

# *FINAL REPORT*

## ***DEVELOPMENTS IN THE CANADIAN PROGRAM RIGHTS MARKET***

***2011***

**Prepared for:**

The Canadian Radio-television and  
Telecommunications Commission  
("CRTC")

**Submitted by:**

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March 31, 2011

## *i) Foreword*

This report was commissioned by the Canadian Radio-television and Telecommunications Commission (“CRTC” or “Commission”) in March, 2011, to provide an examination of key developments in Canadian television program rights, with an emphasis on foreign programming given its status as an economic driver of the English-language TV market.

The report is designed to complement and update a review of the Canadian program rights marketplace conducted for the CRTC by the Author in 2007<sup>1</sup>.

The purpose of the report is educational rather than prescriptive. While the report does raise issues that may have public policy consequences, the purpose of this report is not to offer guidance on public policy response.

The report presents a snapshot in time. The rights market is very fluid with dynamics changing daily. While the Author has made every reasonable effort to ensure information is current and accurate at the time of writing, significant changes may be occurring or have occurred in some areas by the time of reading.

The report reflects the research and views of the Author, and should not be construed as representing any views of the Commission.

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<sup>1</sup> [“An Overview of the Canadian Program Rights Market”](#), July 2007. Among other things, this 2007 Report contains descriptions of the policy measures that support a separate Canadian rights marketplace, and copyright basics on program rights and windows that remain relevant but are not repeated here.

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## 1. Introduction

The last five years have seen an explosion of online video around the world, now representing upwards of 40% of Internet traffic<sup>2</sup>. Canadians, the highest-ranking users of the Internet globally, have become prolific consumers of online video<sup>3</sup>.

The what, how and how much of that video consumption has also evolved dramatically:

- From predominantly short-form user-generated video to full length, professional content including current movies and TV series
- From exclusively PC-based to more mobile-, tablet- and TV-based
- From almost insignificant to 20 hours a month in the 18-34 year old demographic<sup>4</sup>
- From ancillary and incidental TV consumption to apparent TV viewing replacements<sup>5</sup>

In 2007, Internet, online, or what we now call over-the-top TV (“OTT”) was “still undeveloped and largely experimental”<sup>6</sup>. Today it is a commercial - and rapidly evolving - reality. Netflix has a market capitalization of \$12.5 billion<sup>7</sup>, greater than the value of all Canadian TV broadcasting entities combined. Major U.S. gaming, software and web players have OTT plays, including Apple/iTunes, Google/Youtube, Microsoft/Xbox, and Amazon. And U.S. studios vacillate between an interest in greater competition for their product (between OTT and traditional TV) and a concern that they create new virtual monopolies online.

Here in Canada, the emergence of large well-financed foreign OTT conglomerates raises the specter of bypass – in whole or in part – of the Canadian broadcasting system, and hence its ability to support objectives of the *Broadcasting Act*, such as the creation and presentation of Canadian programming.

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<sup>2</sup> Projected to represent 90% by 2014: [Cisco Visual Networking Index](#), June 2, 2010.

<sup>3</sup> comScore Media Metrix, Q4 2010.

<sup>4</sup> comScore Video Metrix, Q4 2010. Even 55+ averages 8.3 hours per month. Note, however, that short form YouTube videos still represent the vast majority of this.

<sup>5</sup> While not fully accepted as clear cause and effect, evidence of cable subscriber declines combined with considerable anecdotal commentary in the blogosphere suggest that cord cutting and cord shaving are occurring, although likely in a limited manner at this time. A recent U.S. survey of 1,287 households nationwide pegged subscriber disconnect at only 0.3%. “[Leichtman Research Group finds that only 0.3% of a survey sample dropped a multi-channel video service over the past year](#)”, March 29, 2011, Hollywood Reporter. On the other hand, an earlier Credit Suisse study reported that “[1-in-3 young Netflix subscribers cut cord to pay TV](#)”, Sept. 16, 2010, FierceOnlineVideo.

<sup>6</sup> 2007 Report, p.9

<sup>7</sup> As at March 31, 2011.

At a minimal level, OTT risks raising foreign programming costs for Canadian broadcasters and/or drawing a certain percentage of viewers, advertising and subscription revenue away from regulated players.

At the extreme, U.S. studios and broadcasters could start to bypass Canadian broadcasters altogether and access Canadians directly. In theory, such a “doomsday” scenario might happen in any number of different ways:

- Studios could choose to withhold online rights to TV programming from Canadian broadcasters in favour of OTT distribution;
- Studios could choose to withhold TV programming from Canadian broadcasters completely in favour of affiliated (foreign) OTT plays; and/or
- Foreign OTT providers operating in Canada could outbid Canadian broadcasters for online rights (even if uneconomic) to improve their competitive position in the Canadian marketplace, and ultimately starve Canadian players of viewers and revenues

Whether gradual or sudden, incremental or all encompassing, reductions in the ability of Canadian broadcasters to secure Canadian multi-platform rights on a cost effective basis would have a direct effect on their capacity to support Canadian programming – especially in English Canada – as profits from foreign programming cross-subsidize Canadian programming (which at best, tends to break even).

Developments in the Canadian program rights marketplace are accordingly a litmus test of the health of system. Tracking such developments and assessing the extent of bypass and/or the risk thereof is therefore a necessary input to determining appropriate policy responses.

## **2. Key Developments in Online and Mobile TV**

### **a. Availability of Online TV**

The 2011 program rights marketplace is characterized by a continuing trend towards disaggregation of rights to serve an increasing array of platforms; and, at the same time, a compression of windows leading to increasing proximity, and in some cases overlap of rights windows<sup>8</sup>.

Today, a top U.S. prime time TV show aired by a national Canadian network, such as Glee on Global TV or Grey’s Anatomy on CTV, will be available within 24 hours on the broadcaster’s web site (as well as BDU sites and set top box

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<sup>8</sup> A program rights “window” refers to the assignment of program rights for a specific time period and a specific platform in a specific territory. For a general description of the concept of program rights windows, and their application, see 2007 Report, Section 3.

("STB") VOD) for "catch up viewing" for up to four weeks. Further, immediately after broadcast, the episode will be available to buy for \$2.49 from iTunes<sup>9</sup> (\$3.49 in HD)<sup>10</sup>. Post-broadcast exhibition can be on the device of one's choosing: TV, PC, tablet and smartphone<sup>11</sup>.

