The CRTC’s Genre Protection Policy
A 2013 Discussion Paper

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(“CRTC”)

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Foreword

This report was commissioned by the Canadian Radio-television and Telecommunications Commission ("CRTC" or "Commission") as a "think piece" on the issue of genre protection and its potential relaxation or elimination in the future. The stated objective was to provide an unbiased overview of issues, options and possible consequences, in conjunction with the CRTC's plans to review the genre protection policy in 2013/14.

The report reflects the research and views of the author, and should not be construed as representing the Commission's views.

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Introduction

Genre protection: Where did it come from? What does it do? Does it matter? What would happen if we got rid of it? How could we evolve or eliminate it?

This is a timely debate, albeit not a new one: The CRTC has indicated that it intends to initiate a formal policy review in the 2013-2014 time frame.

This paper is designed to inform the discussion. To express views and opinions without drawing final conclusions.

There are, however, some facts about genre protection that are noteworthy:

- The policy did not formally come into existence until 2000, even though its antecedent principles informed specialty service licensing up to that point;
- There is technically no link between genre protection and the Commission's policy of denying entry of competitive foreign services. The tests are different;
- The test for genre protection has never been specifically defined. Its objectives have been, but not the actual policy itself. It has, at best, been defined in one of its many monikers, as the "one per genre policy".
- To the extent it has been defined, it has been defined in the exception. That is, that existing specialty services or "*applications [for new specialty services] should not generally be directly competitive with [Category A] specialty services already licensed*"[1]
- The genesis of genre protection was diversity: to license "*genres and formats of the new services that are not generally duplicative* of conventional or existing specialty services"[2]

The challenge with genre protection is that its very premise is immediately undermined by reality – the reality that the definition of every genre is inherently subjective, none are static, none are silos isolated from evolving viewer interests, competing services and business realities. We can know when services are clearly in different genres, and we can know when services are clearly in the same genre (as we choose to define it). But we cannot always find the dividing line between the two. Because sometimes it's not a line …. it's a big grey area.

Unfortunately, regulation doesn't work well with subjectivity, and doesn't favour big grey areas. While the policy does arguably promote diversity, it does it inelegantly, inconsistently, and possibly, unnecessarily.

Nevertheless, genre protection may yet remain as one of those rare examples of an intrusive restrictive regulation that the regulator wants to eliminate, but most of the industry want to maintain. That's because incumbents – those locking up core genres as well as those with only a niche piece of turf – enjoy the (limited) protection from competitive incursions that the policy affords.

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[1] Modified from Public Notice CRTC 1996-120, emphasis added

[2] Public Notice CRTC 1994-59

The history and purpose of genre exclusivity

(These are some of the lines of the debate to follow.)

The policy emerges

Ask most broadcast policy commentators about genre protection and they will shrug, and admit to it being rather an anachronistic (although not necessarily unhelpful) policy from the depths of Canadian broadcast policy. What surprises many is to learn that genre exclusivity is not a policy that has been around forever, nor is it central to the licensing framework for Canadian discretionary services or policies relating to preference for Canadian owned and controlled services over foreign services.

Genre protection or "exclusivity" (the current, more politically correct and arguably more accurate moniker) did not get coined as a term or formal policy until the digital specialty service framework was established in 2000. In that policy, the CRTC established "genre protection" for so called Category 1 specialty services as follows:

> The Commission expects to license approximately ten new specialty services as Category 1 services. These services will have digital access privileges and *genre protection* to assist them to launch vibrant services during the uncertain period of digital rollout. [emphasis added]

In prior rounds of specialty licensing, the notion of genre protection was slowly but clearly emerging, but its full fledged birth did not occur until the Commission faced the difficult challenge of framing a policy for the digital "500 channel universe" that attempted to bridge old school protectionism (Category 1 services) and new school open entry (Category 2 services).

In the 1996 specialty round, the CRTC approved 23 and denied 17 applications for "hybrid" analogue-digital services[3]. In its Public Notice, the Commission stated:

> Applicants proposing services whose formats would compete directly with existing English-language specialty services were advised to be prepared to discuss the impact the proposed new service may have on the ability of the existing services to fulfil their licence obligations.
>
> The Commission, by majority vote, considers that applicants proposing new English-language specialty services should generally be prepared to accept licensing under terms governing their access to distribution undertakings similar to the terms that have been applied to the second group of English-language programming undertakings licensed today; and *that such applications should not generally be directly competitive with specialty services already licensed. [emphasis added]*[4]
>
> Use of the word "generally" gave a big "out", allowing the licensing of additional news services, sports services etc, with the distinction (some would say, under the "fiction") that they were more "headline", regional, local or otherwise different[5].

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[3] Today, most people refer to this round as the third analogue round of licensing, but the expectation at the time was that licensing would promote the rollout of digital, and some services might receive digital only carriage

[4] Public Notice CRTC 1996-120

[5] For example regional news and sports vs. national. Not surprisingly, these genres which were never that distinct to begin with were the first to become competitive Category C services

The previous 1994 round of specialty licensing, which added two English-language pay television services, six English-language specialty services and two French-language specialty services, framed the policy concern as more one of diversity, than competition:

> In order to foster diversity, and to ensure that specialty licensees adhere to their commitments to provide programming within a specific genre, the Commission has prescribed the nature of service as a condition of licence.
>
> To the licences issued today, the Commission has attached conditions which restrict the programming content to only the relevant categories of programming as set out in Schedule I of the Specialty Services Regulations, 1990. *At the hearing, the Commission established with each applicant the particular categories that would be deemed relevant to the genre of programming it was proposing. In some cases, licence conditions relating to the types of drama or other programming have also been attached.*
>
> *… since the genres and formats of the new services are not generally duplicative* of conventional or existing specialty services, audience fragmentation should be minimal[6].

The 1994 round itself differed from previous rounds in that:

> In making past calls for applications, the Commission has outlined the formats of services it would encourage or would specifically discourage as a means of achieving the greatest possible diversity and complementarity with existing services. The present call contains no such limitations as to format[7].

Those previous rounds (now generally lumped into one) included licensing the first Canadian pay television networks in 1982, and specialty services in 1984, 1985 and 1987. In calling "for applications for licences to provide … services in formats not yet authorized by the Commission", the Commission effectively defined the licensable genres, consistent with its definition of a Canadian specialty service:

> a Canadian specialty service is defined as narrowcast television programming designed to reflect the particular interests and needs of different age, language, cultural, geographic or other groups in Canada. The specialty services so envisioned could consist of what is commonly known as "theme or vertical" programming material[8].

Despite the lineage, however, the differences between this policy framework and the one that crystallized in 2000 (and is still enforced today) are notable. The origins of the policy were about diversity, distinctiveness and, but to a lesser degree, impact on conventional TV. The 2000 policy was about attractiveness, diversity and protecting higher contributing incumbent analogue and Category 1 digital services from lower contributing Category 2s.

In other words, genre protection was more of an outcome of, not an input into initial specialty and pay service licensing.

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[6] Public Notice CRTC 1994-59
[7] Public Notice CRTC 1993-77
[8] Public Notice CRTC 1986-199

Implementation then and now (2000 to present)

From its formal recognition in 2000 till its recent confirmation in the 2011 group licensing renewals, the genre protection policy has also undergone significant evolution.

2006 saw the first "articulated"[9] exception to the one-per-genre policy being made for the English-language pay sector, with the ultimate licensing of Super Channel, in competition with Astral's TMN/TMN Encore in the east and Corus' Movie Central and Encore Avenue in the west[10].

2007 saw the Commission publicly contemplate the end of genre protection in announcing a review of the regulatory frameworks for BDUs and discretionary programming services:

> Given that the pay and specialty industry is now a mature, healthy industry characterized by a diversity of popular, recognized brands, the Commission considers it may be timely to eliminate the one-per-genre policy in order to give flexibility to pay and specialty services to adapt their programming strategies to challenges resulting from a rapidly changing broadcasting industry[11].

The Commission cited a number of reasons why an elimination of, or at least alternative to the policy might be appropriate, including:

- The increased number of specialty services has resulted in an increased overlap or cross-over among genres; and
- Nature of service conditions may limit a service from adjusting its program orientation to respond to audience preferences.

Ironically enough, this time it was the broadcasters who called for continued regulation, some in the form of a revised approach; most in asking that the Commission to retain the status quo. The net result was the 2008 reaffirmation and re-articulation of the current policy and its objectives.[12]

The Commission noted the importance of nature of service definitions as the regulatory tool used to ensure that services maintain the genre for which they were licensed:

Each specialty service has a nature of service, which is determined by conditions of licence that set out the following:

- a narrative description of the service and the type of programming it will provide;
- a list of program categories from which the service is authorized to draw programming; and
- any prohibitions or limitations on the program categories from which the service may draw programming, or other limiting conditions[13].

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[9] I use the word "articulated", because there were *de facto* exceptions in 2000 with the licensing of new news and sports services, and in 2005 the Commission adopted a more open-entry approach to new third-language ethnic Category 2 pay and specialty services: Public Notice CRTC 2005-104

[10] Astral and Corus jointly launched HBO in 2008, but from a licensing perspective, this service is merely a TMN/Movie Central multiplex

[11] Broadcasting Notice of Public Hearing CRTC 2007-10

[12] With the release of the Commission's regulatory framework for BDU and discretionary services: Broadcasting Public Notice 2008-100

[13] From bullet form reiteration in Broadcasting Decision CRTC 2011-441, para 74

In deciding to maintain genre exclusivity, the Commission expressed the view "that a wholesale move away from genre exclusivity could have significant negative consequences on the diversity of Canadian services offered to viewers. In the Commission's view, this diversity has two major benefits for Canadians:

1. it provides viewers with a wide range of Canadian programming choices; and
2. it ensures the maximum contribution to the creation of Canadian programming."[14]

A further refinement of this rationale followed in 2011:

> [N]ature of service conditions of licence enforce genre exclusivity, which a) ensures diversity of programming genres, b) protects revenues by limiting competition and thereby enabling Category A services to meet their higher Canadian programming obligations, and c) allows viewers to "know what they're getting," given that they agree to pay for a certain service and therefore expect that the programming broadcast will be consistent with the nature of that service[15].

In 2008, the Commission nevertheless determined that it would permit all Category A services to draw programming from all program categories, subject to a standard limitation of 10% of the broadcast month for categories like sports, drama, film and music – popular categories occupied by other Category As[16].

The CRTC also laid the ground work for the licensing of Category C services in news and sports and by opening the door to "competition in those genres where it is convinced that a competitive environment will not significantly reduce either the diversity of services available to viewers or their contribution to the creation of Canadian programming"

Net result

In effect, genre exclusivity has become a *post facto* umbrella rationalization for public policy objectives that sound reasonable, but lack clear cause and effect. It is full of contradictions and inconsistent applications. And it is now as much an "obligation" as it is a "protection" (hence, perhaps, the name change).

- For Cat As in lucrative genres[17] it is a protection against incursions from competitors in other genres
- For Cat As in less lucrative genres it is an obligation that prevents them from moving into more lucrative genres, whether or not they are occupied

[14] Broadcasting Public Notice 2008-100, para 267
[15] Broadcasting Decision CRTC 2011-441, para 73
[16] Broadcasting Public Notice 2008-100, para 278
[17] And, to some extent, independent Cat As in not so lucrative genres who nevertheless want to protect their turf

- For Cat As generally, it appears to have morphed into a bit of an “obligation to serve” the genre in question[18]
- For would-be Cat Bs it is a huge barrier to entry; to licensed ones, an obligation to remain in generally less lucrative micro-niches

Notwithstanding its reversal in 2008, the Commission again cited its reservations about maintaining the policy after group renewals:

> This review process provided further evidence of the escalating difficulty of regulating genre and of the potential pitfalls, including the unintended consequence of preventing new players from entering the market, particularly where an existing service has effectively vacated its original genre, or has broadened its genre to a significant extent.

