AIMS Commentary

Atlantic Institute for Market Studies

Hands Off!
Why government-free new media works

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Commentary based on a submission to the CRTC on the subject of broadcasting in new media

The CRTC wants to hold your hand the next time you use an iPhone, podcost or WiFi. Or at least that's what the Canadian Radio-television and Telecommunications Commission (CRTC) is considering in its latest round of public hearings (Broadcasting Notice of Public Hearing CRTC 2008-11) on new media.

The Commission has posed questions in six broad areas:

1. The definition of terms related to broadcasting in new media.
2. The impact of broadcasting in new media, particularly on traditional broadcasters.
3. The need for incentives or regulatory measures in regard to Canadian broadcasting content in new media.
4. Access to Canadian content in new media (including the issue of net neutrality).
5. Other policy issues such as "diversity of voices," the role of public broadcasters, the role of community broadcasters, and access to new media content by disabled persons.
6. The appropriateness of the existing new media exemption orders.

Many of the Commission's specific questions may obscure the fact that one of the ultimate determinations to be made in this exercise is whether or not a government agency should place (even more) limits on the rights of Canadians to consume the broadcasting content of their choice. When the Commission asks how "broadcasting in new media" should be defined or whether it should "draw a distinction between professional versus non-professional content," whether "measures are needed" to support some group or some objective, or whether a segment of the broadcasting sector is "contributing in a [sufficiently] significant manner," it should not be forgotten that the real issue at hand is the drawing (expansion?) of the boundaries within which the state will exert coercion over Canadians' viewing and listening choices.

It also is useful to step back for a moment from the regulatory jargon – e.g., terms like "new media," "Canadian content," "mobile television broadcasting undertakings," and "broadcasting policy objectives" – and remember what we are talking about at a practical level: having government officials spend their time and effort (and other people's tax dollars) worrying about how, when, or why we choose to watch *The Colbert Report* via iPod or cellular phone on the bus ride to work in the morning or enjoy *The Border* or *Kung Fu Panda* on the home computer after dinner. To put a finer point on it, average Canadians might ask themselves if they are as concerned as the Commission (Question 12) as to whether the movie

they (or their neighbour) might choose to watch on their laptop during their next long flight, for example, "reflects Canada's linguistic duality, multicultural nature, and special place of Aboriginal peoples within society." (We are prepared to hazard a guess as to what the answer would be.)

Technology continues to advance rapidly in today's ever changing world. In deciding to re-examine the question of broadcasting in new media, the Commission has noted that "high-speed Internet access has been adopted by most Canadians, new technologies and applications are offering high-quality broadcasting content, and Canadians are spending more time accessing this type of content over the Internet and mobile devices." Unfortunately, in light of these changes the focus appears to be on potential extension of the existing regulatory structure, rather than an examination of whether technology and other factors have rendered the decades-old broadcasting regulatory framework out of date.

Broadcasting regulation in Canada tends to be described by its proponents in motherhood language. "Safeguarding the cultural fabric of Canada" and "enhancing national identity" are just two examples. At its most basic level, though, much of Canadian broadcasting regulation is focused on limiting consumers' choices and on providing funding to well-organized and vocal industry players who are not shy about wrapping themselves in the flag while making their demands on others' wallets.

Television and radio broadcasting have lent themselves to regulation since their infancy because government licensing of frequency bands was accepted worldwide as the solution to the potential "tragedy of the commons" problem that arises with radio spectrum. Once bureaucrats and politicians were in a position to determine the technical rules that will manage potential interference among radio transmissions, it was no great leap to regulate the information that would be carried over those transmissions. (In contrast, no common resource problems are inherent to the production and sale of written works and indeed there are no Canadian content rules enforced at your local bookstore or magazine shop.)

The binding technical scarcity of the spectrum resource has been a cornerstone in the arguments for Canadian content regulations. Since the number of radio and television signals in any given market is limited by the laws of physics, the argument went, the broadcasting schedule would be filled with American programming leaving no "shelf space" for Canadian content.