Wonderful for the viewer, the implications of this simple, now everyday example, are nevertheless quite staggering for industry:

- As recently as a couple of years ago, a DVD release of a TV series season would occur in August, well after its broadcast, and just prior to the broadcast of the next season beginning in September. Now, as a *de facto* extension of retained DVD rights, studios permit electronic sales immediately after broadcast, concurrent with broadcaster VOD rights (and will release the DVD immediately after the last episode of a given season airs);
- For the broadcaster, the ability to generate significant audiences and revenues from repeats has materially declined;
- For the BDU, viewers potentially see less exclusive program value in their subscriptions;
- For the ISP, surges in traffic demand are leading to year-over-year increases in capacity requirements of 40-50%; and
- For all, the prospect of powerful new entrants and fundamental disruptions to the TV value chain is very real.

The underlying technological capabilities that are permitting this and other shifts in the television landscape are no longer particularly new. Broadband access, video streaming and downloading have all been in place for more than five years.

What has changed is the willingness of studios and the broadcast industry to embrace multi-platform exhibition, and the capability of consumer electronics, web software and applications to provide it in a compelling way for viewers.

The common fear that has motivated this shift for both broadcasters and studios is exemplified by the demise of the music industry: fears over the vulnerability of

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<sup>9</sup> While in the U.S. there are a number of major sources for online program purchases, including Amazon Instant Video and Wal-Mart's Vudu, iTunes practically owns the market in Canada. However, Cineplex.com now has movies to download or rent, Xbox live features movie rentals and purchases from Zune, Canada's Mobovivo provides online purchases of select TV shows and documentaries and Zip.ca has announced its intentions to launch a streaming service.

<sup>10</sup> "Seasons passes", for all current and future shows in the season, can be purchased for \$47.99 and \$42.99 respectively, comparable to DVD pricing (\$67.99, \$60.99 in HD).

<sup>11</sup> Interestingly, a viewer with an over-the-air antennae and an Internet connection can have as much flexibility as a BDU subscriber, at higher quality, for top network viewing. This is one of the motivations of U.S. OTT service, Sezmi, a 1TB DVR/set-top box that provides access to three types of TV sources: broadcast stations, cable channels (via OTA secondary channels), and Internet content.

a mature business, fears over disintermediation and technological irrelevance, and fears over piracy.

The rise three to five years ago of predominantly pirated TV and film file sharing, through P2P services such as BitTorrent<sup>12</sup>, provided too close a reminder of Napster. The explosion of more user-friendly streaming-based video aggregator sites, such as CastTV, Blinx and Megavideo that mix a legitimate front end with pirated content, added further impetus. Both broadcasters and studios realized that providing competitive online services, even with unclear business models, would be better than allowing piracy to dominate.

Studios had another motivation. Despite the move to Blu-ray, DVD sales have been declining for some time, falling more than \$4 billion from 2008 to 2010 (to \$14 billion with an additional \$1.8 billion in Blu-ray discs sold), collateral damage from the collapse of the music retail industry<sup>13</sup>. Hoping digital downloads will fill the void, studios have been encouraging electronic sales and rentals, even at the risk of compromising broadcast revenues.

This more permissive attitude towards online rights on the part of U.S. studios has led to the emergence of numerous well financed foreign OTT providers, including general interest subscription-based movie and TV show services such as Netflix, Hulu, and Amazon (of which only one (Netflix) currently operates in Canada), more specialized movie services (Vudu), and even independent movie services (Fandor).

These providers have gone far beyond the direct-to-PC model, taking full advantage of game consoles (Wii, PS2, Xbox), Blu-ray players, Internet TVs, web platforms (Google TV, Facebook) and inexpensive dedicated devices (Sezmi, Apple TV, Boxee, Roku, Logitech Revue) to enable user-friendly direct TV access to OTT. While the mobile/smartphone TV market remains nascent for all but major live events, the sudden emergence of the tablet as a major consumer phenomenon presages another TV viewing shift, both as a means of enhancing the BDU TV experience and competing with it (all mostly via Wifi, i.e. an extension of online).

Canadian broadcasters and BDUs have by no means stood still in all this. Broadcasters now offer a comprehensive menu of catch-up viewing to virtually all their popular shows. BDUs have kept pace with equivalent offerings on their VOD platforms, as well as online on demand portals launched in the last year by all the major companies.

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<sup>12</sup> Presumably because of the increased availability of other video viewing options, P2P traffic in North America has gone from 22% of downstream traffic in 2008 to 13% in 2010: Sandvine Fall 2010 Global Internet Phenomena Report.

<sup>13</sup> “[Digital fails to offset fall in DVD sales](#)”, Jan 6, 2011, Financial Times.

The net result has been both a significant rise in online video consumption<sup>14</sup> and the emergence of a number of different OTT business models, including free advertising supported (e.g. Global.ca); walled garden with BDU subscription (e.g. Rogers On demand Online); subscription based SVOD (e.g. Netflix); rental and sale based (e.g. iTunes).

b. Multiplatform Windows

While the terminology used to identify them may differ<sup>15</sup>, it is now possible to identify at least six discrete multiplatform rights windows, each, in theory, providing a distinct and different business model for rights exploitation, thereby together (and in appropriate sequence) maximizing revenue potential for the rights holder:

1. Live Streaming. The “retransmission” of TV signals on the web or to mobile devices<sup>16</sup>. Offers less value added in a home environment, but provides a “customer retention” play for BDUs to permit subscribers to watch their favourite channels on their mobile or tablet devices and an incremental revenue opportunity for mobile service providers<sup>17</sup>.
2. AdVOD. Advertising supported video on demand – free to the viewer, but with “forced” viewing to advertising that is not easily avoided.
3. SVOD. Subscription video on demand. The viewer pays a periodic subscription fee, either discretely or as part of some other “package” of services (e.g. Amazon, Pay TV).
4. TVOD. Transactional VOD or electronic rental. The viewer pays a per-transaction fee to stream or download for a limited period of time (typically 24-48 hours).
5. EST. Electronic sell through or “download to own”. The viewer purchases a permanent (copy protected) electronic version of the TV show, series or movie, akin to purchasing a DVD.