Nevertheless, the Commission reiterates that genre exclusivity should be maintained, at least for the short term, for the reasons cited in Broadcasting Public Notice 2008-100. It is concerned, however, that the application of its genre exclusivity policy is becoming increasingly challenging, as evidenced by the discussions at the hearing.[19]

[18] For example, in Broadcasting Decision CRTC 2011-446, the CRTC determined that “[i]n general, the Commission finds that the OWN service is focused on “enhancement programming” that does not provide basic adult education, job development skills or professional development, as contemplated by the nature of service definition. As such, the service is only fulfilling part of its mandate.” In other words, the Commission appears to have interpreted OWN’s Nature of Service definition that “Educational programs will come from a full spectrum of basic, credit-based, skills-related and life-enhancing programs …[emphasis added]” as requiring OWN to include all these categories.

[19] Broadcasting Decision CRTC 2011-441

The policy “in theory” and “in practice”

Simple in Theory/Hard in Practice

Creating and enforcing distinct genres as between specialty services was relatively easy for broadcaster and regulator alike when we only had a dozen or so pay and specialty services. As of last count, that number is 67 licensed Category A, 275 approved Category B, and 13 approved Category C pay and specialty services of which, 136 Category B services and 10 Category C services are in operation[20]. This, and its technological underpinnings, changes a lot.

- Broadcasters are far less inclined to stay in their niche. When you “owned” comedy or or music you were happy to stay there. But with music videos ubiquitous online, a music service can make far more money as a youth lifestyle service. And services originally licensed for a clearly underserved niche or public good – arts, education, documentary, rural Canada, public affairs – find the waters warmer in more mainstream entertainment and information;

The notion of avoiding direct competition becomes increasingly meaningless as any one niche can face increasing competition from an accumulated array of overlapping niches (e.g. all the lifestyle niches – W, TVTropolis, Food, HGTV …), sub niches (from Category Bs), and the 2008 program category flexibility policy that now allows everyone to do a minimum of 10% of everything (“within genre”);

- Other factors start to play a far greater role on the extent of competition. The mere fact of being a Category B (and hence likely receiving far inferior carriage) is a far greater limiter of impact on Category A services, than nature of service conditions. Competition outside the broadcasting system is an increasing, formerly irrelevant, factor. News and music (and soon lifestyle) services now compete as much with online as each other; and
- The regulatory burden for both licensees and the Commission in enforcing (67+136+10) factorial /(10+136) factorial or approximately 10 to the 260th different service interrelationships[21] is becoming more and more ridiculous.

Reading Tea Leaves

The ambiguity and uncertainty associated with genre protection leaves the impression, for many at least, that interpretation is very much “in the eye of the beholder”.

This is perhaps even more so given that services and the Commission are now increasingly having to rely on and parse the more subjective descriptor aspect of a service’s nature of service, as opposed to more objective program Category definitions. It is generally easier to determine what is a movie, a documentary, a drama, a sports program, than what is technical, artistic or dedicated to women[22].

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[20] CRTC Internal Database.

[21] An approximate mathematical truism based on the fact that Cat Cs and Cat Bs can compete with each other but not Cat As. In other words, each of 67 Cat As can only not compete with the other 66; but none of the other 146 Cat Bs and Cs can compete with them.

[22] This is not to suggest that certain program categories do not have their own interpretation challenges. For example, what constitutes a “religious” or “educational” program, or even what is “documentary” vs. “reality”.

So when disputes arise in areas like the latter, and program categories don't suffice, suddenly nature of service descriptors have to take on far more import than most were ever intended or designed for.

Notably, the enforcement of genre exclusivity (once services are licensed) has shifted from mostly complaint driven to mostly Commission driven.

Broadcasters now rarely complain about each other for infringements of genre exclusivity. Perhaps because no one comes with "clean hands". Perhaps it is because they feel that, even if successful, there are too many ways a competitor can work around a negative ruling. Perhaps it is because they may one day own the service they successfully constrain by complaining[23]. Perhaps it is just because they have bigger priorities.

In this void, and notwithstanding its stated intention to review the policy, the Commission has stepped up to the plate, expressing the concern in group renewals that some programming offered on MTV, Twist TV, Showcase Diva, Outdoor Life Network (OLN), History, and Country Music Television (CMT) "is inconsistent with their nature of service conditions of licence". The Commission even raised the alarm that the new programming focus of the Discovery Science service "away from anthropology towards science in general raises concerns about the competitiveness of this Category B service with the Category A service known as Discovery", notwithstanding the fact that both services are majority owned by Bell[24]. Finally, the Commission found Rogers' G4 and Corus OWN out of compliance with their respective natures of service and ultimately called them to a show cause hearing on December 11, 2012[25].

In doing so, the Commission risks being seen as enforcing an outdated policy to consumer detriment, rather than sensibly supervising the broadcasting system to ensure diversity[26]. In failing to do so, the Commission may fear it weakens its authority as regulator.

Pushing boundaries

Ironically, the ambiguity and vagueness of the current genre protection policy has all but encouraged broadcasters to push the boundaries. The reality is they have little to lose:

1. Any rational interpretation of the current more subjective rules is defensible. Maybe the CRTC will ultimately disagree with a licensee's interpretation, but it is hard for the Commission to pull a licence unless a broadcaster's interpretation is completely untenable;

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[23] Both of which effectively happened when CHUM Television Media complained about Craig launching its new Category A youth channel as MTV Canada. In Broadcasting Decision 2003-65, the CRTC found that MTV Canada was carrying on a service that did "not fully reflect the service approved and described by the Commission in Decision 2000-462" and ordered it to come into compliance. On the one hand, this did not prevent the service from maintaining the MTV brand and carrying MTV programming. On the other hand, when CHUM acquired Craig Media in 2004, its operation of MTV Canada was similarly restricted.

[24] Broadcasting Decision CRTC 2011-441, paras 89-90

[25] On October 12, 2012, by way of Broadcasting Notice of Consultation CRTC 2012-560, the CRTC called Corus' OWN and Rogers G4 to a show cause hearing pursuant to sections 12 and 24 of the *Broadcasting Act.* Rogers filed a letter on November 2, 2012 stating that the company had "taken immediate steps to implement programming changes by November 5th, 2012 that, in our view, will bring [G4techTV's] into full compliance", thereby avoiding the hearing.

[26] Note that while a couple of parties did intervene against Corus at the Show Cause, this was after the Commission triggered the process, and largely in response to Corus' proposed remedies. There is no evidence to suggest any of these parties would have filed a complaint against OWN or G4, absent the Commission's decision to start a compliance review.

2. Questionable programming acquired by a multi-station broadcast group can almost always find a home on another station in the corporate family, if it is ultimately deemed off side by the Commission; and

3. By virtue of 1 & 2, the "cost" of being found non-compliant is minimal. By contrast, the benefits can be enormous – an otherwise lagging service can find new life, increased revenues and greater consumer interest. And ironically enough, this consequence of non-compliance can be good for the system as well as the broadcaster. The system gains a more popular service (helping reduce cord-cutting and cord-shaving) and increased contributions to Canadian programming (given that virtually all the larger, more successful Category Bs are owned by the larger corporate groups and hence caught by their corporate Canadian Programming Exhibition (CPE) requirements.)

Many broadcasters essentially interpret genre protection by looking at the degree of overlap or competition between a given Category A or B and potentially competitive Cat A services as follows:

- Green light: <= 10-25% overlap/direct competition
- Grey area: 10-25% >= overlap/direct competition <= 30-50%
- Red light: >= 30-50% overlap/direct competition

The degree of overlap required for a service to start to be seen as competitive has been a moving target for years:

- Up to 40% language overlap is permitted for ethnic service before being deemed directly competitive with incumbents
- 25% limits have been have been placed on some specialty services, For example, "No more than 25% of all programming broadcast during the broadcast week shall be from any one programming genre (i.e. health, fashion, travel)"[27]
- 10% and 20% overlaps limits has been used to ensure diversity as between like services in the same corporate family[28]
- A 10% overlap "notification" threshold was introduced to identify "partially competitive" Category 1 services in revised procedures for processing applications for new digital Category 2 pay and specialty television services introduced in 2004[29]

The 2008 10% program category flexibility policy confirmed a clear lower bound as to what could be considered directly competitive in core program categories, but left open the question of how much more licensees could necessarily get away with absent or outside of this restriction.

[27] Decision 2000-481 for Luxe

[28] For example, in acquiring CHCH-TV Hamilton and CHECK-TV Victoria from WIC per Decision CRTC 2000-221, CanWest Global was required to commit to 8 hours of unduplicated priority programming and that "no more than 10% of the overall programming aired on the station in any broadcast week shall duplicate that aired on its sister station (CHAN-TV in the case of the Victoria station and CIII-TV in the case of the Hamilton station)". Similarly, in licensing CLT pursuant to Decision CRTC 96-600, the Commission stated that "it would expect the licensee to adhere to its commitment that no more than 20% of the programs broadcast on CLT would also be broadcast by ACCESS TV [the provincial educational broadcaster, also owned by the same entity Learning and Skills Television of Alberta Limited (LTA)]"

[29] Broadcasting Public Notice CRTC 2004-24. The Commission revised the application form to require an applicant to identify those existing Category 1 and analog pay and specialty services with which its proposal could be considered to be partially competitive (i.e. those having programming at least 10% of which is from the same or a similar genre).

More significant, however, the Commission's 2008 10% policy, in allowing everyone to do practically everything 10% of the time, gave a green light to significant direct competition in peak viewing hours. A service with a 24 hour broadcast day has almost 17 hours a week to do almost anything they want. In other words, more than 50% of prime time during the work week can be used for the most revenue generating programming, as long as notionally "within genre"[30]. Used effectively, that 10% flexibility alone could completely turn around a lagging services popularity, and hence both advertising and subscription revenue. It is highly significant.

On the opposite end of the spectrum, broadcasters know, both intrinsically and from various precedents, that once you get one third to a half overlap/direct competition with a genre protected service, you are almost definitely off side. Other than within the same corporate family, no one would permit more than that degree of overlap/competition of one of their Cat As from a competitor, and hence few risk doing it to someone else.

Between these two polar opposites however is a huge grey area. There are many genre protected services that have direct competition/overlap with 1/3 to ½ or less of their program schedule. All the lifestyle channels, many of the music channels, the arts and drama channels and obviously this was always the case, and more, with the former Cat 1/analogue news and sports channels. Why is this OK in some genres but not others? Does it come down to an interpretation of the program category conditions of licence or the descriptor part of a Nature of Service ("NoS") definition, or just the timing of when a licence was issued and who did the drafting? Who knows.

And when no one really knows, and opportunity and business combine to favour a looser interpretation, that is the one that will be adopted.

All genres are not equal

From the perspective of consumer interest, financial viability, and the broader public interest, all genres are far from equal.

With genres defined and "designed to reflect the particular interests and needs of different age, language, cultural, geographic or other groups in Canada"[31], it is no surprise that they not only overlap, but are vastly different in terms of their market potential and ability to sustain direct competition. An arts channel vs. a sports channel vs. a channel for older audiences vs. GLBT audiences vs. a channel with older programs vs. education vs. drama vs. lifestyle and so on. Some are hugely profitable and are already in competitive genres. Others struggle to this day. And no doubt a creative programmer could develop a program schedule that covers all of them (viability aside).

