The 2003 John Graham Lecture

Issues in Media Merger Policy Enforcement

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Abstract

The objectives of the *Broadcasting Act* and the *Competition Act* with respect to media mergers and acquisitions are not being achieved as effectively or efficiently as they could be. This is due to how these objectives are being pursued, not any conflict of the objectives *per se*. A welfare-enhancing, cost-reducing remedy exists that would allow the same legislated objectives to be achieved. If adopted, improved methods for assessing intra- and inter-media mergers emerge.

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* In large part this lecture is based on a series of articles by Allen & Townley and Townley. Drafts of those papers were written while the author was T.D. MacDonald Chair in Industrial Economics at the Competition Bureau. Gwill Allen, who the author thanks for his major intellectual contribution to this exercise, is currently Senior Economic and Major Case Advisor in the Criminal Matters Branch at the Bureau. The views expressed are not purported to be those of the Commissioner of Competition. Correspondence may be addressed to peter.townley@acadiau.ca.

I. Introduction

We treat three related policy issues relevant to the enforcement of legislation pertaining to intra- and inter-media mergers and acquisitions.[1] Whereas the first leads to a policy prescription specific to Canada, the relevance of the other two is not limited to a particular jurisdiction. A brief history of the *Astral* case sets much of the stage.

Astral

- Early in 2001, Astral Media Inc. proposed to acquire various radio assets of Télémédia Corporation in Québec, New Brunswick and Nova Scotia.

- On 21 December 2001, regarding the acquisition of eight radio stations in Québec that were part of this Proposed Transaction, the Commissioner of Competition filed a Notice of Application with respect to Section 92 of the *Competition Act* with the Competition Tribunal.[2] On the same date he filed a Statement of Material Grounds and Facts.[3] The following table (reproduced from that document at ¶-43) shows forecast post-merger market shares in the relevant advertising markets. It highlights a principal cause of the Commissioner's concern.[4]

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1 This paper draws much from Allen & Townley (2003a, 2003b) and Townley (2003a, 2003b). Indeed, to the extent that it is meant to summarize and extend the results of those four papers, parts of them appear here, often without citation.

2 See "*Avis de demande*" at http://www.ct-tc.gc.ca/francais/cas/ct-2001-010/0001a.pdf.

3 See "Exposé des motifs et des faits substantiels" at http://www.ct-tc.gc.ca/francais/cas/ct-2001-010/0001b.pdf

4 This could not have been the Commissioner's only concern as Section 92(2) of the *Competition Act* prohibits the finding of a substantial lessening or prevention of competition "solely on the basis of evidence of concentration or market share."

Publicité Radiophonique de Langue Française
Parts de Marché des dollars publicitaires

Villes	Parts d'Astral après la Transac.
Montréal-Franco	+ de 50%
Québec	+ de 50%
Hull/Ottawa-Fr.	100%
Trois-Rivières	100%
Sherbrooke	100%
Chicoutimi	+ de 90%[5]

- Astral (and Télémédia) proceeded to the Federal Court of Canada, "asking it to rule that the *Competition Act* did not apply to the proposed transaction and that the Commissioner therefore lacked jurisdiction over the proposed transaction."[6]

- On 19 April 2002, the Canadian Radio-television and Telecommunications Commission (CRTC) approved the Proposed Transaction.[7] The CRTC was aware of both the Commissioner of Competition's filing with the Competition Tribunal and the action brought to the Federal Court.[8]

- On 3 September 2002, before the Court could rule with respect to jurisdiction, the Commissioner and Astral registered a Consent Agreement with the Competition Tribunal.[9]

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5 In the Commissioner's filing, the following note is attached to this figure: "La station de radio communautaire CKAJ-FM a des revenus publicitaires très modestes qui ne sont toutefois pas connus. La station CKYK-FM n'a commencé qu'à diffuser dans la région de Chicoutimi-Jonquière via sa nouvelle antenne que vers la fin de l'année 2000."

6 See http://decisions.fct-cf.gc.ca/fct/2002/2002fct310.html at ¶-6.

7 See Broadcasting Decision CRTC 2002-90, *Astral Media Inc., on behalf of 3903206 Canada Inc., Telemedia Radio Atlantic Inc. and Radiomedia Inc.*, Ottawa, 19 April 2002. Available at http://www.crtc.gc.ca/archive/ENG/Decisions/2002/db2002-90.htm. A condition of approval was that CFOM-FM Lévis be divested.