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<sup>14</sup> Within 3 months of its September 22, 2010 launch in Canada, Netflix represented 20% of ISP peak downstream traffic.

<sup>15</sup> The terminology used here is that which most clearly differentiates between the types of multiplatform (sometimes just called “digital”) rights windows. These same terms are used regardless of technological platform (cable set top box, online, mobile), although this is not always standard practice in the industry.

<sup>16</sup> The term “retransmission” is not used in its legal sense here. Indeed from iCraveTV to the more recent ivi Inc. shut down Feb 22, 2011, courts both north and south of the border have determined that retransmission over the public internet does not constitute “retransmission” as it pertains to cablecos or their regulated equivalents, and therefore requires consent of the copyright holder. The extent to which this means just the “signal” or includes underlying program rights depends on the nature of rights granted to the broadcaster, and has lead to broadcasters reaching different conclusions as to whether they have the rights to allow live streaming.

<sup>17</sup>For example Bell Mobile/CTV deals, and recent Comcast-Time Warner deal for the online streaming of channels like TNT, TBS, CNN, and the Cartoon Network: “[TW, Comcast Complete Online Streaming Deal](#)”, Feb 3, 2011.



6. PVOD<sup>18</sup>. Premium video on demand. The electronic delivery of films (rental and sell through) while they are still in theatrical release.

When further disaggregated by the type of platform used for delivery (which, as discussed below, may or may not be treated as a separate right), the array of discrete rights theoretically available for rights exploitation, beyond traditional TV and DVD/theatrical release can be considerable<sup>19</sup>.

	OTA	BDU STB	Online	Mobile	DVD	Theatrical
<b>Broadcast</b>	X	X				
<b>Live streaming</b>			X	X		
<b>AdVOD</b>		X	X	X		
<b>TVOD</b>		X	X	X		
<b>SVOD</b>		X	X	X		
<b>EST</b>			X	X		
<b>DVD</b>					X	
<b>PVOD</b>		X	X	X		
<b>Theatrical</b>						X

The exploitation of rights of a popular TV show would be top to bottom, in the following order:

- Broadcast, potentially with live streaming
- Concurrent exploitation of VOD rights, with a potentially more limited post-broadcast AdVOD window
- DVD release post-broadcast of last episode in season, SVOD/TVOD windows may end or continue
- Possible future syndication (strip broadcast with potential concurrent VOD)<sup>20</sup>

Feature film exploitation would be largely the opposite (bottom to top):

<sup>18</sup> On March 31, 2011, Variety announced that reported that Fox, Sony, Warners & Universal were looking to launch a Premium Video On Demand (PVOD) service called Home Premiere, at a reported \$30 per PVOD rental. While theatre owners had resisted this encroachment on their window, it seems increasingly evident that it will occur. See, for example, [Fox, Sony, Warners & Universal Launch Premium Video on Demand \(PVOD\)](#), On Demand Weekly, March 31, 2011, [Sony mulls plans similar to Facebook-Warner deal](#), CNet, March 9, 2011

<sup>19</sup> While the extremes of broadcasting and theatrical exhibition are platform specific, the array of VOD rights are, at least theoretically, technology neutral.

<sup>20</sup> After a TV series has run for four or five seasons, enough episodes exist for “strip syndication”, typically daytime airing 5 times a week.

- Theatrical release (with potential concurrent PVOD in the future)
- DVD and EST roughly three months after premiere
- TVOD three to six months after premiere
- Pay TV as early as six months after premiere, with SVOD on BDUs
- Broadcast and/or library SVOD 24 months after premiere

### 3. Impact on Canadian program rights

Canadian broadcasters are now largely successful in obtaining multiplatform rights to the vast majority of their top programming, and in a way that supports rather than undermines broadcast exhibition. Central to such successful multiplatform broadcaster strategies are two elements:

1. The ability to obtain appropriate multiplatform rights (typically broadcast exhibition plus AdVOD or SVOD) at reasonable cost; and
2. The ability to retain overall rights exclusivity<sup>21</sup> for the duration of the broadcast licence window.

Absent issues of piracy, the maintenance of broadcaster exclusivity is the more important of the two elements. Indeed, broadcasters will accept limitations on multiplatform rights, but aggressively fight to prevent direct infringements of their exclusive program franchise.

This is not necessarily an easy fight for broadcasters to win. As already noted, very different multiplatform rights, such as EST and AdVOD can nevertheless coincide in time. Moreover, broadcaster ability to retain SVOD rights during a broadcast season, or at least prevent their exploitation by a competitor, is no longer a given. And while broadcasters are always pushing that a given right be deemed “platform neutral” -- for example, SVOD applying equally to Cable STBs, online and mobile -- U.S. studios and Canadian producers prefer to reserve the right to disaggregate, and seek competing bids for different technological platforms.

For Canadian content, broadcasters have to date generally been able to obtain broad multiplatform rights, including technology neutral AdVOD and SVOD rights, throughout a broadcast window of typically seven years or more. This generally allows broadcasters to make run-of-series VOD available to viewers (either direct or via third party platforms), from the most recent episode back to the first. While key issues in terms of trade negotiations between broadcasters and producers have included specific compensation for multi-platform rights, inclusion of SVOD

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<sup>21</sup> The exclusivity sought by broadcasters is, of course, a very different thing from the exclusivity discouraged for BDUs. The former is what encourages viewers to watch a given channel carried by a distributor; the latter is to ensure only one distributor need be subscribed to. Whether OTT services take on the characteristics of a broadcaster or distributor in this regard may inform future policy responses.

rights and length of term, major reductions in the scope of broadcast and VOD rights made available to broadcasters are not anticipated<sup>22</sup>.

For U.S. content, most studios still try to treat STB and online types of VOD as different rights, including even suggesting that “tablets” are a new category. While vertical integration provides the studios with less of a prospect of competing bids among Canadian VOD providers, the presence of Netflix opens up a new competing VOD platform. However, even if it is classified differently, browser based mobile VOD cannot easily be distinguished technologically from online VOD.

