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Technological Change and Canada/U.S. Regulatory Models for Filmed Entertainment

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I. INTRODUCTION

It is a pleasure to be with you today to exchange views with you on the impact of technological change on regulation of the filmed entertainment industries in the United States and Canada.

First, I would like to offer a disclaimer. I have no monopoly on the truth. I am not a particularly gifted fortuneteller, so I can not tell you with any degree of certainty how these exciting new technologies will affect the future of the motion picture industry, much less what regulatory changes governments will adopt as a consequence. But, I am always happy to speculate.

The impact of technological change is visible in at least four areas.

1) It is alarmingly clear that the digital networked environment and the creation and distribution of optical media products such as Digital Video Discs (DVDs) pose truly mind-boggling challenges for the protection of intellectual property on the Internet.
2) Technology has already vastly increased the availability and diversity of films.
3) Electronic commerce will effect distribution – though the exact nature of change in this area is highly speculative.
4) Finally, digital technology will affect production.

I will review the nature of change in these four areas and speculate on the effects these changes could have on government regulations.

II. INTELLECTUAL PROPERTY

Digital networks make it possible for professional pirates or troublesome teens to duplicate and distribute perfect copies of films worldwide, without authorization by, or payment to, the creators. Unless governments take adequate measures to help protect digitized content, creators will lose control of their works and will be robbed of the benefits of their labor.

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As an essential first step, governments must ratify and adopt the 1996 
World Intellectual Property Organization (WIPO) Copyright Treaty\(^1\) and the 
Performances and Phonograms Treaty.\(^2\) The provisions in the Copyright 
Treaty outlawing the manufacture, distribution, and offering for sale of de-

tices that have a primary purpose of defeating measures designed to prevent 
unauthorized copying are especially important for the filmed entertainment 
industry.

The problem of unauthorized copying and distribution on digital net-
woks is not the only challenge technology poses for the copyright industries. 
Our experience in Asia demonstrates all too clearly the threat of optical me-
dia piracy.\(^3\) Optical media piracy refers to the manufacture and distribution of 
pirated CDs, VCDs, DVDs, and CD-ROMs bearing films, music, game, or 
business software. Optical media piracy has revolutionized copyright piracy 
problems worldwide. Instead of a phenomenon that primarily occurs within 
borders, piracy has been a highly international problem. Organized criminal 
groups are also increasingly involved in optical media piracy.

III. DIVERSITY

We have already witnessed huge increases in the amount and diversity of 
films available to consumers over the Internet. Consumers are no longer lim-
ited to the handful of films they can view at their local cinema, or the several 
thousand titles stocked by their neighborhood video stores. Today, consum-
ers can log onto the Internet and order a video from India, a Korean video, a 
Chinese video, or virtually any other genre or nationality of film they could 
want. Consumers can find Web sites to order their video of choice for next-
day delivery by mail to their homes. As streaming technologies come into 
their own, and they will very shortly, ordinary computer owners will be able 
to download full-length motion pictures for immediate viewing. The film 
product from the entire world will be at the fingertips of individual house-
holds.

However, there are trends in the opposite direction. Certainly, the U.S. 
studios face pressures to create products that will attract large, international 
audiences. The costs of making films are high, as are the risks. New financ-
ing models help cover the cost and spread the risk. International companies, 
such as the Australian company Village Roadshow, or the French company


\(^2\) World Intellectual Property Organization Performances and Phonograms Treaty, 

\(^3\) See Piracy Problem Countries Identified in Special 301 Filings, \textit{TAPE-DISC Bus.}, Apr. 
1, 1999, \textit{available in} 1999 WL 13261106.
Canal Plus, are big co-investors in Hollywood pictures. Often, these co-investment deals come with split distribution rights. An international investor is looking for a film that will play well in his home market, as well as in the United States. So, the big-budget picture, with the internationally understood and appreciated special effects and a story line with universal appeal gets made. Smaller pictures with more of a regional or local or ethnic appeal have a harder time attracting this kind of international financing.

Notice that I am talking about the effects on U.S. culture — about untold stories of Hispanic Americans or Asian Americans or African-Americans about stories that should be told, but may not be told. I am talking about the imperative of the international market that can impede financing. Canadians have the benefits of government subsidies to help ensure that such local and regional stories are told. American filmmakers who want to tell these stories do not benefit from U.S. government subsidies.

I do not want to over-play the effect that the demands of the world marketplace and international financing have on diversity. Small, intimate stories with ethnic and regional roots can get made — and do get made in the U.S. system. Movies such as Fargo or Sling Blade or Selena or Waiting to Exhale or How Stella Got Her Groove Back are all witness to the flexibility of the Hollywood system — or the persistence of the creators who did not stop until they got their pictures made.

What is most important is the fact that there is room in the hearts of consumers and in the electronic marketplace for mass-market films, as well as for films that focus on special segments of the viewing public. The new technologies can help ensure these films find as large a market as possible.