8 See Broadcasting Decision CRTC 2002-90 at ¶-20.

9 See http://www.ct-tc.gc.ca/english/cases/ct-2001-010/0024b.pdf.

- A major part of this agreement required Astral to divest AM radio stations in the geographic markets identified above. On 2 July 2003 the CRTC denied approval of a transaction proposed between Astral Media Inc. and TVA Group Inc. that, in part, involved stations relevant to the Consent Agreement.[10]

The institutional setting

According to their inter-agency agreement of 8 October 1999, the CRTC and the Competition Bureau have "parallel jurisdiction" regarding radio and television broadcasting acquisitions and mergers.[11] When a 'Proposed Transaction' involving media (like *Astral*) is notifiable under the *Competition Act*,[12] staff of the Competition Bureau examine the Parties' application.[13] If the Commissioner of Competition is of a view that the transaction would likely result in a substantial lessening or prevention of competition, usually in the relevant media advertising market(s), he or she would apply to the Competition Tribunal for an order to block the merger (assuming that the Commissioner and the Parties were unable to negotiate a Consent Agreement that would satisfy the Commissioner's concerns). If the same transaction involved a television or radio broadcasting property, an application to transfer ownership (or control) of the necessary licence(s) would be made to the CRTC. Of relevance here is the *Broadcasting Act*, and Section 3 therein sets out the objectives of that legislation.[14] Although this legislation confers no explicit jurisdiction to the CRTC concerning newspapers, it is exercised indirectly if the owner of such applies for a television or radio broadcasting licence.

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10 See CRTC 2003-203, *Astral Media Inc., on behalf of 9122-8106 Québec inc., a corporation composed of TVA Group Inc. and Radio Nord Communications inc.,* Ottawa, 2 July 2003. Available at http://www.crtc.gc.ca/archive/ENG/Decisions/2003/db2003-205.htm

11 See "CRTC/Competition Bureau Interface," available at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01544e.html.

12 See Part IX of the *Competition Act* in general and Section 109 in particular.

13 Typically, if the Competition Bureau determines that a transaction would result in a post-merger market share of less that 35%, it would not be reviewed further.

14 The *Telecommunications Act*, which the CRTC also enforces, could be relevant as well; e.g., if the applicant owned a cable company, internet portal or the like.

Issue 1

The *Astral* case is an illustration of two agencies, privy to essentially the same set of facts, reaching different decisions. An obvious explanation is that the objectives of the *Competition Act* and the *Broadcasting Act* differ, so that one should expect the Competition Bureau and CRTC to reach opposite conclusions from time to time.[15] Some would resolve the apparent inter-agency conflict by having only a single agency assess media mergers. For example, Blakney & Bushell (2003: 88) advocate that the CRTC be given sole jurisdiction over broadcast media acquisitions and that it "be particularly mindful of avoiding substantial anti-competitive effects on unregulated markets, such as the market for advertising services which has been an important aspect of the Bureau's own assessment of broadcasting mergers." Their policy prescription was made in response to a presentation by the Commissioner of Competition to the Standing Committee on Canadian Heritage. In his submission, the Commissioner advocated that the mandate of the CRTC be clarified in order to "specify that the CRTC has a responsibility to preserve a diversity of voices within the broadcasting system and, at the same time, focus the CRTC review of broadcasting transactions solely on the impact that the mergers would have on core cultural values and diversity of voices."[16] If adopted, the Commissioner's proposal would leave assessment of a transaction's potential impacts on competition the sole jurisdiction of the Bureau. Blakney & Bushell are of the view that if responsibility for media mergers were to be divided along the lines advocated by the Commissioner, it would "undermine achievement of the objectives of the *Broadcasting Act*."[17]

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[15] Within the Government of Canada structure, the Competition Bureau is part of Industry Canada, and thus the Commissioner of Competition deals with the Minister of Industry. The Minister of Canadian Heritage has responsibility for the CRTC. Whereas leave to appeal Competition Tribunal decisions can be sought from the Federal Court of Appeal, the Federal Cabinet hears appeals of CRTC decisions.

[16] Konrad von Finckenstein, Q.C., Commissioner of Competition, Competition Bureau. Remarks to the Standing Committee on Canadian Heritage on the Study of the State of the Canadian Broadcasting System, 3 April 2002.