With respect to U.S. content, conventional, specialty and Pay TV nevertheless face slightly different rights issues, and pursue somewhat different multiplatform strategies, appropriate to their different business models.

a. Conventional TV

For prime time fare, Canadian conventional networks have succeeded in being treated similarly to their U.S. equivalents in securing exclusive “catch up” Canadian AdVOD rights (BDU and online) for between two and four weeks post-broadcast<sup>23</sup>. While broadcasters are sometimes precluded from sub-licensing their online AdVOD rights to BDUs, STB AdVOD rights and online AdVOD rights for broadcaster and affiliated sites are generally being obtained<sup>24</sup>. With the exception of EST rights held by iTunes, no one else is permitted to exercise any other form of multiplatform exhibition during this two-to-four week period, or, typically, for the rest of the season<sup>25</sup>.

Equivalent rights are also often being obtained by broadcasters for day-time programming, although this is a lesser priority and the duration of window being exploited usually shorter<sup>26</sup>.

Broadcasters have found this model generally acceptable for three reasons:

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<sup>22</sup> Terms of Trade negotiations were expected to conclude by the start of the CRTC’s Group licencing hearing, April 4, 2011 (Broadcasting Notice of Consultation CRTC 2010-952).

<sup>23</sup> The limitation arises from different U.S. Guild arrangement and the extent to which they permit “promotional streaming” before triggering North American residuals.

<sup>24</sup> Given that the “promotional streaming” right would be limited to the broadcaster. This is why for popular prime time shows, BDU online portals often link back to a broadcaster’s site.

<sup>25</sup> So called “season exclusivity” is not, however, a given. For example, episodes of CTV’s *Mr. Sunshine* and *Mad Love* are available on Netflix after their airing and 4 week AdVOD run. As Netflix becomes a more and more viable competitor in Canada, broadcasters expect increasing pressure on season exclusivity.

<sup>26</sup> For example, while CTV has sought daytime AdVOD rights, Rogers has not. A typical duration is a week, or 5 days of episodes.

1. It provides viewers with the convenience of catching up on missed episodes, while encouraging them to continue to use TV as their primary medium;
2. It allows broadcasters to share in growing online revenues; and
3. It preserves their exclusive “free” program viewing franchise.

To date, rights for SVOD or TVOD (beyond the two-to-four week AdVOD “catch up” window) have not been exploited in Canada for top conventional TV series. This is the result of a compromise holdback or “standstill” between the studios and Canadian broadcasters that preserves Canadian broadcaster exclusivity but denies them the potential for incremental SVOD revenue.

On this, the U.S. situation is different. Hulu Plus, the premium subscription version of Hulu (ownership of which includes NBC, ABC & Fox), secures SVOD rights beyond the two-to-four week AdVOD “catch up” window. Thus, a subscriber to Hulu Plus can watch past episodes of a current series (indeed typically, current and past seasons), including the most recent AdVOD “catch up” episodes on Hulu itself. Services such as Comcast’s Xfinity also offer “catch-up” and recent episodes for some series.

Hulu aside, competing OTT SVOD providers in the U.S., including Netflix, have to date not offered much in the way of recent TV series or season viewing. Studios and networks have been leery of licensing current TV show rights to Netflix given the potential impact on broadcast revenue. While Disney/ABC agreed to post 15-day exhibition for non-prime series<sup>27</sup>, for the most part, only older prior season episodes appear on Netflix, and increasingly, only shows that are no longer on air<sup>28</sup>. In Canada, to date, even fewer TV series have been available on Netflix -- generally either those not or no longer being aired by Canadian broadcasters or those being aired by their agreement<sup>29</sup>.

The hesitation, even tentativeness, around major broadcaster/studio multiplatform deals is understandable given the associated business challenges: assessing what is incremental viewing and revenue versus what is cannibalization, and assessing what is a void that would otherwise be filled by a new competitor.

In particular, it is implausible to assume that full series SVOD does not have a direct negative impact on broadcast sales on the one side and DVD and EST sales on the other. Consumer interest in repeats and strip series cannot help but

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<sup>27</sup> [Netflix signs new Disney-ABC deal, shows up doubters](#), Dec. 8, 2010, CNET

<sup>28</sup> [Netflix spooks Hollywood more than ever](#), March 7, 2011, CNet; [Netflix Strategy of CBS is the Smartest One](#), Galaxy Stocks, March 6, 2011.

<sup>29</sup> In addition to the examples cited in 25, supra, Netflix Canada also airs *Running Wilde*, which was not picked up by any Canadian broadcaster. Also, CBC sold SVOD rights to previous seasons of current shows such as *Republic of Doyle*. “[Netflix lands 'day-after' deal with CBC for some TV content in Canada](#)”, December 13, 2010, Fierce IPTV.

wane after four or five years SVOD. And for most people, the joy of “discovering” a recent previously unwatched series is as achievable on SVOD as it is on DVD or EST. Whether SVOD revenues make up for losses on either end is, however, not easy to determine at the outset.

Natural organizational dynamics also come into play:

- SVOD and TVOD rights are seen by studios more as extensions of EST, than broadcast rights, and hence typically sold by their home entertainment or digital distribution division, rather than the broadcast division. Cannibalization of broadcast licence fees is not a front-and-centre concern of a home entertainment or digital division.
- Network owners, themselves, are not sure whether to treat affiliated Hulu as a competitor or complement; sometimes treating Netflix as well if not better in terms of rights deals<sup>30</sup>.
- Even within the same company, BDU and broadcaster interests will often diverge. Broadcaster interest in aggregating maximum audience across multiple platforms will naturally conflict with BDU interest in preserving the value added walled garden of the BDU franchise.

Accordingly the timing, duration and availability of multiplatform rights remains highly fluid. While certain “typical” practices are emerging, there are little in the way of industry “standard terms”. Rather, different studios, broadcasters and OTT providers are making different bets on the future.

The affiliated interests of U.S. and Canadian broadcasters are also starkly different. Vertical integration in the U.S. is largely studio to broadcaster; while in Canada it is broadcaster to BDU/ISP. As long as it increases overall revenues, U.S. studio/broadcasters are at least somewhat pre-disposed to support OTT, even if there is some negative impact on cable. In Canada there is little such predisposition. For the most part, broadcaster and BDU interests are aligned in doing as much as possible to limit or preclude foreign OTT providers from obtaining Canadian rights to recent TV programming.

In any event, neither the U.S studio/broadcaster nor Canadian broadcaster/BDU sector is interested in a \$70 cable bill turning into a \$10 OTT bill.