From a consumer perspective, the notion that genres are not equal is also self evident. In a well defined, narrow niche like weather, Canadians are happy to have only one channel. And if genre protection (and in this particular case, 9(1)(h) mandatory carriage) helps ensure that that service is

[30] The question of whether a prime time driver program would be seen to be compliant with a nature of service narrative has at least a couple of dimensions. The Commission is hard pressed to call a licensee to task for one or two questionable programs. Moreover, while some services have narratives requiring that they be "entirely devoted to" or "dedicated to" their genre descriptions, many use language like "primarily" or "focussed" or are otherwise sufficiently vague to suggest that some programming outside the genre is acceptable

[31] Public Notice CRTC 1986-199

strong, has useful online extensions and contributes to the broader public interest through emergency alert, they are likely to remain so.

But in ill-defined, broader niches - or at least popular ones whose different manifestations and interpretations can sustain greater competition and lead to greater choice - consumers are not only happy with, but demand more … which is why multiple lifestyle, music and movie channels only make sense.

Niche and Micro-niche

The fact that Category 2/B services are/were licensed to not compete with Analogs/Cat 1/As led to the creation of micro-niche services that occupy only a slice of the turf of incumbents.

This limiting of competitive impact on incumbents makes sense from the perspective of maintaining high Canadian programming contributions, but for the most part, has so limited the appeal of Category 2/Bs as to make many of them hugely vulnerable, if not non-viable, in the cord-shaving, digital migration world of today.

The services that were given no carriage guarantees, the worst packaging and the lowest penetration were also given the least flexible or appealing micro-genres.

In enforcing genre protection, new entry has also been prevented despite evidence of a new entrants' "different take" on a pre-established genre. The music service, AuxTV, was originally denied on the grounds that it would be directly competitive with Much Music in 2010[32]. Rogers application to launch an entertainment news service ("Entertainment Desk") was recently rejected on the grounds that it competed with BCE's E! which is devoted to "all aspects of the entertainment industry", even though it seemed clear that what Rogers was proposing was substantially different than what E! was actually doing.

Genre protection cuts smaller and smaller slices of the pie, even though viewers generally like bigger slices of lots of pies.

Unintended consequences

Somewhat ironically, the articulation of the genre protection in 2000 coincided with when the seeds of the policy's more problematic unintended consequences were sewn.

The approval of 16 English-language and 5 French-language Category 1 digital specialty television services[33] and 262 Category 2 services[34] in 2000 has led to a system of over 50[35] companies operating 213 pay and specialty TV services today[36]. Almost immediately after the number of channels went up, the number of significant operators went down - a trend that accelerated through the decade. Quebecor bought TVA. CHUM bought Craig, which was then bought by CTV which was then re-

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[32] Broadcasting Decision CRTC 2010-223
[33] Decisions CRTC 2000-449 to 2000-469
[34] Decisions CRTC 2000-470 to 2000-731
[35] The Commission identifies approximately 35 multi-service pay & specialty TV operators in its Index of Multiple Ownership Charts. This assumes an additional 15 single service operators.
[36] Launched as of 31 December 2011. 2012 CRTC Communications Monitoring Report, Table 4.3.1

bought by Bell. CanWest Global bought Alliance Atlantis which was then bought by Shaw. Astral is next. By the end of 2013, the legacy well-established former analog specialty and pay services will almost all be owned by one of the big four[37] (Bell, Quebecor, Shaw or Rogers).

New independents have emerged - Stornoway, Channel Zero and more recently Zoomer Media and Blue Ant – but their popular Category A holdings are thin. And the challenges in successfully launching new non-third-language Category B services today are so daunting, that few attempt it any more.

Genre protection has become "incumbent protection". The big guys with the big Cat As (or Cs) sit on turf that is virtually unassailable. Bell is protected from incursions by Stornoway and Blue Ant; Astral (soon, presumably Astral-Bell) protected from incursions by TVA. Even the collective strength of all Category Bs together barely makes a dent – their combined viewing share rarely exceeding 2%[38].

In English Canada, Sports is owned by Bell and Rogers. Most of everything else is owned by Bell and Shaw. New entry in popular genres is blocked[39].

In the French-language market, Astral has Pay TV locked up along with the vast majority of non-sports/news Specialty TV. Bell dominates sports through RDS. TVA has news and has made other incursions, but has been blocked by the strength of market incumbency on the one hand, and CRTC concerns about its potential ability to dominate the market, on the other.

Perhaps more problematic for the system, genre protection constrains competitive response to emerging programming trends or changes in taste. A G4 cannot take a different approach to tech that breaches their NoS, even if there is no other Category A service that occupies that turf. A hit YouTube channel cannot be readily replicated.

Pressure to relax or eliminate the policy

While the Commission's 2008 regulatory review saw pressure from broadcasters to revise the policy through the use of broad genre categories or "buckets", 2011 saw the first overt pressure to eliminate genre exclusivity entirely[40].

In the Group licensing hearing, Rogers argued for re-evaluation with a view to elimination of the policy as soon as practicable, and filed evidence to the effect that the policy had, at best, resulted in only 7 out of 21 English-language Category A services being actually "genre specific". The majority were either indistinguishable from conventional TV, had confused branding, received the bulk of their viewing from "conventional drama" (though not their declared genre) or had a non-drama brand that did not reflect their declared genre[41].

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[37] The exceptions are Vision owned by Zoomer Media, and The Weather Channel/Metromedia owned by Pelmorex. It is possible, however, that forced divestiture of Astral channels could result in legacy Pay TV and Category A specialty services being bought by independent companies.

[38] Author estimate from data in 2012 CRTC Communications Monitoring Report

[39] This *de facto* blocking of entry appears to be a feature of incumbency in certain genres regardless. The Cat C experience in news and sports has not led to new entry. (Both TVA and Shaw hold approvals for sports Cat Cs; TVA's Sun News has struggled.) Clearly would-be new entrants feel they simply cannot knock the established players off their perch. This may not, however, prove to be the case if other genres were to be opened up.

[40] On the other hand, BDUs did support outright removal in 2008

[41] *Domestic Genre Definition in Canadian Specialty Channels*, David Keeble, February 4, 2011, p. 13

Industry Context

Consumer shift from linear to on-demand consumption of TV programming is well underway. Initially accelerated by PVR replacement of the VCR (which, as it turned out, was never a popular time-shifting device), it is now in its third phase of PVR growth being subsumed by online and BDU-based VOD.

Numbers show a clear upward trajectory for anytime TV[42]. 40% of Canadian households have a PVR (up from 15% in March, 2009), and in those households 11% of viewing is to Rewind TV (vs. 5% for the population as a whole.)[43] As significant, Digital TV subscribers, now represent 80% of TV households, giving the majority of households access to BDU provided VOD[44]. Meanwhile OTT providers are driving up online TV consumption, now representing a third of online video, and pushing total online video and TV consumption to 32 hours a week (from 28 hours for TV alone)[45]. Notwithstanding Canadians' world-leading appetite for online video, including a greater than 15% penetration level for Netflix[46], current evidence of material *impact* on the Canadian broadcasting system from online video and OTT is limited. Canadian broadcasters are generally able to purchase catch-up viewing rights to their shows, without untoward overall increases in foreign programming budgets - although there have been cases of OTT outbidding Canadian players[47]. There appears to be some evidence of cord shaving of Pay TV, but it is in the low single-digit percentages, and cannot be absolutely proven to be a consequence of OTT[48]. Similarly, many Category B Specialty TV services report subscription declines, but this too may be a result of other factors, including repackaging of services, and greater competition from within the system, including additional services and catch-up viewing on VOD.

As recently as October, 2012, the CRTC expressed the following view:

> The Commission does not consider that there is compelling evidence on the record to demonstrate that foreign, unlicensed competitors are having a significant impact on negotiations for program rights by Canadian broadcasters. In addition, the Commission noted in its report Navigating Convergence II, published August 2011, that based on available data, Internet platforms continue to be complementary to the traditional broadcasting system[49].

Going forward, the impact of OTT, and mobile/online media more generally, on Canadian television broadcasters and BDUs will depend on 6 factors, the first 3 of which are generally favourable to incumbents, the second 3 not:

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[42] Terms like "anytime TV" or "on demand TV" are used here to describe any form of non linear TV programming consumption. TV Everywhere takes this concept into a closed ecosystem where ultimately only BDU subscribers get access.

[43] TVB Report on PVR ownership and use, November 2012. Based on BBM Canada June 2012

[44] Ibid

[45] TVB Quarterly time spent data, as reported in Cartt, Feb 4, 2013

[46] As Netflix no longer disaggregates Canadian data in its public reports, the precise penetration level is unknown. The Fall 2012 Media Technology Monitor (MTM) Report suggests that 21% of Anglophones in Canada now subscribe to Netflix, up 50% from spring 2012

[47] See Developments in the Canadian Program Rights Market, March 31, 2011, by the Author

[48] See *Market Impact and Indicators of Over the Top Television in Canada: 2012*, by Randal Rudniski and the Author

[49] Broadcasting Decision CRTC 2012-574. The CRTC is not alone in this view. See, for example, Deloitte TMT Predictions 2013

1. **Growth in Canadians' screen-based information and entertainment spending.** For more than 3 decades, entertainment/information spending growth has vastly exceeded GDP and the CPI. It is what has made the specialty, BDU, and ISP businesses so successful and profitable. We know PVR owners watch more television[50], and online video consumption appears to be additive. There seems little evidence to suggest that growth in screen based entertainment consumption will not continue, although there is no guarantee that disruptive new models could not pull consumption and revenue from incumbents;

2. **The extent to which Canadians on demand online video appetites are met by Canadian broadcasters** online and on-demand platforms, including TV Everywhere offerings. BDUs and broadcasters have been quick to fulfil consumer demand for on-demand TV, and smart in how they have priced it – free to the consumer, included with the linear offering. The acceptance of on demand viewing as part of the TV ecosystem has also extended to advertising[51]. TV Everywhere will turn this into a closed club where only subscribers get on-demand viewing benefits[52]. The only question (addressed immediately below) is whether incumbents can continue to hold rights to the content that viewers want;

3. **The dominance of incumbents and pre-eminence of the current TV value chain**. Certainly for the foreseeable future, the answer is yes. No one along the existing value chain – studio, broadcaster, distributor – wants to see a monthly $100 cable bill turn into an $8 Netflix bill. While studios will flirt with Netflix as an incremental play, the goal is "healthy" competition for program rights not disruption of the business model. For their part, vertically integrated BDU-broadcasters in Canada have moved to dominate the two "must have" categories of TV – live sports and premium (pay TV & movie) content. Whatever online video can offer in terms of cooking shows, music, comedy, lifestyle etc, the bet is that they will not be able to offer this;

4. **Shifts in advertising from traditional media to online and mobile**. The phenomenal growth of online advertising over the last decade has been well documented. From little more than $100 million in 2002, online advertising grew to exceed $2.8 billion in 2013, passing radio at $1.5 billion in 2008, print at $2.1 billion in 2010 (after a 10 year decline from $2.5 billion), and is expected to pass TV at $3.5 billion in 2015[53]. While the advertising pie continues to grow faster than GDP, if fuelled by mobile and other categories it continues to grow at anywhere near the rate it did over the last decade, it cannot help but suppress TV advertising, like it did print. The best hope for broadcast incumbents is that advertising revenues shift to their online and mobile content, not just their competitors;

[50] TV's weekly reach of PVR owners indexes at 101 vs. the general P2+ population: TVB 2012

[51] So called PVR "playback" viewing, that is live programming time-delayed by pausing, or viewing recorded programming up to seven days after the original airing, now counts from a rating perspective and hence for the purposes of advertising. Advertising on VOD also counts – either as of the viewing to the original show, or as a "premium" on traditional advertising (as is the case for online SVOD)

[52] Indications are that a more formalized approach to TV Everywhere, with authentication for subscribers, will roll out in 2013. Already On-demand access to premium content, like HBO, is reserved for paying subscribers. Presumably the approach will be extended to specialty services, and possibly OTA services – although the latter would remain free OTA in linear form.