Ensuring cultural diversity has long been a stated goal of Canadian regulatory policy. “Creating space for Canadian content” and “making a place for Canadian content” are the phrases that appear throughout Canadian government and private sector policy documents. One example is Canadian Content in a Global World: New Strategies for Culture and Trade, the report submitted by the Cultural Industries Sectoral Advisory Group on International Trade to the Department of Foreign Affairs and International Trade and the Department of Canadian Heritage in February 1999.

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4 Fargo (Grammercy Pictures 1996).
5 Sling Blade (Miramax Films 1996).
6 Selena (Warner Bros. 1997).
7 Waiting to Exhale (20th Century Fox Film Corporation 1995).
8 How Stella Got Her Groove Back (20th Century Fox Film Corporation 1998).
Digital networks create as much space as is needed or desired. They definitely end the problems of limited space. In theatrical exhibition, there are a limited number of screens on which to exhibit motion pictures. There are only twenty-four hours in a day on a limited number of frequencies for traditional analog broadcast television. Home video stores have a finite amount of physical shelf space. By contrast, the space on the Web is infinite – or certainly appears to be infinite today.

Regulatory models like quotas are designed to solve the shelf-space problem. But, in the Internet world, there is no shelf-space problem, therefore, there is no need for quotas. Quotas are designed to address yesterday’s problems. They are passé in the Internet environment.

A. Distribution Issues

What effect will these new media have on distribution? Two trends are visible today – and they point in opposite directions. Some believe that creators will be able to reach consumers directly. They cite the example of the music industry, where recording artists are creating their own Web sites to market their recordings directly to their fans. Others believe that the brand-names held by the studios, who are the distributors, will continue to play a large, perhaps even an enhanced, role on the Internet. With so much diverse product available, consumers may want to rely on brands that they know and trust to bring them the kind of entertainment to which they are accustomed. According to this line of reasoning, consumers may be bewildered by the vast quantities of choices offered to them, so they may want to turn to studio Web pages to help guide their selections.

What does this mean for government regulation? If you believe the theory that creators will distribute directly to the public, there are implications for regulators. Under the current system, the distribution companies bear most of the costs of fighting piracy. Economies of scale can be achieved when distributors pool resources to investigate Internet piracy, take down illicit Web sites, and prosecute copyright violators of hundreds of titles at the same time. Creators are likely to find fighting piracy of just their own works to be a very expensive proposition. Governments that want to support a decentralized distribution model may need to step up efforts to investigate and prosecute on-line piracy, rather than relying on the current partnership with industry.

What are the regulatory implications if you believe the second theory, that brand-named distribution companies have a more vital role than ever in the new digital environment? If Canadian regulators applied old ways of thinking to new technologies, they could conceivably require all foreign-owned sites having Canadian addresses and/or servers located in Canada to
ensure a fixed percentage of Canadian titles. However, it is hard to envision how one would regulate sites that were located outside of Canada.

What tools would better suit the new challenges? Perhaps governments could help stimulate a local "brand-consciousness" by helping advertise available local content. I am told that Canadians can already access search tools that pull up Canadian content first on any search. Tools like this can speed those who are in search of good Canadian films to those Web sites that offer them. I do not know the answers, but I do know that it is time to think outside the old boxes.

IV. PRODUCTION

In the production area, like the distribution area, the effects of changes in technology point in two different directions.

Some argue that digital technologies can lower production costs. Digital cameras reduce costs by obviating the need for expensive 35mm film stock. Digital cameras also reduce the costs of editing. However, at present, the cost of converting digital production back to 35-millimeter film stock, which is still the standard for exhibition in theaters, remains costly. As theaters adapt digital projection technologies, the cost savings may increase. This would argue for lower production costs, which could increase the independence for filmmakers by reducing the need to rely on the big studios for financing.

Others point to the increasing average production costs for films, as special effects and stars' salaries, both of which are seen as necessary to attract international audiences, drive up production costs. This would argue for the continued role of big studios to help attract financing and offset the risks of high-cost productions and high-cost failures.

If one did believe that production costs will fall with new digital technologies, does that mean that demand for subsidies would also fall? Of course not. No filmmaker will ever say he or she has enough money or will turn down the offer of a nice subsidy to lower costs or offset personal risk.

V. CONCLUSION

This leads me to the one conclusion of which I am certain: there is no necessary correlation between changes in technology and changes in regulations. Regulations respond to many factors in addition to the hard, cold facts of changing technologies. Regulations are affected by inertia; they tend to continue in the same direction long after the initial force that set them moving in that direction has dissipated. Regulations respond to politics, and a desire to "do something" even when there is little that government regulations can achieve.
Nevertheless, we can and should strive to understand better the nature of technological change in the hopes of better informing the regulatory process. We should take steps to address the new dangers technology provides for the protection of intellectual property. We should understand that the diversity problem is no longer a shelf-space problem. We should continue to study the changes that technology may pose for distribution and production and think creatively about what regulatory changes may be warranted. And, we should try to ensure that the regulatory responses are appropriate.