA/NAFTA.
28. Key laws and regulations that currently support a separate Canadian rights market include:
 - *Broadcasting Act* oversight, generally;
 - Specific broadcasting regulations like simultaneous substitution; and
 - The advertising deductibility provisions of the Income Tax Act (“ITA”)

Key Conclusions

29. From its very beginnings, a separate rights market has been a central objective of the Canadian Broadcasting system, and an underpinning of Canadian broadcasters’ ability to support Canadian content. New electronic content exhibition technologies threaten that foundation.
30. In an emerging media landscape characterized by expanding multi-platform exhibition, it is clear that all reasonable public policy measures and instruments will be needed to maintain the integrity of a separate and distinct Canadian program rights market. Moreover, Canadian broadcasters must be given access to multiplatform rights in order to offset the impact of “non-broadcast” platforms which tend to diminish the value of broadcast rights without recompense.

Introduction

1. There is no question that the introduction and use of new technologies in the communications sector has had a profound impact on how consumers access, receive and consume content and media. What is less known, and hence less understood, are the implications of these new technologies for content creators and rights holders.
2. The multitude of platforms for the exhibition of content has resulted in the creation of a cluster of new “ancillary rights” that call into question commonly held practices regarding how content is exploited, by whom and under what terms. In addition, these new platforms, many unregulated and of foreign origin, may also challenge the integrity of the Canadian rights marketplace and its ability to be maintained.
3. For these reasons, the Canadian Association of Broadcasters (CAB) submits it is critically important, particularly in the context of the Government’s fact finding process, to examine the television program rights implications of the future environment facing the Canadian broadcasting system.
4. Accordingly, the scope of the study includes the following elements:
 - An overview of the changes to the traditional North American program rights market(s) (how rights are sub-divided) and other trends as a result of new technologies in both the French and English-language markets;
 - A description of the business and economic challenges associated with the proliferation of ancillary rights over and above the traditional broadcast rights in both the French and English-language markets;
 - A description of the impact of existing or proposed regulatory requirements on the domestic program rights market(s) with respect to both foreign and domestically produced content; and
 - An overview of the implications of the above-noted changes and challenges for Canadian broadcasters in the French and English-language markets

Program Rights “101”

5. The term “program rights” is generally used to refer to the copyright held in a program, and the conditions under which the program can be exploited.
6. In practice, program rights can encompass more than copyright -- for example trademark issues may arise -- but primarily the issue is one of copyright.

7. This paper assumes the reader has a modicum of understanding of copyright¹. For the purposes of this study, knowledge of different types of copyright (synchronization rights vs. performing rights vs. reproduction rights etc.) is not necessary. Two basic concepts, however, should be appreciated.
8. First, just as program rights can encompass more than copyright, they also inevitably encompass more than a single copyright. A television program will rely on copyrighted scripts and treatments, and may include background and foreground music (some originally commissioned, some known hits), clips from other TV programs or films and portions of other artistic or literary work for which separate copyrights exist.
9. Second, certain copyrights are negotiated directly (e.g. to use a certain piece of music in a scene or a certain actor's performance), and other rights are exercised collectively under the aegis of the Copyright Board (e.g. to "broadcast" or "publicly perform" a composer's music.) The former rights are "pre-cleared" or negotiated up-front by the producer; the latter rights relate to use and are collected after the fact from the broadcaster, typically on some kind of percentage of revenue basis.

Perspectives of the Producer versus the Broadcaster

10. Copyright in any television program or feature film encompasses a myriad "underlying rights" which determine the use to which that film or TV program can be put. The person responsible for assembling the necessary permissions or "clearances" (and ultimately held responsible for respecting any conditions on these "clearances") and the holder of the maximum bundle or umbrella of rights is, ultimately, the producer. No subsequent sublicensee of the producer holds more rights than that "maximum bundle" held by the producer.
11. From this point on, the producer divides the bundle of rights that is a film or TV program in chunks of time, platform, and/or territory in an attempt to maximize her return on investment. The television producer will typically sell rights in her principal territory direct to a succession of broadcasters for defined platforms, periods of time and/or numbers of runs². For the last 15-20 years, a typical high end Canadian drama or MOW might, for example, have had some variation on a pay TV window of 12 to 18 months, a conventional broadcast window of 3 – 5 years (with several runs), a specialty service window of 2-3 years (also with a number of runs), then an afterlife on other specialty services or non-prime time conventional TV. Any "Internet" or "new media" rights granted by the producer would have typically been limited to promotional clips, if granted at all.

¹ A good general Canadian source is Lesley Ellen Harris, "Canadian Copyright Law". The Copyright Board of Canada has a description of the rights it administers at www.cb-cda.gc.ca.

² Other territories will be handled by a "distributor(s)", someone who will license the rights for a fee and make a business/take the risk of recouping in those territories. The feature film producer will use a distributor for all territories.