[53] IAB Canada figures (except projection)

5. **The substitutability of "good enough" content**. This is a golden age of television. Scripted and unscripted content have never been better, and the abundance of choice is astounding. There is way more content – way more good content - than any one person can possibly watch. OTT providers rely on this. Not all possible content, not even necessarily the best content, but enough "good enough" content. And for many TV viewers that may increasingly be enough[54].

6. **Regulatory costs and the competitive disadvantage they create** for Canadian television broadcasters and BDUs. The net "cost" of regulation is not an easy thing to determine. Regulation levies direct monetary costs – Canadian programming expenditure and contribution requirements, in particular. It imposes requirements that have associated direct and opportunity costs - exhibition and carriage requirements. It also confers benefits – reducing competitive entry, particularly from foreign providers, and in the case of genre exclusivity, reducing direct service competition. In a more competitive open system however, the benefits start to pale in comparison to the costs, and regulation becomes a major impediment.

Whether one believes in more positive or more negative outcomes for the Canadian broadcasting system over the next five to ten years given these factors, the trend line is clear, and its consequences evident:

1. More and more viewing of television will shift to the unregulated online world, consumed by an array of mobile, tablet and big screen TV devices. A good proportion of it will be exempt broadcaster activity, competing with an array of other OTT choices not present in the closed BDU TV system; and
2. Pressure will be on the CRTC to justify its regulations, and demonstrate that they are necessary and proportionate to the environment in which they function. The CRTC will want to make sure that regulations and policies such as genre exclusivity are still necessary, and do not hinder the ability of Canadian providers to compete and contribute.

In this increasingly domestic and foreign OTT-driven open system, Canadians' interest in watching programs rather than channels will reach a new level. As channels themselves become less and less meaningful as a delivery technology, and more and more meaningful as a brand, can CRTC mandated genre exclusivity even, in theory, achieve its stated goals?

At least a partial clue can be found in examining the market-driven, genre exclusivity free, multi-channel TV market to the south.

[54] The MTM Report, noted above, cites 5% of Canadians watching TV exclusively online up from 4% in 2011. Not a big increase, but significant if it continues. Note also, for example, media commentary on Neflix's House of Cards, such as House of Cards: what I learned by watching the whole series in one sitting, Guardian blog, February 5, 2013

US "free market" experience

There are currently over 900 national and regional Cable networks in the US[55]. These can be grouped into 14 broad "genres" as follows:

- 100 Arts/Culture/History Channels
- 104 Children & Family Channels
- 87 Education/Learning Channels
- 223 General Entertainment Channels
- 83 Lifestyle Channels
- 23 Mature Audience Channels
- 60 Movie Channels
- 121 Multicultural/Foreign Language Channels
- 87 Music Channels
- 171 News/Business/Info Channels
- 36 Religious Channels
- 22 Science/Technology Channels
- 16 Shopping Channels
- 183 Sports Channels[56]

A review of these U.S. offerings reveals 3 characteristics:

1. There is a considerable variety of offerings in a large variety of niches
2. Even the US market does not have many cable channels serving small micro-niche genres
3. There is considerable brand redefinition and evolution of services away from original mandates

When compared to Canada, some characteristics are to be expected, others somewhat surprising.

It is no surprise that in the popular, larger "heritage" niches, the US cable market is very much like Canada's. It was the US that was the source of inspiration and programming for many if not most of Canada's analog specialties. And it is to be expected that these big "anchor" genres would be as successful in Canada as they are in the US.

What is surprising is that even with a market 10 times our size, there are not that many genres that the US has that we don't. And in some of the biggest genres, the US still has only one channel[57]. No doubt, largely equivalent service in Canada is one of the (hopefully) lasting legacies of the Commission's Category 2, now B, licensing framework. By stepping out of the way, and letting broadcasters and BDUs figure what would be sufficiently popular with Canadians to warrant launching, the Commission truly let a thousand flowers bloom.

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[55] NCTA estimate

[56] These "genres" are as defined in the NCTA Cable Network Directory. Many channels fall under more than one genre category. NCTA's "other" category has been removed and the 7 channels exclusively identified as "other" placed in other categories. Many channels are included in 2 or more program genres. The list also includes 152 HD channels, many of which are HD versions of other channels

[57] For example, one general interest History channel, one general interest Comedy Central channel

Lack of Micro-Niches

What seems also surprising is the lack of micro-niche cable channels, even in the US. There is no sailing channel, no trucking channel, no motorcycle channel, no make-up channel, no dating channel.

Where micro-niche-channels do exist, there are often no more of them available than in Canada. We have a "Pet Network", they have a Dog TV (for dogs, not people). We have a Fashion Television; they have FAD TV: Fashion and Design Television. We have Outtv, they have Heretv.[58]

In fact the roster of channels in the US that have run into financial difficulty and either shut down or morphed into something else shows interesting parallels to Canada's own history of struggling niches (including licensed Cat Bs that have never launched):

- Wedding Central shut down in 2011
- Wine TV shut down in 2009
- Varsity TV, a teen channel that went off the air in 2009
- Water Channel, devoted to water sports, shut down in 2009
- World Championship Sports Network, featuring high end amateur sports, shut down in 2008
- Lime TV, originally Wisdom Television, defunct and went online in 2007
- Q Television, a GBLT channel shut down in 2006
- The Puppy Channel, shut down in 2001
- NewsTalk Television, launched as the Talk Channel in 1994 and shut down in 1995
- Festival, a 1980s family oriented HBO spin off shut down in 1987
- Lifetime, a health channel, 1984
- Z-Channel, one of the first pay TV movie channels launched in 1974 and shut down in 1989
- Cable Music Channel, launched in 1984 to compete with MTV and shut down only months later[59]

Morphing of Genres

What the US also has in common with Canada, but arguably to an even greater extent (presumably given the lack of genre exclusivity rules), is the morphing of genres and brand confusion. For example:

- G4, originally launched as ZDTV, a computer/Internet-oriented network, in 1998, and then rebranded as TechTV is slated to become Esquire Network"an upscale Bravo for men" on April 22, 2013[60]
- Outdoor Life Network became Versus in 2006 and NBC Sports Network in 2012
- Discovery Health Channel became OWN: Oprah Winfrey Network in 2011
- The Nostalgia Channel, relaunched as GoodLife TV Network, then AmericanLife TV Network, and in 2011, Youtoo TV, a "social television" service with a focus on mobile devices
- Fine Living Network became Cooking Channel in 2010

[58] The former Gay TV abandoned much of its LGBT programming in 2012 and rebranded as LOGO
[59] *Disconnected, Cable networks that didn't quite make it*, Peter Paltridge, blog, and Wikipedia
[60] G4 becomes Esquire Network April 22, Gamespot

- Discovery Kids became The Hub (a dual audience, split daypart, kids/family channel) in 2010
- CMT, launched as an all music video Country Music Television in 1983, moved into country lifestyle shows and movies in the late 90s, and most recently, animated comedy
- A&E launched as the Arts and Entertainment network in 1985; the name shortened in 1995. By 2003 the channel was marketed as "The Art of Entertainment", a very different spin on its original brand, but consistent with it's current focus on reality shows and true-crime shows
- American Movie Classics was launched in 1984, and became known as AMC in 2001. "Classic movies" became "movies", movies became documentaries and series including most recently, Emmy-award-winning *Mad Men* and *Breaking Bad*.
- The Nashville Network launched within days of CMT with a focus on country music-related original programming, rebranded itself with TNN moniker in 1998 (which briefly stood for "The National Network" starting in 2000) and became Spike in 2003 completing the shift to off-network sitcoms and shows targeted to young adult males
- Bravo, while never changing is name, has like A&E morphed from its 1980 launch focus on the arts to a current focus on pop culture with a lot of reality TV
- Fox Family Channel (whose origins lay in the 1979 Christian Broadcasting Network Satellite Service) became ABC Family in 2001, completing a 2 decade transition from Christian programming (courtesy of Pat Robertson and other televangelists) to family-friendly sit-com re-runs, movies, and a few original productions
- TLC was founded by NASA and the US Health Department in 1972 as the Appalachian Community Service Network. Privatized in 1979, it was renamed "The Learning Channel" In 1980, and adopted the acronym only form of the name in 1998. From then on, educational content gradually started to decline and be replaced by reality programming[61]

Most recently, several cable networks have been moving into original drama series as a way to maintain viewers in an increasingly crowded marketplace (and with OTT services nipping at their heels), including 2012 announcements from:

- E! and Bravo! planning scripted programming series
- USA airing Modern Family reruns in fall 2013
- Hallmark Channel airing movie pilots for original drama series[62]
- BET announced plans to expand out into theatricals and scripted drama, particularly sitcoms
- A&E re-embracing scripted dramas[63]

Other "expansion of genre" moves are also evident: Drama driven TNT getting into reality; A&E getting into family series. Speed being rebranded and broadened as Fox Sports 1. And on the MSO side, Time Warner Cable recently dropped the arts channel Ovation, arguing that fewer than 1% of its subscribers tune in on any given day -- not enough to justify the $10 million in carriage fees it says it has paid over the past several years. "Ovation isn't even an arts channel any more, Time Warner Cable says,

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[61] See, for example, US Cable Upfront Report, Sept 10, 2012, and 6 TV Networks That Aren't What They Started Out to Be, October 10, 2012, Wired.com

[62] Cable networks explore new genres, USA Today, Nov. 16, 2012

[63] US Cable Upfront Report, Sept 10, 2012. Reportedly, "they all stay within their carefully crafted brand identity"

contending that 70% of its schedule is now turned over to old movies, repeats of "Antiques Road Show" and direct-response product pitches"[64].

Drifting to the Middle

All of which suggests that the so-called natural tendency of services to "rush to middle" may be to some extent, "a truism", but ignores the impact of a brand in appealing to different types of viewers with different interests in content:

- Of all the U.S. examples of brand and genre morphing cited above, only one appears to be a narrowing or focussing of the brand/genre: Fine Living becoming the Cooking Channel;

- Increasingly faced with (at least the threat) of competition from OTT and online video, networks are responding with two apparently divergent, but nevertheless logical, strategies. That is they seek to broaden their appeal through:
    1. Adding programming of different types (drama, when they have none; reality when they have none) attracts new audiences
    2. Commissioning top quality tent pole production that attracts and maintains subscribers consistent with their brand

That any concern about services "rushing to the middle" can or should nevertheless be addressed through a policy of genre exclusivity remains at least open to question.

On the "can" (genre exclusivity) prevent it, the evidence is at least mixed. In all areas where Canada has analogous services to the US, and the US services have "rushed to the middle" the Canadian services have also … at least to the extent they can given genre exclusivity. Bravo, OWN, G4, MuchMusic, TalkTV, Showcase, History, MTV …. all have followed a parallel path in Canada to their equivalents in the US. And as previously noted, the inherent flexibility in prime time means that genre exclusivity has little ability to prevent this where it counts financially.

On the "should", the evolution of the US marketplace over the last 3 decades, in particular as it faces the evolving OTT marketplace, offers some interesting insight.

First, while it is impossible to determine cause and effect, the fact that Canada does offer a comparable diversity in Canadian specialty services to those available in the US can in large measure be attributable to *a set* of policies which include:

- Genre exclusivity and its predecessors
- Preference for licensing of Canadian services over importing foreign
- Access rules

And while Canadian services have done their fair share of "bait and switch", it is hard to point to any services that have more dramatically shifted their genre than CMT and TNN/Spike – both of which were allowed into Canada on the basis of their initial genres, and both of which remain here[65].