#### b. Specialty TV

The Canadian specialty service sector, at one time mostly independent of conventional television, is now largely owned by the major conventional networks, or affiliated entities.

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<sup>30</sup> [Why Jason Kilar Will Leave Hulu](#), Jan 7, 2011, paidContent.org.

This ownership structure, soon to be combined with a regulatory framework that encourages further synergies<sup>31</sup>, has permitted programming strategies that maximize the value of program acquisitions, through:

- Use of multiple program runs on appropriate conventional and specialty platforms; and
- The purchase of program packages and the ability to find a home for virtually all programming purchased.

Perhaps in part because of this, multiplatform exhibition of specialty TV shows has not, to date, been treated in a fundamentally different way than the case for conventional television. Shows are available for free as AdVOD on BDU STB platforms, broadcaster sites, and (where possible) BDU online sites.

What is slightly different is the duration of rights windows. Many Canadian specialty services involve partnerships with U.S. equivalents that ensure a comprehensive all-platform program supply. In addition, multiplatform rights issues are often less complex with cable programming, given that such programming is traditionally cleared on a broader basis<sup>32</sup>. As a result, in many cases, as broadcasters are able to retain broader rights, a whole season's, and even prior seasons' episodes, are made available<sup>33</sup>.

For example, Showcase has all episodes of the current season of *Weeds* (a Showtime hit) available on its website, plus three prior seasons worth of episodes<sup>34</sup>. (All of which is also available to buy on iTunes.)

This obviously goes well beyond "catch-up" viewing, and is likely a temporary "gift" to the broader Canadian public, including those who are not subscribers to Showcase or other Canadian specialty services.

While for specialty operators, providing broad AdVOD can be seen as an extended "free preview" for potential subscribers, and a strong counterpoint to piracy, BDUs have bemoaned this "giving" away of product which would otherwise require a BDU subscription.

In fact, both north and south of the border, the major cable companies and other BDUs are investigating various authentication models to find appropriate means to implement what Comcast has called TV Everywhere – the idea that if

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<sup>31</sup> Pursuant to Broadcasting Regulatory Policy [2010-167](#).

<sup>32</sup> This is partly because, unlike for OTA programming, there are no North American residual rights issues with cable programming.

<sup>33</sup> It should be noted, however, that the opposite is also true. In other programming cases, specialty services are not only unable to obtain extensive AdVOD or SVOD rights, but are also losing season exclusivity. Some in the industry fear that this problem will only increase.

<sup>34</sup> Season 1 and 2 are available on Netflix, suggesting that Showcase did not retain these rights.

customers pay for a TV subscription once, they should be able to watch from any screen (but only if they are subscribers).

Given BDU ownership of the major Canadian broadcast groups, authentication practices may well become the norm in Canada effective the 2011/2012 season.

c. Pay TV

The emerging multiplatform rights models for Pay TV programming are different from conventional and specialty TV, both in terms of the nature of rights obtained and how they are exploited.

Within Pay TV itself, there are also, not surprisingly, significant differences between the treatment of first run movies, original drama series, older movie titles, and, say, children's programming. Our focus will be on original, prime time fare.

With original series, Pay TV is generally obtaining SVOD "season exclusivity" on TV series, that is, retaining (post broadcast) SVOD rights for all episodes in a given series for as long as 15 months from broadcast of first episode. As in conventional/specialty, EST rights are typically not obtained by the broadcaster, but exploited by the likes of iTunes, concurrent with or just post broadcast. Not surprisingly, for a "premium" TV product, there is no freely available (legitimate) AdvOD. Online or STB VOD viewing to top Pay TV shows, like Dexter or The Wire, requires a Pay TV subscription.

While protecting the Pay TV franchise within the commercial online world, the pay SVOD model is nevertheless unable to prevent piracy. Torrent sites are known for having the latest Pay TV product. Even video aggregator sites have a fair selection of pirate product, as well as (in some cases) links to paid sites<sup>35</sup>.

For first run Pay TV movie services, the broadcast window, and associated SVOD rights now come roughly five-to-seven months post-theatrical release, and also subsequent to DVD, EST and TVOD windows. (Subsequent conventional and specialty TV broadcast windows come closer to two years after theatrical release.) While this is considerably sooner than the case even two years ago (when the pay TV window would have commenced closer to a year after theatrical release), it still leaves movie-based Pay TV services subject to considerable competition from both:

- Piracy (Torrents and Video aggregators); and
- OTT providers

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<sup>35</sup> For example, Dexter is readily available on a free and TVOD basis. (At the time of writing, see [Watch Dexter Online](#), megavideo.com, loombo.com and [blinx remote](#) for free pirate versions; [CastTV](#) for TVOD versions.). Similarly for The Wire.

Indeed, it should be no surprise that many of the top OTT providers have their roots in DVD sales, including Netflix and Amazon<sup>36</sup>. Unlike TV shows, movies are obviously not tied to broadcast exhibition, and while Pay TV operators are in a position to negotiate an exclusive broadcast and associated SVOD window, OTT providers are almost always able to offer prior EST and TVOD windows and subsequent SVOD windows (once the Pay TV window ends).

Thus, on the one hand, a movie fan in a hurry to watch a recent release will have already seen it theatrically or via EST or TVOD. On the other hand, a movie fan in less of a hurry, may be quite prepared to wait another 18 months for the end of the Pay TV window, to watch it on an OTT provider. Squeezed at both ends, and notwithstanding an ability to retain an exclusive linear and SVOD window, Pay TV still faces significant competition from OTT in the movie business. Indeed, in Canada, movie-based Pay TV services are arguably the class of TV services most threatened by OTT providers: at the one end iTunes, at the other Netflix.

While problematic for movie-based Pay TV channels, in and of itself such a development need not necessarily be overly detrimental for Pay TV generally. Movies have always been popular with TV audiences, but have been subject to steadily increasing competition for years. As a consequence, most broadcasters, including Pay TV operators, have steadily reduced their reliance on movies in favour of original series. The launch of HBO Canada in October 2008 was emblematic of this; not only does the channel's branding speak more to premium TV series, but packaging with Pay movie channels helps ensure that the latter retain subscribers<sup>37</sup>.