12. History and experience has taught the producer that the more ways she can divide up these rights, the more different “sales” she can make, and consequently the more money she can make. For their part, broadcasters, knowing their businesses, have generally been content to license the appropriate window for their particular platform (or platforms) at a “lesser” cost than would otherwise be the case if they were to purchase more expansive rights that they are not really in a position to monetize. A natural back and forth on the number of runs, the size of the window and for what price has been the practice for decades³. Where broadcasters like CHUM and CTV have chosen to buy rights for multiple broadcast platforms that they can monetize (conventional and specialty), they have simply negotiated appropriate terms and license fees.
13. Today, both the producer and the broadcaster are acutely aware that the technology-driven, changing environment is fundamentally altering the once relatively stable marketplace for program rights. The producer sees “ancillary rights” associated with new platforms -- VOD, Mobile, Internet etc -- as new revenue centres and seeks to sell them off separately, or, at least receive incremental license fees.
14. Broadcasters, on the other hand, view new or additional platforms as sources of audience fragmentation which invariably produce revenue threats if exploited by others. For the most part, new platforms have not represented “new” revenue for broadcasters and, if anything, have served only to decrease the revenue from traditional platforms. When these new platforms do somehow generate modest revenue, it serves only to recoup some of the losses on the traditional platform and does not generally cover the increased costs of administration. Consequently, given that the majority, if not all, of these “ancillary rights” have yet to generate incremental net revenue, broadcasters seek to acquire them as part of the traditional broadcast licence at little incremental cost, or, in the alternative, exclude such ancillary rights and expect to pay lower licence fees for the traditional broadcast rights.

The Unique Challenges Facing Canadian Broadcasters

15. Canadian cultural policy has for decades succeeded in largely ensuring a separate program rights market in Canada. In broadcasting, the primary purpose of this has been to ensure that Canadian broadcasters are able to exploit and profit from foreign programming, and use these profits to cross-subsidize domestic programming. The cross subsidy is not as apparent in French Canada as it is in English Canada, (because of Quebec broadcasters’ lesser interest in U.S. programming in general), but it does exist in both markets⁴.

³ This is not to suggest that there has not been some evolution of this “give and take”. For example, in the 80’s, CHUM Limited introduced the notion of “play days” rather than “runs” adapting a concept originally applied to pay television to take into account the multiple daily runs required of specialty services on a 6 or 8 hour “wheel”. In many cases this was possible because of underlying union contracts which required “step-ups” after a certain number of runs on conventional television, but not on so-called “cable” channels.

⁴ For example, (dubbed) U.S. blockbuster feature films remain a profit centre for French-language broadcasters as they are for English-language broadcasters in Canada.

16. A breakdown of the Canadian rights market that significantly erodes this cross-subsidy is a huge threat to the Canadian broadcasting system, and in particular the production of Canadian content, certainly in English Canada. In today's environment, this is precisely what technology risks doing.
17. The growth of the internet and other currently unregulated platforms threatens to allow a complete and effective bypass of Canadian English-language broadcasters. Today, U.S. specialty services distributed by Canadian BDUs can already guarantee full Canadian exposure and promotion for US programs -- only the revenue potential is limited⁵. U.S. over-the-air channels are also hampered in their ability to sell advertising to Canadians by the advertising deductibility sections of the *Income Tax Act* and "simultaneous substitution" (a practice that can only exist so long as U.S. suppliers continue to choose to sell Canadian rights to Canadian broadcasters.)⁶ Thus, as unregulated Internet and mobile platforms grow and generate more and more revenue, there is a definite risk that U.S. producers and broadcasters could choose to "go direct" to Canadian viewers through these means, rather than go through a Canadian broadcaster "middleman"⁷.
18. For the youth demographic, a combination of mobile and Internet platforms may provide greater reach and revenue potential than broadcast outlets. MuchMusic and YTV have been two such trendsetters in Canada in this regard, developing popular websites, and quickly branching into new platforms as they become available: ringtones, Internet and Cable VOD, mobile etc. The CTV/MTV program/channel deal, announced in September, 2005, further underlined the value of so-called "ancillary" rights, noting that the venture gave "[e]xclusive access for CTV to MTV's array of digital media assets in Canada, including online, wireless, interactive and Video On Demand, as well as development of new digital media content for Canadians"⁸.

The Unique Challenges Facing Canadian Producers

19. The "collapse" of the international marketplace for production over the last 5 years has been a major preoccupation of Canadian producers and a primary factor in the flattening of Canadian production activity. Simply put, there is in most, if not all genres, a glut of product from more and more countries producing ever higher quality and greater quantities of programming.
20. In some genres of programming, this has lead major international broadcasters to reduce U.S. national licence fees for a half hour show from close to \$400,000 per episode five years ago, to little more than \$50,000 today. For Canadian producers at least, ancillary rights -- both established ones, like DVD sales and emerging ones, like

⁵ US advertisers, while certainly aware of Canadian spill, do not specifically pay for Canadian audiences to US channels.