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[64] Despite Cable-Costs Crackdown, New Channels Keep Coming, Ad Age Media News, Jan 3, 2013

[65] Students of Canadian broadcasting history will know the background here. CMT was forced off Canadian cable in 1994, pursuant to Public Notice CRTC 1994-61 triggering a trade battle with the US. This was resolved through an agreement between Rogers and Nashville CMT to sell 20% of a rebranded Canadian CMT. Spike was found not to be in "partially or totally competitive" with any Canadian services, Broadcasting Public Notice CRTC 2005-9

Second, the fact that the US does not offer that many more “micro-niches” than Canada, suggests that without access guarantees, such micro-niches would be hard pressed to survive in Canada anyway.

Over the last 5 years a number of US channels have shut down in favour of online-only alternatives – implying that if there is a future for micro-niche, it is not on domestic broadcast distribution networks, but available to the world online.

Third, there is reason to expect that online will increasingly challenge the viability of even relatively popular genres – cooking channels, lifestyle, fashion, dance and so on. For example, YouTube’s original content program has funded 100 Original Channels which vary between micro-niche niche (Drive, Red Bull) and niche (CafeMom (lifestyle), Look TV (fashion), Reuters).

Thus if shifting of genre in response to market demand was a natural feature of the last 3 decades, it will be an absolute necessity going forward.

Distinctions between English and French-language markets

In looking at the French-language market, the Commission has long maintained that, while many French and English-language broadcasters share certain common features, they operate under different conditions and have different requirements.

As concerns the pay and specialty TV market generally, the Commission historically recognized that the French-language market can of necessity only absorb a limited number of services and that high penetration was to be encouraged. In so doing, however, the Commission strove to ensure that a similar diversity of offerings was made available to French-Canadians, as was available in English Canada[66].

In the case of genre exclusivity, the Commission has never articulated a different policy; it has arguably, however, applied that policy differently, or at least applied it in a way that has led to different results.

The result has been a market where, with the exception of news and sports[67], Astral has historically had a virtual stranglehold on the best genres.

Today, there are 15 French-language Category A specialty services (plus 2 English-French: Weather and Teletoon) covering most of the same genres as their 45 English language equivalents.

The application of genre protection in French Canada can therefore be seen to have led to the same broad general genres being covered, but with:

- Fewer overlaps and/or competing genres. For example, while English-Canada can be said to have 5 Category A "lifestyle" channels, French Canada basically has only one, Canal Vie)
- Few if any micro niches. No Pet Channel, no GBLT channel etc. This, though, is as much or more of a reflection of economics, than the policy itself.

A recent example of this different application (or, at least, result) is TVA Group's 2010 request "that the French-language general interest pay television services genre be opened up to competition so as to allow it to operate a new service to be known as Ciné-TVA. A minimum of 50% of the service's programming would be devoted to dramas, and it would specialize in the broadcast of theatrical feature films."[68]

While acknowledging that the incumbent Pay TV service, Astral's Super-Ecran, was "profitable and popular" and had "the financial ability to sustain some competition while continuing to fulfill its programming obligations", the Commission concluded that the French-language feature film market was not large enough to sustain competition[69].

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[66] See, for example, Public Notice CRTC 1996-120 for a description of the CRTC's historic approach

[67] Le Canal Nouvelles was licensed to Telemetropole in 1996. Decision CRTC 96-615

[68] Broadcasting Regulatory Policy CRTC 2010-861

[69] While this was cited as a primary reason, the Commission did also note that "TVA Group did not propose additional measures beyond the current undue preference rules to ensure that the French-language market is not excessively destabilized by opening up the general interest pay television genre. The Commission is particularly concerned that TVA Group belongs to the same ownership group as Videotron, the dominant broadcasting distribution undertaking in the French-language market." It will be interesting to see if a different decision could be forthcoming under the expected scenario of Super-Ecran being owned by Bell

The Commission proceeded to issue a call for "complementary" French-language pay TV services, to which no would-be applicants responded[70]. Interestingly, even when the Commission openly invited applicants to question whether this view could be "sustained", and extended its application deadline to include competitive services, still no one applied[71].

[70] Broadcasting Notice of Consultation CRTC 2010-860
[71] Broadcasting Notice of Consultation CRTC 2010-860-1

Arguments pro and con genre protection

The CRTC's 2011 articulation of the 3 general public policy rationales behind genre exclusivity can be further disaggregated into at least 6 discrete sub-objectives, as follows[72]:

Maximizing support for Canadian programming

1. Reduces competition for foreign programming
2. Enables services to meet their Canadian programming requirements – eg. Prevents low contributing Cat B's from competing directly with, and thus negatively impacting, high contributing Cat As

Maximizing Diversity

3. Diversity of programming choices
4. Diversity of ownership
5. Keeps out foreign services

Consumer protection

6. Consumers know what they're getting

For the purposes of the current analysis, the paper doesn't particularly question the objectives, merely whether genre exclusivity achieves them.

Reducing competition for foreign programming

The argument that genre exclusivity reduces competition for foreign programming, hence leaving more money for Canadian programming, has never been specifically made by the Commission, but is certainly one that has some logic behind it[73].

The logic is this: Confining services to specific genres limits the competition for programming within that genre, and therefore reduces the amounts that must be paid in bidding for that programming.

When Canadian specialty services launched and aligned with US partners (formally and informally) there is evidence that this happened. Discovery Canada bought from Discovery US, History from History, TSN from ESPN, Comedy Network from Comedy Central, MuchMusic from MTV and so on[74]. These agreements were often very favourable to Canadian services, as there was effectively no other Canadian buyer that could buy the same volume of US programming, on such a reliable basis.

Today, while such arrangements still exist, the price points are significantly higher. There are alternatives, both online, and "close enough" services, that preclude a Canadian service from acquiring

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[72] To be clear, this is the Author's disaggregation, not the Commission's

[73] The Commission's review of conventional TV and decision to re-introduce Canadian program expenditure requirements was, in part a response to escalating foreign programming costs. Arguably, by maintaining genre exclusivity and CPE requirements, the Commission avoided this problem with specialty TV. See, for example, Broadcasting Regulatory Policy CRTC 2010-167, para 35

[74] Note that these arrangements include(d) everything from equity stakes and comprehensive output deals to ad hoc program acquisition arrangements

US programming at bargain basement prices. Moreover, given group CPEs, should a broadcasting group choose to outbid competitors for foreign programming, to the detriment of profitability, that is a business choice.

In fact, an argument can be made that a freer market for foreign programming may be important for the broadcasting system's survival.

A "poor" operator sitting on a genre that has far more market potential than that broadcaster is offering is a target for foreign OTT. Opening up that genre – allowing a newer or better heeled broadcaster to refresh and invest in it – is a good hedge against Canadians abandoning the system in favour of foreign OTT alternatives.

The new broadcasting world encourages loss leaders. Ensure your brand and channel has some "must watch TV" – on conventional to ensure a premium in advertising cost per thousand (CPM) and to carry and promote everything else; on specialty to ensure people subscribe. On some specialty networks, you may only need one show in that category. It doesn't matter if it loses money; if it carries the channel and ensures the enterprise makes money, it is well worth it.

No hot show on US cable will have only one Canadian bidder. All 3 English-language corporate groups - Shaw/Corus[75], Rogers and Bell - will bid if they feel it appropriate, and find a place for the show somewhere.

On run-of-schedule specialty shows, genre protection presumably does limit the bidding, and the margin on these shows could well be quite healthy[76]. But the assumption that elimination of genre exclusivity will drive up the costs of these shows still rests on the assumption, that, say, a home renovation channel would decide that cooking or outdoor activity would be more profitable and worth a format switch. There may be genres where such a wholesale change may be sensible. Only a broadcaster, reviewing the profitability of its specialty channel in genre "X", could determine that moving to genre "Y" (and acquiring all new programming to do so) would be worthwhile. But common sense suggests that a wholesale switch – with its inherent re branding, programming and customer confusion costs – would make sense in very few cases (i.e. a very low performing channel with high penetration). More often than not, subtle changes - the addition of popular signature shows within the same general program schedule – would be the smarter route; ultimately possibly changing a channel's whole perception or brand, but not all in one go.

Preventing low contributing Cat Bs from competing directly with high contributing Cat As

For a time, this argument made sense.

Popular Category Bs have achieved as much or greater carriage than less popular Cat As. And when Cat B's had no CPE requirements, and exhibition requirements as low as 15%[77], the notion that they be allowed to compete directly was nonsensical.

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75 By lumping Corus and Shaw Media together, the author is not suggesting they operate as one buying group today. They do not. But if the potential benefits reach a point where Shaw (and the market) concludes they outweighs the costs, it will happen.

76 The "real" profit margin on specialty shows is always harder to gauge than conventional given the question of allocation of subscriber fees. Many networks just look at advertising revenue margin, recognizing that a low or negative margin show may still be "profitable" if it drives or sustains subscribers.

77 The exhibition requirement for Category Bs starts at 15% in the first year of operation and rises to 35% in the third year. Broadcasting Regulatory Policy 2010-786.

But three things have changed:

1. The popular Category Bs are almost all now into their 2nd term of licence. They therefore have Canadian Content (Cancon) exhibition requirements of 35%
2. The group licensing framework now imposes a 30% CPE on all corporate Category Bs with more than $1 million in revenue. That captures all corporate Cat Bs except those in their first year or two of operation[78].
3. It is almost impossible to launch a new English-Language Category B service today. Subscribers don't want them. BDUs don't want them. And established broadcasters don't want them. There may be an argument for micro niche channels, but OTT generally provides a much better vehicle for such programming[79].

So the argument either no longer holds, or can be addressed through less intrusive means.

Diversity of programming choices

This is a benefit that is hard to argue against from a historical perspective. Requiring applicants to think of and create new genres, and then compete against each other for the privilege of running a channel to serve them, surely created more diversity, and more Canadian diversity, than ever would have otherwise been possible.

From 1984 to 1999, 65 US services were added to the lists. From 2000 to 2013, 21 were added. In a time when the number of US channels continued to explode in that market, only 21 made their way directly into Canada.

Our regulatory policies ensured Canadian services occupied almost every popular programming genre, and many or most of the less mainstream ones as well.

But that was then.

Today, it is harder to argue that genre protection is ensuring programming diversity. At least not until ownership diversity is factored in, as it will be below.

The argument that services will "rush to the middle" is not borne out by Canadian, U.S and international experience -- at least any more than already happens. All services acquire the most distinctive popular programming they can, and that the market can sustain. The fact that so many services seek popular drama consistent with their niche has not led to less diversity, but a golden age of drama. The fact that reality TV has taken off, and that so many services can put their own stamp on it, may have led to too much reality TV for some people's tastes, but not for viewers in aggregate. The market works.

Diversity of ownership

While not explicitly identified as a policy objective in 2008, the notion of fostering ownership diversity surfaces as a putative benefit.

It does not really pass muster.

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[78] None of the majors want to run a Cat B with less than $1 million in revenues for very long.

[79] Whether it's *Machinima* on YouTube for gamers or *Sailing Anarchy* for Sailors, the reality is that niche interests appear to lend themselves more to online than new linear channels.

In fact, genre exclusivity may well hurt the case of ownership diversity rather than help it. That's because the channels genre exclusivity really protects are the legacy former analog Cat As. It may or may not help the digital Cat As. It almost certainly hurts the Cat Bs

Cat Bs are shut out of the "good" genres and trapped in micro niches that offer little room to grow. The perverse result is a Blue Ant Aux (music channel) first being prevented from launching and then being prevented from competing directly with the 3 Cat A music oriented channels owned by Bell-CTV (all the while, not even being carried by Bell as a BDU).

Independent legacy Cat A's now comprise only the non-profit TV5, Vision TV owned by Zoomer Media and The Weather Channel/Metromedia owned by Pelmorex. The latter currently has 9(1)(h) status, the former two have applied for it.