Technology is rendering this shelf space argument obsolete. Consumers are no longer limited to a handful of viewing and listening options in each hour of the day. Radio and television from all over the world – and of course from all over Canada – can be accessed via the Internet. And rather than being bound to broadcasters' schedules, consumers can enjoy their programming choices at their own convenience by downloading files to desktops computers, laptops, cellular phones, or devices like iPods, or by recording programs to personal video recorders. As well, Canadians have never had access to more diversity in thought and opinion: a resident of, say, Saskatoon can use the Internet to tune into a morning radio show from Charlottetown, read a newspaper from Montreal, and get information from a blog in Whitehorse – the options are almost literally endless.

This increase in access works in the opposite direction as well. Canadian content producers can now use the Internet to make their products available worldwide much more easily, quickly, and cheaply. Someone with a laptop computer in Tokyo, Istanbul, or Buenos Aires can download an episode of *Corner Gas* as easily as someone in Kelowna or Peterborough.

Also, technological advances (like the development of new media) are eroding the Commission's ability to apply and enforce Canadian content rules. For example, as more and more Canadians choose to listen to radio stations via the Internet, the size of the Canadian listening audience whose musical consumption conforms to the Commission's edicts for Canadian content diminishes. Geo-blocking theoretically prevents Canadians from accessing certain foreign television programming over the Internet, but as the Commission's own background materials (e.g., Alan Sawyer's *Changing channels: alternative distribution of television content*) point out; IP addresses can be spoofed to circumvent geo-blocking protection.

These fundamental changes to the broadcasting landscape provide new reasons to question the wisdom of continuing with Canadian content policies that restrict consumer choice.

However, there remain additional, longstanding reasons for ending such policies. These were nicely summarized by Professor William Stanbury in his 1998 Fraser Institute paper entitled *Canadian Content Regulations: The Intrusive State at Work*. In fact, in a single paragraph he presents a damning list of indictments (page 7):

"The present Canadian content regulations have almost no redeeming social value. They are based on citizenship, not on the substantive content of TV programs or musical recordings. They alter the set of choices available to TV viewers and radio listeners by limiting the availability of foreign programs and musical recordings. After several decades, there is no evidence of any link between CanCon regulations, national identity, and cultural sovereignty – the key stated objectives in the Broadcasting Act. These regulations have raised broadcasters' costs and cable TV rates. They also amount to a regressive tax and so harm the poor proportionately more than the rich. CanCon as an industrial policy amounts to neomercantilism, an idea discredited long ago. The emphasis on supporting the export of Canadian cultural products turns Canada into what cultural nationalists loathe about the US, a 'cultural imperialist.' Most importantly, Canadian content regulations are arguably a violation of the constitutional right to freedom of expression. It is hard to overemphasize the importance of freedom of expression in a democracy."

To summarize, technological advance as exemplified by the growth of new media has rendered the existing paradigm of broadcasting regulation obsolete. Canadian consumers now have access to once unimaginable levels of choice and diversity in broadcasting content – except to the extent that their government denies them this choice.

In addition to William Stanbury's incisive critiques of a decade ago there are two new reasons to argue for jettisoning the CanCon regulatory model: new technology has massively expanded the "shelf space" available for Canadian broadcasting content and it also is slowly undermining the Commission's technical ability to enforce Canadian content rules.

Rather than asking whether new media's exemption from the existing regulatory structure should be lifted, the Commission should be asking whether there remain valid reasons to maintain much of the broadcasting regulatory edifice that now stands.

We do not see how Canadian consumers benefit from state-imposed restrictions on the types of broadcasting content that they may access and therefore we recommend that the process of dismantling the CanCon framework begin. This would include rewriting the objectives of the *Broadcasting Act* so that our current legislation reflects the realities of 2008, rather than 1958 or 1978.

To the extent that market failure can be demonstrated for certain types of "Canadian" programming that would be widely supported as socially beneficial (perhaps educational or historical programming), the government should designate funds for this purpose and be held accountable for results.

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