The big risk to Pay TV is arguably not in the proliferation of online movie alternatives, but in the competition over original premium TV series and first-run movies. Evidence of this south of the border comes from the rapidly evolving and differing treatment of Netflix by U.S. Pay TV providers:

- Starz, which had been one of the first off the block with a licensing deal with Netflix in 2008, announced on March 25, 2011, that effective April 1<sup>st</sup>, premieres of new original series would be henceforth available on Netflix 90 days after they debut on the network<sup>38</sup>

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<sup>36</sup> Canada's largest online DVD rent-by-mail service, Zip.ca, has been announcing an imminent launch of online streaming for over 7 months: Zip.ca executive: [Netflix is going to expand our market](#), Sept. 22, 2010, techvibes. In the U.S., Vudu while founded as a media technology company, was purchased by Wall-mart, a major DVD retailer, in March 2010. Blockbuster, which past on earlier opportunities to buy Netflix, is now in Chapter 11 awaiting imminent sale: ["Blockbuster's Fall and Netflix's Rise"](#), Feb 24, 2011, Dealbook.

<sup>37</sup> This continues today. On Rogers, HBO Canada is available with TMN for \$16.95 per month, and for an additional \$4, MPIX. HBO Canada has similar pricing and packaging with Movie Central and Super Channel in Western Canada.

<sup>38</sup> ["Starz to Introduce 90-Day Netflix Delay for Original Series"](#), March 24, 2011, Hollywood Reporter.



- On March 22, 2011, Showtime announced that effective summer 2011, it would pull earlier seasons of TV shows still on the air, like “Dexter” and “Californication”, from Netflix, and make them available only on Showtime’s online service<sup>39</sup>
- Established market leader, HBO, held back all its new television shows and movies from Netflix from the start

Competition for original premium TV series and first run movies has also suddenly arrived in a major way in Canada and will be discussed in Section 5 below.

#### **4. Current Health of the Canadian program rights market**

In its strictest sense, the health of the Canadian program rights market can be said to depend only on whether or not Canada is treated as a separate market for program rights purposes. As long as it is, Canadian based entities have the opportunity to bid for those rights, and Canadian policies and regulation can attach to those entities.

In reality, the presence of Canadian program rights, Canadian entities that acquire and exploit those rights and Canadian public policy that supports this are all inextricably intertwined. Without the latter two, there would be no need for the former. No one asks about acquiring the Canadian rights to even a popular user-generated YouTube video.

Thus, assessing the health of the Canadian program rights market is dependent more on proxy measures, such as, the extent to which:

- Canadian rights are made available to Canadian broadcasters and other Canadian entities; and
- Canadian rights are successfully acquired by Canadian broadcasters and other Canadian entities.

By such measures, the Canadian program rights market currently shows many signs of good health. As we have seen, Canadian multiplatform rights to foreign and domestic content are for the most part not only being made available to Canadian broadcasters, but are also being successfully acquired by them. The few exceptions to this can arguably be said to largely preserve broadcaster program exclusivity or at least have minimal negative impact.

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<sup>39</sup> [“New Showtime-Netflix deal excludes 'Dexter,' 'Californication' and other new shows”](#), March 22, 2011, Los Angeles Times.

In the absence of public policies that require a distinct and separate marketplace for Canadian program rights<sup>40</sup>, Canadian broadcasters have nevertheless to date been able to maintain it, based on a number of competitive and structural advantages. These include:

- Established successful business models and value chains
- Incumbency and relative strength of broadcasting over online
- Evidence that online exposure including social networking leads to greater viewing of hit TV programming
- Leeriness with respect to OTT on the part of major U.S. broadcasters and cablecos
- Usage-based billing and low bandwidth caps that discourage use of OTT as a replacement for BDU service<sup>41</sup>
- Vertical integration, and the common incentive BDU/broadcasters have to purchase exclusive multiplatform rights, to preserve the BDU franchise

For its part (until very recently at least) the only foreign SVOD provider operating in Canada, Netflix, appears to have been purchasing Canadian rights separately, generally for non-exclusive studio and distributor library product not held by Canadian broadcasters.

Moreover, in the French-language market, given its distinctiveness and far lower reliance on foreign product, there is virtually no current threat to the Canadian program rights market<sup>42</sup>.

Unfortunately, there are also a number of factors that act against the maintenance of a separate Canadian program rights market, particularly in English Canada. In certain areas, and over time, such factors could outweigh the positive ones. They include:

- **Canadian broadcasters' lack of leverage when negotiating traditional and digital rights to U.S. content**<sup>43</sup>. While in theory, the purchasing power of Canadian broadcasters suggests that packaging in multi-platform rights should not be difficult, in practice, the highly competitive Canadian broadcasting landscape means that there is little opportunity for a Canadian broadcaster to use its broadcast rights purchase as leverage for

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<sup>40</sup> These measures, which apply only to traditional broadcast platforms, are discussed in detail in the 2007 Paper

<sup>41</sup> To combat this in Canada, on March 29, 2011, Netflix announced lower quality default settings for its video streaming in Canada, allowing users, on average, to watch 30 hours of content while only using about 9 GB of data, rather than the normal 30 to 40 GB or more. "[Netflix tweaks Canadian service to lower data usage](#)", Globe and Mail

<sup>42</sup> The greater threat in French Canada is the comparably lower levels of French-language content available online. If online French-language content fails to keep pace with online English content, French Canadians may accept English-language substitutes.

<sup>43</sup> This factor was also noted in the 2010 CRTC Navigating Convergence Report.