Perhaps before the last 10 years of consolidation, an argument for protecting then independent (now largely vertically integrated) analogue channels existed. Not now.

Digital Cat As bring us back to the "all genres are not equal" issue.

Today the independent digital Cat As are:

- iChannel, a public affairs channel owned by Stornoway
- Travel and Escape, owned by Blue Ant
- Bold, formerly Country Canada, now Cottage Canada owned by Blue Ant
- One, Mind Body and Spirit owned by Zoomer Media
- Outtv

Bold and Travel and Escape were bought by Blue Ant in the last two years. They are both in genres that previous owners found insufficiently profitable or desirable. It seems unlikely that loss of genre protection would encourage other players into these genres. Quite the opposite, it would likely give Blue Ant more opportunity to pursue these brands without constraint.

One, Mind Body and Spirit, now owned by Zoomer Media, would appear to be in a similar situation.

iChannel, a public affairs channel owned by Stornoway is in a different situation. It lost a battle with CPAC to limit competition from its nearest, and more widely distributed, competitor. And its more distant competitors are the well entrenched now Category C news services, as well as channels like Documentary. Would the loss of genre exclusivity create more competition for iChannel? Perhaps a bit. Would it create opportunities for IChannel? Possibly, but perhaps not ones that a small, undercapitalized independent broadcaster like Stornoway would be able to take advantage of.

So what's the greatest likely benefit for all of these Category As owners, should genre exclusivity be eliminated. *Selling the channels*.

By virtue of their Category A status, these channels are guaranteed access, minimum packaging and hence higher subscription levels than Category Bs (many of which are seeing themselves repackaged to the detriment of their subscription base). Given the chance at a free genre slate, they could be bought by the big 3 just for their subscribers.

Only Outtv, with a micro-niche genre and the most limited Canadian distribution, is unlikely to so benefit. The channel has, in any event, most recently made its way through international exports, and so may be even less likely to want to cash out on Canada as a result.

So ironically the strongest argument for genre protection may be to keep independents locked in genres that no one else wants. In so doing it may well force a level of both programming and ownership diversity that would not otherwise exist.

That this is a good thing is now debatable. Providing programming that very few Canadians want to watch is a rather defeatest attitude to programming diversity. And propping up companies, in those genres, that would not otherwise be sustainable, a luxury that today's open system and the OTT competition may ill allow us to afford.

Keeps out foreign services

The assumption that it is genre exclusivity that keeps out foreign services is a common one. As it turns out, the policies are similar, but not related.

The Commission's longstanding policy is to not allow direct entry (on the eligible services list) of any foreign service that is partially or totally competitive with a Canadian service, in order to "ensure that licensed Canadian services are in a position to fulfill their commitments and obligations with respect to Canadian programming and other objectives set out in the *Broadcasting Act,* responsibilities that non-Canadian services do not share."[80] That policy has seen interesting cases of interpretation and application (e.g. CMT), and has most recently been amended to exclude third-language services[81].

More relevant, the policy has largely worked despite the fact that no "reciprocal" genre protection policies lie on the other side of our borders. The notion of "partially or totally competitive" is a question of fact at a moment in time. Pass the test and a foreign service is allowed in, and to all intents and purposes is never kicked out[82]. Don't pass the test and you can always reapply.

The test for genre exclusivity is one of being "directly competitive". It is unclear whether the foreign and Canadian tests are materially different, but the reality is they are different tests, applied in different circumstances.

Elimination of genre exclusivity need not prevent maintenance of the foreign services test. In practice, it might be harder to apply. As in the case of the foreign service itself, potentially competitive Canadian services would have to be examined directly, rather than relying on a nature of service definition. Moreover, a Canadian service that moved into a genre occupied by a US service in Canada would presumably not have the right to call for that service's removal.

The bigger impact may be policy and legal. If, like the foreign services rule, a principle rationale behind genre exclusivity has been in order to "ensure that licensed Canadian services are in a position to fulfill their commitments", surely removal of genre exclusivity calls into question the need for the foreign services rule. And as we've seen before on this issue, such an apparent direct discrimination against US interests could well result in a trade action.

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[80] As enunciated in the Commission's decision to allow the continued distribution of Spike TV, formerly known as TNN, Broadcasting Public Notice CRTC 2005-9

[81] In Broadcasting Public Notice CRTC 2004-96 the Commission announced that, under its revised approach, requests for the addition of non-Canadian, third-language, general interest services to the digital lists would generally be approved, subject to new distribution and linkage requirements aimed at minimizing the potential negative impact on Canadian third-language ethnic services

[82] While, in theory, the policy allows this; in practice, everyone knows it will never happen.

Consumer protection

The argument that genre exclusivity is useful or necessary so that “consumers know what they're getting” seems to be a *post facto* rationalization. It appeared only in the 2011 articulation of the policy.

Whatever its genesis, it is hard to argue that consumers need this kind of protection from the CRTC.

The CRTC does not regulate branding. And branding, and its associated marketing, is the most important signal of what a channel is.

On branding, broadcasters have been more than happy to make sure consumers know what the new “Channel X” has become, or at least ensure the old brand is muted to become less relevant to the new.

In the US, American Movie Classics becomes simply AMC, The Learning Channel: TLC, Arts and Entertainment Television: A&E, and so on.

In Canada, Country Music Television becomes CMT, MuchMusic becomes Much, Razer becomes MTV Canada then MTV2, talktv becomes MTV Canada, and, Canadian Learning Television becomes CLT which becomes Viva which becomes Oprah Winfrew Network, which almost immediately becomes known as OWN.

If anything, Canadian broadcasters can be accused of overselling the change not underselling it. Forced to comply with Cancon requirements and legacy COLs, MTV Canada, looks nothing like MTV, surely disappointing many young Canadians “looking for the real thing”.

In any event, BDUs routinely either reference the nature of service narrative or require a “substantially similar” clause in Affiliation Agreements. Thus, both on the consumer and distributor side the market appears to be self regulating, to a reasonable extent.

The Con Case - Public policy objectives can be met through other means

The recognition, inherent in the Commission's Category C and Pay TV licensing policy, that all genres need not be treated equally may be the single most important construct to determining the ongoing relevance of the whole genre exclusivity concept.

Moreover, having determined that all genres are different, with different levels of demand and needing different levels of support, the possibility of a more targeted approach becomes evident.

The remaining "valid" policy objectives appear to be:

a. CPE integrity
b. Programming diversity
c. Ownership diversity

Arguably, the scope of services that merit genre exclusivity are those exclusively owned by, and/or possibly have the potential to impact, independent services.

The rationale here stems from the basic logic that there is little need for the Commission to protect the big vertically integrated corporate broadcast groups from each other, and even less ability to do so.

The advantages of incumbency

If any one of Shaw/Corus, Bell and Rogers on the English-language side or Quebecor (and likely soon Bell) on the French-side decide there is a business opportunity to get into a niche occupied by one of their competitors, genre protection is not the only barrier. Barriers to entry do exist, even for these players – the advantages of incumbency, entrenched supply relationships, long term locking up of programming rights, difficulty obtaining distribution – but genre exclusivity is no longer the biggest among them.

The proof is in the pudding. The introduction of Category C licences has barely nudged the playing field in news and sports.

Yes, an exception is Quebecor's launching of Sun News. But as evidenced by the service's pitch for 9(1)(h) status[83], it remains unprofitable and well behind news incumbents in terms of penetration levels. In fact, the service was only able to be launched in the first place because of extraordinary synergies beyond broadcast-BDU vertical integration (the Sun news chain; legacy Toronto One OTA TV basic carriage) and determined resolve to make it happen (despite the costs and risks) on behalf of Quebecor leadership.

But in English-Canada, sports – that first brass ring of television's entire future – is now even more head-locked by Bell and Rogers, than ever before. Following the Maple Leafs Sports & Entertainment Ltd. Acquisition, and the apparent sports "truce" if not duopoly that emerged, the last independent sports service, The Score, sold out to Rogers[84]. In 2011, Shaw Media publicly announced that it would no longer "pursue a robust sports offering" and in April 2012, shuttered Category B Fox Sports World after

[83] Sun TV News was one of 22 services that applied or re-applied for 9(1)(h) status in a public hearing to be held April 23, 2013. Broadcasting Notice of Consultation CRTC 2013-19

[84] *Rogers scores with purchase of The Score*, Globe and Mail, Aug 24, 2012

11 years in operation[85] – perhaps in return for distribution guarantees for its other dominant pay and specialty brands.

In French-Canada, Quebecor's aspirations for a competing mainstream, professional "TVA Sports" service met with CRTC approval with the issuance of a Category 2 licence in 2010[86], and a market launch, in program partnership with Rogers Sportsnet, in September 2011.

With numerous platforms to choose from, and in genres where content is plentiful and (lifestyle, reality, music, even drama) the big VI entities, genre exclusivity is a minimal inconvenience to corporate goals. And, as noted before, group CPEs and the large Category B rule maintain CPE integrity.

The role of independents

The value of genre exclusivity has been reduced to one of supposedly protecting independents, but protecting them in a spectacularly inefficient manner.

As already noted, genre exclusivity may now do more to hurt independent ambitions, and diversity, than support them. Blocked in their small, "less popular" and primarily Category B service niches, independents risk losing subscribers to cord shaving and repackaging to the point of failure.

But if genre exclusivity is now being used to support independents, what exactly are we supporting independents for? Objectives have some alignment but they are not the same.

Presumably we support independents (i.e. ownership diversity) for some combination of the following reasons:

- **Editorial diversity**. Independents are a unique and separate editorial voce in an otherwise concentrated media landscape
- **Programming diversity**. Independents do stuff the big guys don't. They are both inclined and forced (to survive) to occupy niches that might not otherwise be served
- **Research & Development (R&D)**. Independents are broadcasting's R&D lab. They think of and execute "out of the box" ideas. While the then majors stuck to conventional TV, independents brought Canada into specialty TV. They continue to pioneer today, with greater integration of online and linear programming components and/or new niches.

This naturally leads to policies that seek to support independents as a class (e.g. VI Code of conduct; 3:1 rule) and/or in relation to specific services they own (e.g. Cat A licensing; genre exclusivity, mandatory basic carriage).

From this vantage point, it becomes evident that there may be better ways to support independent broadcasters than genre exclusivity. If we want to support the class, we could expand the VI Code of conduct, put more specific rules into regulation or enforce the 3:1 rule without exception. If we want to support particularly deserving genres we could issue more Cat A licences to independents or use 9(1)(h) to specify carriage terms.

[85] As reported in A Rouge Point, Blog, *Fox Sports World Canada Will Shutdown April 30*
[86] Broadcasting Decision CRTC 2010-116

Greater use of 9(1)(h)

Current use of the Commission's 9(1)(h) mandatory carriage power has been limited to the granting of digital basic carriage for services of "exceptional" public interest. As has already been the case for APTN, Accessible Media, Weather Network/Meteomedia and others, the granting of such 9(1)(h) status all but guarantees the survival of the independent concerned. The Commission has scheduled a hearing on April 23, 2013 to hear new and renewal applications for 9(1)(h) status. Any such applications granted will almost all be for independents.

The difficulty for the Commission, though, is that mandating digital basic carriage is arguably a significant burden on BDUs and imposition on consumers, at a time when OTT competition may be ramping up. As a result, it must be used sparingly, and hence is seen as a solution in only the most exceptional cases.

But while 9(1)(h) carriage has become synonymous with mandatory basic digital distribution, that is not actually what section 9(1)(h) of the *Broadcasting Act* says. What it does state is this:

> **9.** (1) Subject to this Part, the Commission may, in furtherance of its objects, …
>
> (*h*) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

In other words, the "terms and conditions" of 9(1)(h) carriage could be:

- Analogue basic
- Digital basic
- Highest penetrated discretionary tier
- Packaging requirements etc etc

Nothing prevents the CRTC from using 9(1)(h) orders for carriage options short of basic digital carriage.