⁶ These provisions are discussed in more detail on pages 21 and 22 of this report.

⁷ Examples of this exist today, but not in sufficient numbers to constitute a serious "bleed" from the system.

⁸ See release dated, September 28, 2005, "MTV Returns to Canada - Canada's CTV Inc. and MTV Networks International Announce Multi-Platform Partnership to Build MTV Brand in Canada" <http://www.newswire.ca/en/releases/archive/September2005/28/c4865.html>

mobile exhibition -- must somehow make up for a massive shortfall from traditional broadcast platforms.

21. As technology evolves, Canadian producers will face even more challenges, not the least of which is simply defining and tracking new “rights”.
22. With the increasingly complex nature of the marketplace, there may also be a natural tendency for producers to attempt to withhold certain ancillary rights, gambling that the value of future rights will eventually escalate. Yet as costs of production inevitably continue to increase, it will be even more vital for producers to find ways to exploit these new revenue opportunities, as well as opportunities that have not yet been thought of. Negotiations could likely become more complex as broadcasters attempt to exploit rights which pertain to their particular situations (and not pay for rights which they are unable to exploit.)
23. While these additional aggravations by themselves will not stand in the way of new production, when coupled with the collapse of the international market (and consequent increased reliance on domestic broadcasters) and severe limits on public funding, producers may well feel “forced” to maximize all possible immediate and future sources of revenue.
24. At the end of the day, the greatest fear for producers is a scenario of higher production costs, more competition, less revenue and more expensive administration.

The Growth of “Ancillary Rights”

Definitions of “Ancillary Rights”

25. In TV program terms, “ancillary rights” refers to the rights to all platforms other than the main “broadcast” platform(s)⁹. Historically such platforms either didn’t exist or were immaterial -- that is they were essentially restricted to “publicity and promotions”... using likenesses, clips etc. for promotion of the channel and/or program. Today, ancillary rights includes a number of non-traditional TV platforms, that are seen as potentially lucrative. They can include:
 - Internet promotion rights. Usually defined as short (e.g. 15 second) clips for use in all media, or “no more than 3 minutes per hour of programming”
 - Internet streaming rights
 - Internet download rights¹⁰

⁹ Film would, of course, include theatrical release as part of the “main rights”

¹⁰ These different forms of Internet rights are disaggregated for illustration purposes here, but may or may not be disaggregated in program contracts.

- Rights to mobile phone exhibition, including (in some cases) editing rights (e.g. to make “mobisodes”)
 - Video-on-demand (VOD). Note that this is increasingly being treated as a distinct broadcast right, but some older contracts still exist that treat VOD as ancillary
 - Interactive Television rights. These can be specific to particular iTV platforms, or more general and applicable to any form of interactivity
 - Product Placement rights. Not a “new platform” but an increasingly important area given the potential for conflict between the producer (who uses product placement to save production expenses) and the broadcaster (who uses product placement for incremental advertising revenues)
 - Other media. May or may not be specifically defined but could include “satellite radio”, other forms of mobile exhibition (DVB-H, DMB etc)
27. The nature of rights actually granted to broadcasters has always been confusing, and is only becoming more so¹¹.
28. For example, is HD transmission a new “platform” or simply a refined form of delivery on existing TV platforms? Broadcasters worldwide have largely resisted the notion that HD is a new platform. In fact, broadcasters have, for the most part, successfully protected their rights franchises by ensuring that HD is seen as just a new “format” -- i.e. no more a new “platform” than digital (SDTV) television was over analog NTSC or PAL formats. This, despite the fact that BDUs and regulators have sometimes confused the issue by distributing or licensing separate “HD channels”, which have in certain cases just obtained “HD rights”.
29. Another example, rights holders have largely come to terms with the concept of home recording and Personal Video Recorders (PVRs)¹². If, on the other hand, a cable company wants to offer the service to record a program for a customer (who can then play it back later on a VOD basis) rights holders are currently balking. In one light, this may simply be a matter of the location of the PVR (at the cable company rather than in the consumer’s home.) On another, it is seen as an additional “broadcast” (even if it is to only one person) and therefore not allowed under most program rights contracts.
30. Fear of piracy (whether in the form of unauthorized viewing, copying or distribution) is never far from the minds of rights holders. Just as each new technology presents potential new markets, the exploitation of these technologies also presents new opportunities for abuse. A distinction between “streaming” and “download”, for example, can be crucial from a valuation of rights perspective (one connotes a “view”; the other a “recording”), but irrelevant from a reasonably sophisticated computer user

¹¹ All, of course, “grist for the mill” for lawyers and courts as they interpret and argue about program contract language that is not always clear and can not anticipate every eventuality

¹² Canada has essentially followed the U.S. lead in accepting such “personal use” as “fair use” or “fair dealing”

perspective, given that Internet “streams” can be captured in their entirety and stored. Fear of piracy explains the reluctance of many rights holders to move into new areas of distribution and is certainly one of the main reasons rights holders typically refuse to grant full Internet rights, and limit usage to promotional clips.