- better digital rights. The U.S. studio/distributor knows that there are generally at least two other national players who would be prepared to buy traditional rights without pre-determining digital rights, and at least one aggressive foreign OTT provider who would be more than happy to acquire exclusive or non-exclusive SVOD rights.
- **Lower content costs, no regulatory contribution, and minimal distribution costs of foreign OTT providers.** Together these factors significantly lower the cost base of OTT. Regulatory contribution, defined as mandated acquisitions of Canadian programming and other obligations, accounts for approximately 30% of broadcaster and BDU revenues<sup>44</sup>. Lower content costs may or may not be a permanent feature, but to date foreign OTT providers have often benefited from a “pioneers preference” in terms of favourable licencing deals, and in any event, a lower cost library and non-exclusive content emphasis. From a broadcaster perspective, the minimal distribution costs is also significant: while Netflix gets 100% of its sub fees, specialty and pay services generally receive 50% of BDU retail subscription revenues.
  - **A more compelling OTT consumer interface.** Now that OTT can readily and easily connect to a consumer’s HDTV, the differences between 10-year-old cable STB technology and new OTT STB technology become apparent. The OTT consumer experience is faster and in many ways easier (somewhat similar to a telco IPTV interface)<sup>45</sup>.
  - **Shifts in the U.S. marketplace.** US trends, including changes in the competitive environment and value chain, may not automatically flow north of the border, but they become hard to resist. For example, adoption of U.S. style bandwidth caps (i.e. closer to 120 GB than 40-60 GB) would largely eliminate the disincentive of additional ISPs fees for TV level use of Netflix. Adoption of NBCU-Comcast type safeguards in Canada (requiring BDU dealings with OTT to be on an equivalent basis to other programmers) would eliminate BDU-broadcaster synergies in battling OTT
  - **Shifts in OTT focus from library/non-exclusive content to exclusive fare.** This is an area of considerable conjecture and a number of recent developments, which will be will be commented on further below.

## 5. Risk Factors for the Future

### a. General Risks

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<sup>44</sup> The 30% figure is largely recognized for major broadcasting groups: Broadcasting Regulatory Policy [2010-167](#). For BDUs, the combination of mandated Canadian carriage requirements (and associated affiliation payments) plus direct BDU contributions of 6.5% also comes close to this percentage.

<sup>45</sup> Shaw Communications, for one, has announced that it will launch a new media gateway product, likely in May 2011, to close this gap, “Shaw to launch new media gateway product in May”, Jan. 17, 2011 Cartt.

The greatest underlying risk to the Canadian rights market is not unique to any Canadian player or sector or specific foreign OTT provider, nor is it stoppable. It is the shift to on demand viewing, and with it, the shift to online and mobile TV platforms that are no longer part of the “walled garden” and historic “closed system” of Canadian broadcasting.

This shift to on-demand and hence to OTT, while unlikely to replace broadcasting in the foreseeable future<sup>46</sup>, has considerable momentum, as a result of such factors as:

- Increases in Internet network capacity of 40-50% driven largely by consumer demands for online video;
- The explosion of Internet enabled TVs and other boxes allowing seamless access to traditional and online TV sources;
- The apparent determination of both studios and the FCC to foster a competitive OTT market; and,
- Consumer interest in cord-cutting or -shaving to reduce TV costs, eliminate services they don't watch, and obtain easier on demand access.

As more TV viewing shifts to on demand and online, the Canadian rights market will be under increasing strain. Even with a strong competitive response from Canadian broadcasters and BDUs, Canadian players will see a diminution of market share to foreign OTT providers, who even with inferior and/or less content, will draw viewers and revenues from the system for reasons of price and convenience.

The more that viewing shifts to on-demand, the bigger the slice that OTT gets, the better able OTT is to get better programming, and the less revenue Canadian broadcasters will have to buy the foreign programming that is their competitive advantage. The cycle continues with a greater incentive for studios to sell to foreign OTT in Canada, particularly their own or affiliated services (eg. Hulu).

The genius of the Canadian broadcasting system has always been its ability to provide Canadians with the best foreign programming as well as Canadian programming. While there have usually been foreign alternatives for Canadians – U.S. border stations, grey market DTH – such foreign offerings have never really been able to provide something the Canadian system could not. OTT is different.

Nothing will change the dynamic faster, and drive Canadians away from the broadcasting system more, than an inability to provide popular content.

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<sup>46</sup> There are however many believe who believe that the Internet and TV will effectively “merge”, or that “Internet Video Viewing to Trump Broadcast TV by 2020”, May 19, 2010, The Diffusion Group.

This could happen if the business model for OTT providers succeeds in narrowing the exclusive content window for broadcasters, and will happen if broadcasters lose exclusive rights to their best foreign content.

How likely is any of this?

The evolving business strategy of Netflix presents a real time case study.

b. Specific Risks

At launch in Canada, Netflix had a relatively limited program inventory of mostly library product. A significant exception to this was the company's ability to provide first window 20<sup>th</sup> Century Fox film product by virtue of a window share with the, then under CCAA protection, competitive Canadian Pay TV service provider, Super Channel<sup>47</sup>. As opposed to a normal 18-month Pay TV exclusive, 20<sup>th</sup> Century Fox movies appeared on Netflix three months after Super Channel's first airing.

On March 28, 2011, Netflix significantly upped the ante on exclusive Canadian Pay TV rights to movies in announcing a five-year deal with Paramount Pictures for over 350 titles in the studio's library, plus all first run films<sup>48</sup>. Netflix outbid Canadian Pay TV licence holders Corus and Astral by a significant margin to secure the premium Pay television window for Paramount properties in Canada.

Just 10 days earlier, Netflix outbid the likes of HBO and AMC to purchase the exclusive rights to stream 26 episodes of the original series *House of Cards* (starring Kevin Spacey and directed by *The Social Network's* David Fincher), in the US and Canada in late 2012<sup>49</sup>.

Netflix's move in the direction of content exclusives, including commissioning original content, is notable for its broader strategic implications as well as specific questions it raises:

- At a cost believed to be in the \$100 million range, the purchase of 26 episodes of an unknown TV series is, at the very least, a risky proposition. Media companies in the original content business typically amortize that risk across numerous projects, and use risk minimization strategies, such as commissioning pilots or an initial run of 13 episodes, before committing

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<sup>47</sup> Super Channel filed for CCAA protection on June 16, 2009 and secured creditor approval for its restructuring August 31, 2010.

<sup>48</sup> "[Netflix, Paramount sign Canadian film rights deal](#)", March 28, 2011, Globe and Mail. Netflix concluded an agreement for U.S. streaming rights to movies from Paramount, Lionsgate and MGM for a reported \$1 billion over 5 years in August, 2010. "[Netflix Streaming Selection Expands To Include Paramount, Lionsgate, MGM Movies](#)", August 10, 2010, Huffington Post.