Imagine, for example, if the Commission granted a deserving (but not exceptional) independent service a mandatory order to be "packaged with the most highly penetrated equivalent VI service". This wouldn't guarantee 100% of digital homes, but could effectively guarantee discretionary carriage as high as 60-80%.

This would arguably be a more consumer friendly approach, and allow the tailoring of carriage guarantees to the specific merits and needs of the independent service in question. It would still be an imposition on consumers, but only ones who buy similar services. It would give a licensee more than Cat A status but less than mandatory digital basic.

CPE and Cancon Exhibition Tailoring

With respect to any anomalies that may result from competing services having asymmetric CPE or Cancon obligations, the tailoring of CPEs and Cancon to individual circumstances is an option.

If a case-by-case approach were deemed inefficient, standard COL's could likely be developed. For example:

- Independent English language Cat B's > $1million in revenues could be automatically assigned a CPE of 25%, 5% points lower than the major groups;

- Standard increases in Cancon exhibition could escalate beyond 35% to 50%, and changed from just year of service based to year of service plus revenue threshold based;
- Alternatively, an escalating contribution scheme of Cancon exhibition and CPE thresholds could be tied to penetration

Thus a competitive Category B service fortunate enough to garner similar carriage levels to that of an incumbent Category A would not also benefit from lower obligations. The system would not suffer a net loss in contribution; the Cat A would not succeed over the Cat B by virtue of regulatory advantage.

Supporting independents as a proxy for supporting diversity

In effect, supporting independents becomes a proxy for supporting format and editorial diversity; concerned by the prospect of a private broadcast environment solely occupied by 3 big VI English-language private players and 2 big VI French-language players, we ensure independents exist, comfort ourselves in the knowledge that they will gravitate to niches not served by the big players, and then protect them in so doing. In return, we require them to stay in the genres we protect, and eliminate any anomalies in asymmetry of contribution that may arise.

Other arguments against genre exclusivity

Rogers offered the following arguments in support of its contention that the Commission should eliminate genre exclusivity:

i. genre exclusivity limits competition and innovation;
ii. there has been a clear erosion in genres of programming offered by Category A services;
iii. the majority of Category A services meet the Commission's established criteria for opening up protected genres to competition; and
iv. the elimination of genre exclusivity would not compromise Cancon and CPE requirements.

These are largely a variation on the theme of those arguments discussed above. Interestingly the market based innovation argument stands in strong contrast to its genre protection (and independent driven) equivalent.

The Pro Case – Genre Exclusivity has more pluses than minuses

The argument in favour of maintaining genre exclusivity finds its genesis in at least four sub-arguments.

- It does some good, particularly for strong incumbents, and could turn out to be even more valuable in the future
- While its effectiveness is hard to measure, and it may not be consistently applied, it also does little harm
- We may not fully understand its import and may regret getting rid of it
- Transitioning out is too difficult and may have unintended consequences

These may be vague arguments, but they can be powerful nonetheless. And they have manifested themselves in a reluctance by most existing pay and specialty services to call for fundamental change, and a reluctance by virtually all broadcasters to avail themselves of opportunities to transition out of protected Category A genres into open entry Category Bs or Cs:

- In the 2008 review, no broadcaster called for an outright elimination of genre protection. Calls were made for greater flexibility, and use of a basket approach, but not elimination
- In the 2011 licence renewals, only Rogers called for a phasing out of genre exclusivity. While other broadcasters generally supported the notion of a review prior to the next round of licence renewals, everyone but Rogers felt that changes at that time would be unwelcome. (This did not prevent the groups proposing "a wide range of amendments to various components of the nature of service conditions of licence for services of a number of licensees"[87])
- Broadcasters have not proposed or supported an expansion of the Commission's Category C framework beyond news and sports. Indeed, the Commission's proposed expansion into music services was largely rejected by broadcasters in favour of a broad review[88]
- Reluctance to turn in Category A licences in favour of Category B licences with less genre restriction. Both Rogers (G4) and Corus (OWN) contemplated this as a way of addressing Commission findings that the services were out of compliance with their Nature of Service conditions. Ultimately, they chose to come into compliance with their Category A licences instead[89].

"What if" Scenarios

Any number of "what if" scenarios can always be conjured up to suggest that elimination is a bad idea.

For example, what if genre protection is eliminated and a number of the big players launch their own weather channels and/or further expand their news channels to provide more convenient onscreen, online and mobile weather components, gradually eroding the Weather Network's audience. The Weather Network loses advertising revenue, but by virtue of 9(1)(h) remains solvent. Eventually however, revenue and viewing to the Weather Network drops to the point that it fails to meet

[87] Broadcasting Decision CRTC 2011-441, para 81

[88] Broadcasting Notice of Consultation CRTC 2012-246. Both Corus and Bell found fault with the Commission's proposed standard conditions as applied to their Category As (CMT, Much and MuchMore)

[89] See the public record, including transcripts of the December 11, 2012 Show Cause hearing, via Broadcasting Notice of Consultation CRTC 2012-560

expectations on emergency alert initiatives, and is ultimately seen as irrelevant and no longer deserving of special status. It is ground down to failure.

Another example: What if in a post genre exclusivity environment, OTT drives the big players towards the middle. They retrench, dropping the more peripheral, more marginal channels (their own and independents) through repackaging or termination, in an attempt to protect the core at a lower price point. These measures fail. Like U.S. local radio dropping the "local" component in the '00s, they cause Canadian TV to lose its diversity and competitive edge. Moreover the VI entities, who now see they can make more money with less hassle as ISP pipelines for foreign OTT, retrench from their BDU/broadcaster flirtation, with no one left to pick the pieces of the Canadian broadcasting dream.

These arguments all share the same flaw. *They could well happen anyway.*

But there is another, the opposite of the last example, which could at least theoretically be brought on by the elimination of genre exclusivity What if all the big 3 English-language players decide they each have to own a channel in the top 10 or 20 genres? The fear is that the size of our market makes it impossible for multiple services in certain genres to succeed – and the risk is that the failure of Canadian services will leave the door open for foreign entrants. If we had 3 comedy channels, none might be successful, paving the way for Comedy Central, from the US.

Finally there are legitimate transitional "unintended consequence" concerns. Even if the major players don't compete head to head in all major genres, they could be expected to compete more vigorously. Rogers, currently with far fewer affiliated services than Shaw or Bell, would seek to close that gap, giving whatever "due" preference appropriate to help its new fledgling services along – this would likely result in lower penetration levels, revenue and profitability for other former Category As, right at the time they need to be strong to compete with foreign OTT.

But then, are de facto monopoly specialty services the best way to compete with foreign OTT? Should new entry be still be blocked, and services still protected from direct competition, 15, 20 even 30 years after being licensed?

Philosophy and Particular Interests

At the end of the day, it comes down to issues of philosophy, risk, transition[90] and whether more focussed or targeted policy alternatives exist.

Philosophically, genre exclusivity remains out of synch with the general trend of regulation towards greater flexibility, less intrusiveness and, yes, more reliance on market forces. Risk cuts both ways. For every argument that elimination of genre exclusivity presents a risk to diversity or independents, there is another argument that without increased flexibility to respond the system may fail.

For each case of a genre or independent that warrants support there may be a more focussed less intrusive way of providing it. And if the question remains whether the larger players need protection from themselves, the answer may be that the competing OTT environment won't permit it anyway.

That said, for the time being at least, each player will continue to look at genre protection through the prism of their particular status and interests:

[90] Transitional issues include, as pointed out by Shaw in Broadcasting Notice of Consultation CRTC 2012-246, the impact on the 3:1 independent rule

- The main Cat A incumbents will either be indifferent or support some form of broad genre exclusivity – unless more important affiliated BDU interests lean otherwise;
- Majors who own few major Cat A genres – Rogers and Quebecor – will likely oppose genre protection, as being in the interests of both their BDU and out-flanked specialty interests;
- Independents will largely support ongoing genre exclusivity – to protect the small turfs they have - unless the Commission were to replace it with greater use of more targeted support measures (such as 9(1)(h)), in which case they would switch sides; and
- BDUs will be inclined oppose genre protection, given the greater negotiating leverage an open competitive environment would generally afford – unless it is replaced with greater use of more intrusive measures (such as 9(1)(h)), in which case they will likely prefer the status quo

Possible transition models – is change an all or nothing or is there a half way?

The Ultimate Objective

Models depend broadly on whether the ultimate objective is to phase out or merely "simplify" genre exclusivity, and more narrowly, the degree of concern for issues such as:

- Implementation in time for or prior to anticipated 2016 group licensing renewals[91]
- Impact on independents
- CPE/Cancon asymmetry anomalies
- Regulatory burden and compliance

For the current analysis, we will use the broad categories of "phase out" and "simplify".

"Simplifying" or "streamlining" Genre Exclusivity

A decision to "simplify" or "streamline" genre exclusivity could be made for one of at least 3 different reasons:

1. As an interim step towards phasing out (say, before the 2016 renewals)
2. As an interim step, to "test the waters" in advance of an unspecified but anticipated phase out
3. As of a means maintaining the putative benefits of the policy, while eliminating its more overreaching or burdensome dimensions

Whatever the reason, there would appear to be a number of approaches the Commission could take, separately or combined.

Apply to Category As only

The logic here would be that these services have the most privileged position (other than 9(1)(h)), contribute the most and are the most popular and important to consumers, and that given their broad genres and 10% flexibility, genre exclusivity is not an excessive burden.

Removing genre requirements on Category Bs would introduce greater competition and vibrancy to the specialty service sector most vulnerable to OTT and BDU responses to OTT (reworking & reducing packages etc.). Category Bs would have a competitive advantage against Cat As in terms of unrestricted genres to counterbalance their lack of carriage rights. Any potential advantage in terms of lower Canadian programming expenditure would be automatically wiped out for successful Cat Bs that are part of a larger corporate group. (Measures could be introduced for Cancon exhibition and independent Cat Bs.) Moreover, the ability of a Category B service to go head to head with an established Cat A, while theoretically possible, would be restrained by the Cat B service's lower subscriber penetration and revenues.

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[91] With the exception of Rogers, the major English-language corporate groups (Bell, Shaw, Corus) were given 5 year licence terms to August 31, 2016. Rogers was given 3 year licence terms to August 31 2014, which could always be administratively renewed. Broadcasting Decision CRTC 2011-441

If the Commission wanted to give a leg up to independent Category B services, it could choose to eliminate genre exclusivity for these services only, or at least give them a head start.

Apply to Category Bs only

Interestingly, there is an argument (although not necessarily a good one) for this completely opposite approach.

Category B services would remain free to compete with each other[92] but unable to compete in Category A genres, even though the latter would no longer be bound by these genres.

Competition, BDU expectations[93], packaging and incumbency should ensure Cat A services cover roughly the same genres anyway. In the event that a genre is completely abandoned, and the Commission deems it in the public interest, an invitation for 9(1)(h) applications to serve this genre could be issued.

Continuing to restrict Category Bs by way of genre requirements would arguably prevent "unfair" competition with Cat As at a time when the system will increasingly rely on their strength to keep subscribers connected.

Akin to an extended Category C framework, greater competition and innovation would be introduced into the mainstream genres, without opening up "unfair" competition from Category Bs.

Reduce/eliminate subjective elements

Reducing or eliminating the more subjective elements of genre protection could ensure the policy is more clearly understood, and hence easier to comply with and enforce.

As noted earlier in this paper, in addressing disputes on compliance with genre protection, the Commission has put itself in the position of increasingly having to rely on and parse the more subjective description aspect of a service's Nature of Service, as opposed to more objective program Category definitions.