31. That fear is arguably subsiding -- at least for certain affiliated programming -- as evidenced by the slate of recent U.S., and now Canadian, network announcements of TV programs being released “for free” on the Internet, whose monetary value include embedded advertising and the “buzz” factor. In theory, someone could store and recut the program without the ads and make it widely available on file sharing services like Bittorrent¹³.
32. These are still early days and while a certain amount of “experimentation” and “research” is seen by all players as important, the commercial impact over the longer term remains unclear.
33. The issue of piracy and legal enforcement is particularly interesting. To date, the major TV networks and affiliated or key producers have concluded that they can afford to be far less “legalistic” than their music industry counterparts. In particular, rather than going after consumers as the RIAA has done, TV rights holders are limiting themselves to the big aggregators and marketers -- and even then, only occasionally¹⁴.
34. The treatment of “YouTube” and “Myspace” is a case in point. With two notable exceptions¹⁵, TV rights holders have largely recognized that postings can only help create buzz, profile and ultimately more TV viewing. Hence as long as network branding is not lost, they “tolerate” it, but reserve their rights to do otherwise.
35. In fact, major producers have begun using these sites for their own purposes -- even creating specific “short form” programs for posting -- most notably, Paramount Classics recently created a short film (of less than two minutes) entitled “A Terrifying Message from Al Gore” as so-called viral marketing to promote the release of the feature documentary “An Inconvenient Truth” during its theatrical run.
36. Challenging, from a Canadian rights market perspective, however, is the fact that while U.S. studios and (their often affiliated) broadcasters are beginning to make top product available over the Internet, such rights are rarely if ever being made available to Canadian broadcasters for their websites.

¹³ Bittorrent is one of many predominantly video based file sharing services that has emerged in the last couple of years, as a consequence of wide-spread adoption of broadband internet access, on the heels of predominantly music based Kazaa.

¹⁴ Obviously, the relative difficulty of downloading and transferring high-quality TV programming vs. the ease with which it can be done with music can’t be overlooked as a key factor in the different behaviour of the music and TV industries.

¹⁵ First, the well noted case of the “Lazy Sunday” clip from STL, a “faux pas” unlikely to be repeated, especially given that, after NBC insisted it be removed from YouTube the clip was posted for downloading on NBC’s website. Also, this past August, Fox announced the “aggressive pursuit” of a leaked pilot episode which showed up on a number of download sites.

37. The supposed rationale for this position is to ensure the integrity of the rights being held by U.S. rights holders in the U.S. The net effect however, is to *expand* the rights being held by U.S. broadcasters, while *diminishing* those held by Canadians.
38. Mobile phone use is a new platform category that has only surfaced in Canada in the last year. There continues to be debate as to whether or not video over mobile phones constitutes “broadcasting”. While it fits many of the criteria for broadcasting (one-to-many distribution, over-the-air transmission), the Commission’s recent decision to treat it, like broadcasting over the Internet, as exempt from licensing, only makes it harder to argue that the “right” to distribute in this manner is automatically included in a broadcast licence. And if not automatically included, it creates another form of bypass, as producers and foreign broadcasters can then choose to negotiate directly with mobile providers rather than Canadian broadcasters.
39. This is in fact already happening. Unable to get specific “mobile rights” and hesitant to accept the liability inherent in assuming a broadcast license includes mobile, broadcasters are in many cases simply unwilling to put mobile versions of their channels “on-the air”.
40. This leaves a void that foreign broadcasters are more than willing to fill. For example, Telus has already done deals to directly obtain mobile rights to programs like Bravo U.S.’s “Project Runway”, that while licensed for broadcast in Canada, have not been made available to Canadian broadcasters for mobile or internet platforms.
41. New mobile platforms, DVB-H, DMB, Satellite Radio (video) -- especially should they similarly be treated as exempt/unregulated services -- will only further enhance the need for Canadian broadcasters to obtain multi-platform rights, and the difficulty in doing so for foreign product.

Technology Induced Program Rights Trends

42. Both broadcasters and producers see technological change as having a fundamental effect on their business models.
43. To date, evidence suggests that the introduction of multiple “non-broadcast” platforms tends to diminish the value of a program in aggregate, rather than being accretive. The difficulty of easily monetizing many of these new platforms means that Internet and other new platform consumption comes at the expense of traditional broadcast consumption, reducing the value of broadcast rights without recompense. To the extent that new platforms are easily monetizable, or create incremental consumption, however, this will change -- mobile platforms being a key potential case in point¹⁶.