<sup>49</sup> "[Netflix locks down House of Cards exclusive for late 2012](#)", March 18, 2011, ars technical; "[Netflix Bags House of Cards](#)", March 21, 2011, Zacks Equity Research.

further. Is Netflix's move on *House of Cards* an indication of much more to come, or a rare exception to a business strategy that nevertheless creates buzz for subscribers and says that, one way or other, the service is here to stay?

- Was Netflix's decision to significantly outbid Canadian Pay TV for the Paramount output deal an indication of more to come, or a one-off? Can the outbidding be attributed to Netflix's more advantageous cost structure and justified by its Canadian market potential alone<sup>50</sup>, or was it made possible because of the company's overall size and ability to absorb an otherwise uneconomic acquisition for the Canadian market?
- Nature of rights purchased: it is assumed that Netflix purchased an exclusive SVOD window for *House of Cards*. Other rights (including, presumably, broadcast rights) will presumably follow on other windows. (When) will they? Were the Canadian and U.S. rights were sold separately or combined?
- Exhibition strategy. Netflix has indicated it plans to release episodes in a "cluster" as opposed to a regular broadcast format of one episode per week when *House of Cards* is premiered in late 2012. Will it still be a broadcaster like "prime time" launch of, say a 9 pm Thursday night? What percentage of Netflix subscribers will seek to stream it when first made available? Will ISP networks even be able to handle the traffic<sup>51</sup>?

The purchasing of first run movie exclusives and original TV series together represent the core foundations of a competitive Pay TV provider.

At first glance, such an OTT strategy may appear less threatening to incumbents (and the system) than purchasing SVOD rights to a broad array of current TV shows in a way that competes with their broadcast distribution. An OTT Pay TV channel, with an emphasis on first run movies and original series, becomes another premium TV subscription choice on the "TV dial", that survives on the strength of its exclusive content choices, rather than its ability to compete with broadcasters with the same programming aired somewhat later.

Indeed, Canada is currently unlike the U.S. in this regard, where Pay TV providers (HBO, Showtime, Starz, Epix) have exclusives with no more than two or three of the six major studios. Some will argue that introducing "true" competition into the Canadian Pay TV market is overdue, and that reducing Astral and Corus from their traditional 5 major studio exclusives to four, or ultimately three, would not be a disaster.

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<sup>50</sup> It should be noted that even on the basis of the Canadian market alone, Netflix is by no means a small player. At over 500,000 Canadian subscribers (and 1 million expected by 3Q 2011), Netflix's 2011 Canadian revenues should easily exceed \$50 million.

<sup>51</sup> There is reason to doubt that they will. Netflix's consumption of 20% of ISP traffic, is believed to be by only 2% of Netflix subscribers at a give time. This suggests that if as little as 10% of Netflix subscribers seek out the premiere of the show at the same time, there could be network congestion problems.

From the perspective of the future of the Canadian broadcasting system, however, the implications of this precedent would appear to go well beyond the impact on Pay TV and the ultimate success or failure of Netflix itself:

- First, the acquisition and commissioning of exclusive premium TV programming rights by an OTT provider represents the first significant example of widely available bypass of the Canadian broadcasting system. Until this moment, the only effective means of achieving and monetizing a mass TV audience in Canada had been through a Canadian broadcaster and/or BDU;
- Second, the fact that an OTT provider like Netflix has characteristics of both a competing Pay TV service and a competing general interest TV distributor, increases its potential impact on the system, and raises consumer access issues including the appropriateness of exclusive content arrangements;
- Third, it raises the prospect of Canadian broadcasters being regularly outbid by well-financed foreign OTT providers that have lower Canadian costs, and in any event, do not need to recoup content costs from the Canadian marketplace;
- Fourth, it forces the likes of Showtime and HBO (and ultimately the U.S. broadcaster – studio conglomerates: NBC-Universal, etc) to question at what point they are better off launching Showtime.com and HBO.com in Canada, rather than licensing to Canadian broadcasters such as Corus and Astral; and
- Fifth, the “tipping point” will not necessarily be the same in the U.S. and Canada. While launching competing Showtime.com and HBO.com services available to non-cable subscribers in the U.S. may never make sense, bypassing third party Canadian broadcast partners and their economic rents in support of Canadian programming could become a rationale business decision far sooner.

Are Netflix’s March 2011 moves towards exclusive first run and original programming the first in an inexorable trend towards it and other foreign OTT providers outbidding Canadian broadcasters for multiplatform rights and starving them of viewers and revenues?

With no regulation to block or restrict it, one foreign OTT provider has already found sufficient online audience and prospect for growth to launch the first-ever legal Canadian-distributed comprehensive bypass of the system. As TV viewing moves more on-demand and more online, the business opportunity for foreign OTT providers can only grow with it, and the threats to Canadian broadcasters only increase.

One thing is certain. The pace of change is so fast that by the start of the 2012 broadcast season, there are likely to have been major new developments. In

fact, early indications already suggest that the presence of an aggressive and material OTT player in the Canadian marketplace will have an impact on prices and scope of rights secured by Canadian broadcasters across the conventional, specialty and Pay TV space for 2012.



## Appendix A: About the Author

Peter Miller is a senior communications lawyer and engineer with 20 years of broadcast and telecommunications industry experience, in both private practice and senior executive positions. He acts as an advisor to select clients in both the public and private sectors, specializing in business and policy development, particularly in regards to digital media.

From June 2008 to May 2009, Peter was Chief Operating Officer for S-VOX, the Vision TV group of companies. In this capacity he oversaw the organization's revenue generation and infrastructure as well as its communications, legal and regulatory functions. From 2002 to 2005, Peter held the position of Vice President, Planning and Regulatory Affairs for CHUM Limited, where he was the key strategic advisor on industry developments and growth opportunities for CHUM Limited, as well as being responsible for all facets of CRTC regulatory affairs and government relations. Prior to joining CHUM in 1998, Peter was Senior Vice-President and General Counsel to the Canadian Association of Broadcasters (CAB), responsible for all policy and legal issues for radio, specialty and television.

Peter Miller began his career in telephone network design at Bell Northern Research in Ottawa. His experience also includes serving as a Parliamentary Assistant in the House of Commons.

Peter is a frequent industry commentator who has been actively involved in numerous industry boards and committees. Mr. Miller is a past chair of the CAB Specialty & Pay Services Board, past treasurer of Canadian Digital Television and a current member of the Board of Volunteer Toronto.

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