There is little difficulty in enforcing the genre of a movie, sports, music or news service. The difficulty comes in enforcing genres that transcend program categories, and/or rely on program categories that can themselves be subjective - the recent OWN and G4 examples being notable in this regard.

A natural question then is why rely on the subjective nature of service descriptor at all? Why not, at least, limit issues of compliance to that of compliance with the more objective program category restriction dimension?

The pro side is clear. Fewer compliance issues. Ease of implementation. (The CRTC could simply state it will no longer enforce the descriptive component of a Nature of service definition, and that licensees could apply for amendments to that effect at their convenience.) A more general, objective test for genre. Greater flexibility for licensees. (Assuming this is deemed desirable.) But the ability to continue to tailor CPE and Cancon requirements to program Categories. Services expected to rely heavily on

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[92] For small Category B services of under 200,000 subscribers, this now includes the ability to change genre to another previously approved category B genre: Broadcasting Order CRTC 2012-689

[93] Many, if not most, affiliation agreements refer to a services nature of service, either generally or with specific reference to the services CoLs. A service that wanted to materially change its NoS would have to satisfy BDUs that this was in the BDUs interests, or risk being dropped for breach of its affiliation agreement

Canadian drama could, for example, continue to justify higher sub fees than services doing cheaper magazine style programming.

On the con side is two fold.

One, it would mean protection for only one kind of genre: the kind driven by program categories. This would continue to ensure, at least to some degree, that movie, sports, music, documentary, drama, religious, education and news channels exist[94]. We could continue to use copyright limitations, as appropriate, to separate pay, broadcast and library movie windows and as a (weak) proxy for demographic appeal. But we would no longer be trying to separate movie channels into romance, action, horror or children's. We would let the market do that. We would no longer be trying to ensure we have a homes and gardens channel or an outdoor channel or an arts channel. (Some would say, we don't really have those by fiat anyway)

Second, and perhaps the biggest con may be that the Commission has already effectively moved in the opposite direction. It has loosened its ability to rely on program categories through its 10% flexibility rule. Relying solely on program Categories for genre exclusivity would be seen as a very loose form of the rule.

Reduction or elimination of limits on program categories

This complete opposite approach was proposed by then CTVgm and Canwest in 2008.

The 2 broadcasters argued for the elimination of prohibitions on certain program categories and no limits on any categories. The only regulatory tool to ensure that services maintained the genre for which they were licensed would be the narrative description in the nature of service condition of licence.

In the result, the Commission would be called upon to interpret and enforce the most subjective aspect of Nature of Service definitions. Only the most egregious cases of direct competition would presumably be found in breach, ushering in a far more competitive specialty framework that nevertheless called for some genre distinction.

Buckets

The notion of genre buckets is one that the CRTC has effectively endorsed through its Category C approach. Further expansion of the bucket approach could be achieved by simply relaxing the criteria or mandating use of the approach.

In the 2008 review, Rogers recommended that the Commission establish five broad genres (news, sports, general interest, music and drama), each with common exhibition and spending requirements. Others proposed different groupings[95].

More recently, Rogers suggested that using six genres (in addition to news and sports) - Comedy, Documentary, Drama, Women, Lifestyle, and Music & Youth - the majority of Category A services met the Commission's criteria for opening up genres to competition[96].

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[94] This is not to suggest that there are not challenges in interpreting program categories. Formal vs. informal education: 5(a) vs. 5(b). Documentary vs. reality: 2(b) vs. 11. Etc

[95] For example, Corus proposed genre groupings of children/youth/family; news/information/education; sports/recreation; music/entertainment; and, others, as required to accommodate existing and proposed new services

[96] Rogers comments in Broadcasting Notice of Consultation CRTC 2012-246

As evidenced by other reaction to the Commission's suggestion that a genre bucket be used for music, however, with any given bucket definition, there are likely to be winners and losers – making a shift to a Category C approach for a specific genre bucket, potentially more difficult than a shift for all genres at the same time.

Presumably, somewhere between the 6 new buckets proposed by Rogers and the 12 identified by NCTA, the Commission could identify the right number and set of buckets that, in aggregate, come closest to meeting its Category C criteria. Such a wholesale change, sometimes benefiting, sometimes disadvantaging services and prospects for new services within a broadcast group, might best allow for the finding of an acceptable middle ground.

On a spectrum, such an approach would obviously be "weaker" than current genre exclusivity rules. Those that support genre exclusivity, would see its flaws in that light. Those that would like to see genre exclusivity phased out, might see it as a potentially acceptable first step. But it would be "stronger" than the exclusive reliance on program categories noted above. It would still rely on general NoS descriptors (say of a "lifestyle channel"), when necessary, with all the attendant pros and cons of that.

Combinations of the above

If the "what" is Cat A or Cat B or both and the "how" is reliance on program categories, nature of service descriptions or genre buckets, that creates as many as 9 different combinations.

The fact that such different, even opposing, combinations can be contemplated is a reflection of how mixed and unclear the policy objectives and their resolution actually are. Increasing competition and maximizing contribution can conflict with program diversity and supporting independents. And is program diversity in the interests of consumers that don't demand it?

Considering the removal of genre exclusivity for Cat As vs. Cat Bs is a particularly illuminating exercise. Do Cat As need genre protection from Cat Bs or do Cat Bs need an edge to survive?

One thing such an exercise does do is force policy makers to decide what it is they are specifically trying to achieve and what the current operating environment makes possible naturally, or requires regulation.

"Phasing Out" Genre Exclusivity

Phasing out of genre exclusivity, if deemed the ultimate goal, could be done by way of an immediate flash cut, or staged approach.

The only real advantage of staging, especially if the bucket approach were used, is if the CRTC was not 100% committed and wanted the opportunity to never go all the way.
With a flash cut phase out of genre exclusivity, the issue would be when.

There are 3 logical times:

a. Immediately post a policy decision on the matter, say 1Q 2014
b. At some point subsequent to a policy decision. Perhaps a year or so after, or the beginning of the next broadcast year
c. Effective the next group licence term, approx September 2016

The difference between the first two options would be minimal from a policy impact perspective, but may be material from a licensee perspective. The opportunity for licence holders to plan for a change in

regime, be it in terms of different program or budget expectations, would appear desirable, regardless of whether they were supporters or opponents of genre exclusivity elimination.

From a legal perspective, licensees, being in many cases mid-term, would be invited to apply for changes to CoL to eliminate Nature of service definitions. As it would be to the advantage of all licensees to do so, presumably the Commission need not be concerned if certain licensees chose not to.

The difference between eliminating genre exclusivity in the next couple of years or after licence renewals in 2016 (or later[97]) has both public policy and business ramifications.

On the latter, much of the broadcaster opposition to Rogers' proposal to eliminate genre exclusivity at the 2011 group licensing proceeding was because of the unknown outcome of that proceeding. Licensees had prepared their business plans on the basis of genre exclusivity, and were concerned that a genre exclusivity free environment might significantly change their business models and the commitments they indicated they were prepared to accept.

The adoption of a common group CPE has largely put these concerns to rest. The only broader competitive issue might be Roger's lower than average and Corus' and Astrals' higher than average programming of national interest ("PNI") commitments. Elimination of genre exclusivity would provide impetus to the argument for common PNI commitments – at least among all primarily specialty-conventional groups.

A material challenge with a mid-licence term elimination of genre exclusivity would be what to do with these commitments. For Astral and Corus, who might benefit from reduced PNI, applications to eliminate Nature of service definitions would presumably be accompanied by applications for reduced PNI expenditure requirements. The benefits of elimination of genre exclusivity alone would presumably be enough to encourage Bell and Corus to apply. Rogers would face a choice[98]. If, despite their historic support, Rogers concluded that elimination of genre exclusivity would not outweigh the costs in terms of increased PNI, they would not apply. The CRTC would however be in a position to impose it in 2016[99].

From a broader public policy perspective, the implementation of a new policy direction as soon as practicable only makes sense. If a change is desirable deferring it is illogical. Similarly, making a policy decision based on facts known at a point in time, and then implementing it at future time when the facts may have changed makes even less sense[100].

The converse is also true. The Commission should not initiate a process to review the elimination of genre exclusivity, if it has no intention of immediately acting on it. A proceeding initiated in 2015 or 2016 would make much more sense if implementation is expected to be deferred to the major group's next licence terms.

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[97] The Commission has made a decision to "wait" until renewals before, only to have those renewals deferred for a few years. (Resulting in, for example, an 11 year delay in Group TV licence renewals, as a result of the 1999 TV Policy (Public Notice CRTC 1999-97) not being revised until 2010 (Broadcasting Regulatory Policy CRTC 2010-167)

[98] The TVA Group doesn't currently operate under group based licensing as it was deemed "inappropriate" in the circumstances. Among other specific differences, TVA does not have PNI requirements at all, because of historically high levels and Cancon expenditures. Whether this would change if/as the TVA Group acquires more specialty services would also be an issue. Broadcasting Decision CRTC 2012-242

[99] The current corporate group licence terms are 5 years for Shaw, Corus and Bell. In any event, section 9(1)(c) of the *Broadcasting Act* empowers the Commission to amend licences on its own motion after 5 yrs in the licence term have passed

[100] The Commission has bordered on doing this a few times, particularly in dealing with the transition to digital. Then Vice Chair Andree Wylie's dissent on the 1996 for "hybrid" analogue-digital licensing round was based on her view that this is what the Commission was doing. Public Notice CRTC 1996-120. The digital migration policy was also very future driven at a time we did not fully know how digital would evolve. Broadcasting Public Notice CRTC 2006-23

Smart Regulation

A term somewhat out of favour, but very much relevant here.

Genre exclusivity cannot be considered "smart regulation".

It has elements that make it internally contradicting, ambiguous, difficult to understand, costly to enforce, and it may possibly be just plain wrong-headed for today's Canadian broadcast system.

Moreover, to the extent that at least some of its underlying objectives remain relevant, and require regulatory intervention to achieve, this can be done in a far less intrusive manner.

The CRTC is not required to "rely on market forces to the extent possible" in its regulation and supervision of the Canadian broadcasting system. But in this instance there is much to be said for doing just that.

There has always been something heavy handed, almost sinister, about a government body dictating the type of programming a Canadian service must air – or more precisely what it must not air. Genre protection has been good at restricting but not necessarily at creating. A service required to air X% of a certain category of programming can be made to do that, but it can't (at least today) realistically be required to spend a proportionate or given amount of money on it, air it in prime time, or promote it. And that's the definitive part of a nature of service definition. A service required to air "programming of interest to community Y" or "dedicated to P,Q, R & S" can generally take whatever view of Y they want (as long as it has some basis in reality) or focus almost entirely on R, while largely ignoring P, Q and S.

Whatever it is genre exclusivity does, it does not create meaningful exclusive genres.

The group licensing policy sensibly moved away from micro-regulation of what broadcasters put in prime time and where (both channel and genre) they spend their Canadian programming expenditures. Eliminating genre exclusivity would be a logical next step. More targeted public policy support approaches – for deserving genres or independent broadcasters - could be a more efficient way of achieving necessary policy goals that underlie genre exclusivity.

That's one view.

The other is, we've muddled along this far, we can muddle along a little farther. Other than the embarrassment it causes the industry and Commission on occasion, the need to rationalize or explain things, it's hardly the kind of offensive policy that has people calling for the abolishment of the CRTC. And quite frankly, who cares if some Category A services show some programming that "is inconsistent with their nature of service conditions of licence"[101]. If the public, or competitors don't care, why should the CRTC?

[101] The Commission's finding in respect of MTV, Twist TV, Showcase Diva, Outdoor Life Network (OLN), History, and Country Music Television (CMT) in Broadcasting Decision CRTC 2011-441