¹⁶ Basic economics would suggest that without incremental revenue, new platforms would not come to exist at all. The difficulty, however, is that different platforms have different value chains and different payment models/levels for content. Thus while consumers pay for Internet access, creating big incremental business for ISPs and Telcos, content providers get relatively less of this money than they do in the broadcast space. By contrast, in the mobile space, content providers are able to get more significant pre-determined revenue splits.

44. In any event, whether new “non-broadcast” platforms will ultimately be more of a “diminisher” of content value overall or an “enhancer” is very much an unknown.
45. What is clearer, is the tendency of these multiple platforms to reduce a program’s effective “life span”, through the compression of windows and/or reduction of value in later windows.
46. This phenomenon is already well known in the feature film world where the combination of DVD/Pay and VOD windows has dramatically reduced the value of conventional broadcast windows. For all but the most popular feature films that warrant repeated viewing, a conventional broadcast theatrical window is no longer a significant viewing event.
47. Similarly, an explosion in “pre-broadcast window” viewing of TV programs -- be it through VOD, internet or mobile viewing -- will reduce the value of broadcast windows, to the detriment of the business model of specialty services currently relying on second window exhibition of 3-7 yr old content.
48. The reality is that a healthy Canadian production, and broader cultural, sector cannot exist without a healthy Canadian broadcasting system. The intrinsic need of a nation’s culture to be (a) fostered domestically by (b) a significant cultural medium (like TV) should be unassailable.
49. To date, the trend has been to more and more specific requirements on broadcasters to use “independent” producers -- an objective of the Commission since the original licensing of pay television in 1981.
50. Those requirements also now find basis in a new objective introduced in the 1991 *Broadcasting Act*, and include such measures as:
 - the requirement that 75% (by volume) of “priority” programming aired by multi-station conventional TV groups is produced by independent producers;
 - specific conditions of licence attached to pay and specialty services defining percentages of spending or exhibition on independent production;
 - license conditions on TQS requiring use of independent producers;
 - the convention that a vast majority of tangible benefits moneys go “on screen” and that a majority of that go to independent producers; and
 - privileged access by independent producers to production funding agencies like the CTF

Avoiding a Log Jam

51. From a content production public policy perspective, there have always been two clear leanings:
 - i. A “sectoral” approach that prefers “independent” production over “affiliated” production; and

- ii. A tendency to directly link rights ownership with independence.
52. Over the last decade, both of these leanings have started to, and needed to change. Just as there are ways to ensure a healthy independent production sector without discriminating against affiliated production, there are ways of valuing and encouraging independence, without feeling the only way to do it is to insist on producers retaining rights
 53. To date, some examples of early exploratory negotiations between broadcasters and independent producers that have addressed meaningful multi-platform rights include:
 - More limited time windows in return for expanded platform rights. The broadcaster gets to exploit fully across all meaningful platforms for a period of time, and then either renegotiates to extend or allows the producer to exploit with others while the product is still relatively fresh; and
 - Profit/revenue sharing of ancillary rights. In many cases, neither the broadcaster nor the producer has any idea what the revenue potential is of internet, VOD or mobile rights.
 54. Recently, there have been emerging interventions from government bodies such as the Canadian Television Fund (CTF) in the creation of disincentives for the acquisition of multiplatform rights by broadcasters -- insisting on a “cooling off period” and “separate negotiations” for “non-broadcast rights”. The effect can be to limit broadcasters’ ability to even obtain (time period) exclusivity and preclude the use of ancillary rights against them.

Domestic vs. Foreign Programming

An Issue of Effective Control

55. The above discussion has not been particularly specific to Canadian content, but that is not to suggest there are not important practical differences between the negotiation of rights for domestic vs. foreign content. The key differences are principal market, economic clout, and, arising from these, control.
56. As noted previously, a television producer will typically sell, or more accurately “pre-determine”, rights in her principal territory through direct negotiations with a limited number of domestic broadcasters for defined platforms, periods of time and/or numbers of runs. More often than not, that “predetermination” involves the commissioning by one broadcaster of a show or series, whose “green light” involves or triggers the majority, if not vast majority, of production financing. Other domestic windows, be they “pre” (e.g. pay, PPV or possibly VOD) or “post” (e.g. specialty, 2nd/tertiary window conventional) while important to complete financing, are usually fairly predictable in value, and therefore typically follow the deal with the commissioning broadcaster.

57. Sales to foreign territories vary from “gravy”, to “profits” to “integral”, depending on the type of production and expectations of the producer:
- For high-end indigenous domestic production -- in Canada, that would likely be a drama or documentary production accessing public grants or funds such as Telefilm and/or the CTF -- foreign sales would be largely seen as “gravy”: great if it happens, likely not to transpire in any significant way by pre-sale, but not essential to the viability of the production or producer.
 - For “evergreen” or easily “transportable” programming -- lifestyle programming, children’s shows, magazine shows -- foreign sales are more likely to be essential to profitability: Again, not likely not to transpire in any significant way by pre-sale, probably not essential to the viability any given production, but largely essential to the viability of the producer over time.
 - For co-productions, programming largely intended for foreign markets or triggered by a foreign broadcaster -- largely non-“distinctly” Canadian drama -- foreign sales are obviously essential to the production being made to begin with and likely to transpire by way of pre-sale.
58. In all but the specific territories involved in a service production, foreign sales (pre-sale or co-production) are essentially an afterthought for foreign producers. Foreign sales are more or less expected, but unlikely (certainly, in respect of any one territory) to materially affect the rights offered. Thus the norms and practices of the domestic/originating market -- and its rights definitions of time, platform, and/or territory -- will largely prevail.
59. Put another way, for foreign content, rights rules are dictated by the host broadcaster/producer, unless otherwise required because of particular importing country laws and regulations.

The Role of “Domestic” Cultural Policies

60. The crucial role of cultural policies in respect of foreign content is often forgotten or misunderstood. While direct subsidy is inarguably essential to domestic content, cultural regulation and law arguably has as much or more to do with “controlling” foreign content -- and, in particular, ensuring domestic industries benefit from its import -- than it does in promoting domestic content.
61. Indeed it is only such domestic laws and regulation that can either alter the norms of foreign jurisdictions in regards to program rights practices or change what would otherwise be in the best economic interests of foreign producers/broadcasters.
62. Today, given (a) the relative strength of Canadian broadcast platforms over unregulated/ancillary platforms now available and (b) the relative strength of Canadian cultural laws and regulations in support of Canadian broadcast platforms, the value of

Canadian broadcast rights still significantly exceeds that of Canadian unregulated/ancillary platforms.

63. For example, while cultural groups criticize the increasing amount of money Canadian broadcasters spend on foreign (primarily U.S.) programming, it is arguably these increasing amounts that ensure foreign rights holders remain satisfied that they are earning a fair return from the Canadian broadcasting system, and have no great incentive to bypass it completely. Should U.S. suppliers conclude that Canadian broadcast license fees are inadequate and decide to bypass Canadian broadcasters, it could only result in significantly less money being available for Canadian content and Canadian producers, creators and other rights holders.
64. This situation could change in the very near future given:
 - Unregulated Internet and mobile platforms have the potential to grow exponentially and generate more and more significant revenue;
 - U.S. producers/broadcasters will be in a position to “go direct” to Canadian viewers through unregulated platforms, rather than go through a Canadian broadcaster “middleman”; and
 - A “tipping point” may be reached with the internet and other unregulated platforms that allows complete and effective bypass of Canadian English-language broadcasters
65. This would then result in a breakdown of the Canadian rights market that would significantly erode support for Canadian content by eroding the cross-subsidy essential to its support, at least in the English market.

Unique Circumstances of the French-Language Market

66. Canada’s French-language market operates in a distinct, separate and parallel way to the English-language market.
67. As is the case in English Canada, French-language broadcasters have evolved from primarily purchasing market-by-market rights to increasingly purchasing national Canadian French-language rights -- either by compulsion, because of national coverage, or in order to maximize their ability to preserve the rights to their principal markets.
68. The massive practical differences that exist between Canada’s French-language and English-language television markets are well understood, and stem from both the distinct language and cultural preferences of Quebecers and other French-Canadians. These include such factors as a higher desire for domestically produced content, and the economies of scale and scope necessary to have a vibrant, sustainable French-language broadcasting system in Canada.
69. However, while there is less reliance on foreign content in the French market, there is increasing competition for it. Not reliant on simulcast, windows are less sequential and

competition for popular foreign programming occurs not just between private conventional broadcasters, but also between private and public¹⁷, conventional, specialty and pay broadcasters.

70. In fact, in many ways, it is the English-Canadian market that is unique in the world, with its geographic proximity to an English-language market 10 times its size, universal distribution of the most popular U.S. broadcast outlets (all major U.S. conventional networks, plus more limited distribution of “mini-nets” and popular U.S. cable channels), and huge consumption of top U.S. content. It is French Canada that shares more in common with other countries – be it France, Germany, Australia or the U.K.
71. Despite this, there appear to be no fundamental differences between English and French Canada with respect to issues of rights in domestic content, except by economic need and tradition and convention. Such traditions include a greater tendency towards the collective exercise of rights, and stronger guilds, unions and collectives as a consequence.
72. Audio-visual works in Quebec rely heavily on a series of collective agreements involving broadcasters and between producers and actors, directors, composers and screenwriters which define such key terms as the duration and nature of rights granted and fees/residuals.
73. The acquisition of ancillary rights in the French market is further complicated by the multi-party negotiations that are required between (and among) rights holders represented by artist associations such as l’Union des Artistes (l’UdA), Société des Auteurs de Radio, Télévision et Cinéma (SARTEC), l’Associations des réalisateurs et réalisatrices du Québec (l’ARRQ) and producer associations, namely l’Association des Producteurs de Films et de Télévision du Québec (l’APFTQ) pursuant to the *Loi sur le statut de l’artiste*. Furthermore, because the agreements reached by these associations require that all residuals payable to performers must represent a percentage of their initial fee for the work¹⁸, it has made negotiations for ancillary rights between producers and broadcasters based on a revenue share/split model next to impossible. While English-language broadcasters have been able to negotiate multiplatform rights in independent productions on a case by case basis, French-language broadcasters have been almost entirely limited to obtaining such rights in affiliated productions or in productions that do not involve members of UdA.
74. While today, some protection is still provided by language barriers, this language-based protection is likely to lessen over time. For example, piracy and marketing issues are increasingly leading major theatrical film releases to a consistent “day and date” release around the world, with foreign language dubbing done in advance. Were such a practice to come into play in the TV programming world in the future, traditional 1 year post-English language TV release approaches (allowing time for Quebec dubbing) – will become a thing of the past.

¹⁷ Société Radio Canada and TéléQuébec continue to compete with private French-language conventional and specialty broadcasters for top U.S. programming

¹⁸ The percentage varies by broadcast “window” and/or distribution platform.

75. Thus while the needs of Canada's French-language broadcasters for multi-platform rights are similar to those of English-language broadcasters, the barriers for domestic content are different.

Key Public Policy Tools that Foster a Separate Canadian Rights Market

76. The Canadian rights market is currently in a state of delicate balance.
77. For the most part, in Canada we have enjoyed a distinct program rights market from the U.S. This separation is neither systemic nor guaranteed, but rather the result of several fortuitous factors—some practical, some historical and some legislative. For U.S. programming, this separation is based purely on the financial interests of the rights holders—interests that could well change in the coming years.
78. The simple fact is that, currently, a U.S. rights holder can expect to receive more from Canadian broadcasters than he could by selling Canadian rights to a U.S. broadcaster. This may not always be the case.
79. Historically broadcasting was based on terrestrial transmitters with limited territorial coverage. A separate rights market in Canada developed naturally because there was no other way to exploit programming in this country. The advent of first, cable reception of foreign signals, and then satellite channels put some degree of pressure on this simple separation, but by that time Canadian broadcasters had become well established. The current situation has been reinforced and strengthened by a number of factors.
80. Bill C-58 discouraged Canadian companies from advertising on U.S. based television channels. This has meant, for example, that a Ford commercial on a U.S. network is not paid for in part by Ford Canada for the coverage in this country.
81. Simultaneous substitution on conventional television has increased the value of certain prime-time U.S. programs in Canada and consequently, the payments possible to the rights holders. This has also helped encourage the separation of rights for this country.
82. But these factors may not apply to new methods of program delivery. While advertising deductibility restrictions apply to newspapers, periodicals and broadcast stations/networks, they do not currently apply to Internet delivery of programming.
83. It should be clear that Internet delivery, while currently in a somewhat immature state, is rapidly becoming a reality. U.S. services such as MovieLink are delivering television programming on both streaming-subscription and on a VOD/download basis. Advertiser supported services are being tested and the business models are continually being refined.
84. The next release of the Windows operating system (Windows Vista) is reported to inherently contain the abilities to “converge” Internet and television program delivery, thereby erasing the difference between the computer and the cable/DTH box. Once

your television remote can directly access programming through the Internet and present it on your television set the last remaining barriers to IP delivery on a mass scale are likely to fall.

85. There are no technological impediments to making these services available directly to Canadians notwithstanding the fact that these services are currently restricted to U.S.-based Internet connections.
86. With the increasing appetite for various forms of new media and new delivery platforms, at some time in the not too distant future it is possible that at least some programming currently being sold to Canadian broadcasters may be withheld in order to reach Canadian audiences directly from the U.S. Should it become more economically advantageous to a U.S. rights holder to sell those rights only to a U.S. (perhaps affiliated) broadcaster, we will have reached a tipping point which will have the potential to undermine the current economic model of the Canadian television system.
87. Some measures currently in place to foster and support a separate rights market for Canada include:
 - Broadcasting Act oversight, generally
 - Specific Broadcasting Regulations like simultaneous substitution
 - The advertising deductibility provisions of the Income Tax Act (“ITA”)

A *Broadcasting Act Oversight*

88. The significance of an electronic media activity falling under the purview of the *Broadcasting Act* is twofold.
89. First, from a trade perspective, “broadcasting activities” have been clearly recognized (under the FTA/NAFTA) as falling within a nation’s “culture” and therefore appropriate areas for subsidy or other preferential treatment. Under the NAFTA/FTA, this also places them squarely under the “cultural exemption”.
90. Second, from a program contract perspective, classifying a new electronic media activity as “broadcasting” makes it easier for a broadcaster to claim it has been granted such rights. As noted above, this is precisely the issue faced by broadcasters with respect to mobile phone “broadcasting”.
91. While the *Broadcasting Act* includes new electronic media activity (as long as it is not predominantly alpha numeric text), as in the case of mobile, the Commission’s decision to treat such new activity as exempt from licensing, makes it harder for a broadcaster to argue that the “right” to distribute in this manner is automatically included in the rights purchased for “broadcast”.

92. This exemption from licensing could tangibly compromise broadcasters' ability to obtain new platform rights, and in the case of foreign programming, could create significant opportunities for bypass.
93. This is not to suggest that a "restrictive based" licensing regime is either necessary or required for new electronic media activities. It does suggest that mere licensing -- perhaps on an "incentive" basis -- could be beneficial to maintaining the integrity of the Canadian rights market.

B *Simultaneous Substitution*

94. According to a Report prepared for the then Department of Communications in 1990 by Arthur Donner, Ph.D ("the Donner Report")¹⁹, the historic "value" of simultaneous substitution in terms of net incremental Canadian TV advertising revenues is as follows:

Year	Simulcast Rev (Millions)	Tot. Conventional TV Revenue	% of Revenue from Simulcast
1982	\$21	\$214.4	9.8%
1984	\$52.7	\$670.8	7.8%
1988	\$67.3	\$1092.1	6.1%
1988 (CAB)	\$81.3	\$1092.1	7.4%
1990 (CAB)	\$99.2		

95. Today, all indications are that even with the proliferation of distant signals, simulcast remains an important revenue preserver for conventional TV stations in Canada, particularly in the English market.
96. Assuming simulcasts were to represent roughly 10% of private TV revenues today, that would put its current value at approximately \$200 million. Industry executives estimate that approximately 20% of prime time schedule Private TV revenues come from simulcast. Given the increasing relative importance of "top 20" prime time shows to conventional TV -- representing upwards of 80% of private TV revenues -- the value of simulcast today could actually be closer to \$300 million.

C *Section 19.1 of the Income Tax Act - Advertising Deductibility*

97. In 1976, Bill C-58 amended the *Income Tax Act* (ITA) to disallow expenditures for advertising targeted to Canadian audiences on U.S. television and radio stations as eligible business expenses for advertisers when computing their corporate taxes.

¹⁹ "The Financial Impacts of Section 19.1 of the Income Tax Act (Bill C-58) and Simultaneous Substitution". Dr. Donner was also the author and/or primary contributor to a series of reports conducted in 1979, 1983 and 1986 which tracked the impact and effectiveness of C-58 and simultaneous substitution; the 1986 study being sponsored by the Caplan-Savageau Task Force on Broadcasting.

98. Section 19.1 of the ITA states:

“ ... in computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer made or incurred ... for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking”.

99. According to the Donner Report, the historic “value” of C-58 in terms of net incremental Canadian TV advertising revenues is as follows:

Year	C-58 Revenue (Millions)	% of Conventional TV Revenue
1977	\$16.2	
1978	\$23.2	
1982	\$28.2 to \$32.7	
1984	\$35.8 to \$41.8	
1988	\$48.6 to \$67.5	

100. To the CAB’s knowledge, no comprehensive/publicly available analyses on the effectiveness of C-58 have been conducted since 1990, i.e. for over 15 years. On the other hand, while the “enforceability” of C-58 has always been of concern, there is no evidence to suggest that the effectiveness of C-58 has waned.

101. Assuming C-58 remains of primary importance to conventional broadcasters, and the percentage of conventional broadcaster revenues attributable to C-58 were 6% or more, this would make C-58 worth on the order of \$120 million, today.

102. While no analysis appears to have ever been done on the impact of C-58 on specialty broadcasters in Canada, it is reasonable to assume that it has had at least some positive tangible effect -- by for example, discouraging Canadian advertisers with a North American wide profile from simply advertising on U.S. cable channels for all their US and Canadian needs.

103. In addition, it appears that no serious consideration has been given in public policy circles to extending these provisions to new electronic media, be it the internet or mobile, notwithstanding their potential benefit and permissibility under NAFTA.

Key Conclusions

104. For 60 years, a separate rights market has been a central underpinning of the Canadian Broadcasting system, and Canadian broadcasters’ ability to support Canadian content. New electronic content exhibition technologies -- and how and by whom they are exploited -- threaten that foundation.

105. In an emerging media landscape characterized by expanding multi-platform exhibition, it is clear that all reasonable public policy measures and instruments will be needed to maintain the integrity of a separate and distinct Canadian program rights market. Moreover, Canadian broadcasters must be given access to multiplatform rights in order to offset the impact of “non-broadcast” platforms which tend to diminish the value of broadcast rights without recompense.