[17] See Townley (2003b) for a fuller critique of Blakney & Bushell's arguments.

The policy question both Blakney & Bushell and the Commissioner of Competition seem to be answering is along the lines of the following: What is the best way to divide responsibility for media mergers between the CRTC and the Competition Bureau in the pursuit of the objectives of the *Competition Act* and the *Broadcasting Act*? That, we think, is the wrong question because it includes an unnecessary constraint. A more constructive approach is to simplify the question: What is the best way to achieve the objectives of both Acts with respect to media mergers and acquisitions? An advantage of this approach is that it allows us to abstract from any potentially irrelevant conflicts between the CRTC and the Competition Bureau and to concentrate on any potentially conflicting objectives in the *Competition Act* and the *Broadcasting Act*. However, when we examine their 'purpose' parts, Section 1.1 of the former and Section 3 of the latter, it is not obvious why conflict arises with respect to these legislated objectives — and the criteria that flow from them — peculiar to media mergers and acquisitions.[18]

We investigate this issue in Section II. Whereas the criterion that flows from the *Competition Act* is straightforward — the Competition Bureau challenges a media merger if it would likely result in a substantial lessening or prevention of competition — the stated objectives of the *Broadcasting Act* are so broad that it would seem possible for the CRTC to find a reason to accept or reject almost any application for the transfer of a broadcasting licence. Nevertheless, we do not expect the CRTC to render decisions in a haphazard manner, and thus we seek to discover what criteria the CRTC actually applies and the extent to which it does so consistently. Relying on Townley (2003a), we find that one of the two principal criteria the CRTC applies results in that agency favouring media mergers that enhance market power in media advertising markets. As one might expect, the Commissioner of Competition is opposed to such acquisition

[18] Our interest is limited to the criteria applied by the agencies specifically when they assess acquisitions, not more general considerations. For example, the Competition Bureau assesses acquisitions with respect to Section 92 of the *Competition Act*, and thus would be concerned if one might result in a substantial lessening or prevention of competition. That the Bureau might be concerned with other potential violations of the *Competition Act* by any broadcaster — such as refusal to deal, tied sale *et cetera* — is not relevant here. Similarly, we are concerned with the criteria the CRTC applies when it receives an application for the transfer of ownership or control of a broadcasting licence, not regulations that every broadcaster must comply with as a condition of licence, such as Canadian content and ownership rules.

of market power, and therein lies a major source of inter-agency conflict.

We offer a rather obvious policy prescription. It entails the Department of Canadian Heritage taking over directly what the CRTC, rightly or wrongly, perceives to be one of the objectives of the *Broadcasting Act* — support of Canadians in cultural industries.[19] If adopted it would refine the CRTC's objectives with respect to media mergers to the protection and promotion of media plurality and diversity. And, together with the Bureau's focus on competition issues, would bring the combined objectives — plurality, diversity and competition — in line with that of other jurisdictions.[20] Moreover, it would allow (a) those objectives of the *Broadcasting Act* the CRTC currently pursues to be achieved, (b) the Competition Bureau to play its usual role *vis-à-vis* Section 92 of the *Competition Act*, (c) a resource saving to the economy, and (d) likely less burden on consumer-taxpayers.

Issue 2

However, that is not the end of the story. If the prescription of Section II were to be adopted, other policy doors open. If the objectives of media merger policy were reduced to plurality, diversity and competition, are two agencies needed? Obviously, only one is required if they would always reach the same decision, even when pursuing different objectives and applying different criteria. And, if only one is required, does it matter whether it is a cultural agency (e.g., the CRTC) or an antitrust agency (e.g., the Competition Bureau)? We investigate this policy issue in the context of intra-media mergers in Section III.

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19 Although we disagree with this and other objectives pursued by the CRTC, we take them as given here, the goal being that they be achieved in as economically sound a manner as possible.

20 For example, the Australian Competition and Consumer Commission (1999: 2) states: "It is generally considered that competition in the media is in the national interest, and that concentration of ownership can act against the Government's stated policy objectives of plurality, diversity and competition."

Issue 3

Many observers have expressed concerns regarding inter-media mergers. A major one is that cross-ownership of media may lead to a stifling of news and editorial voices. (Even if this view is valid, and there is some doubt about that, whether a government should intervene is a matter of debate that goes back at least to Presidents Jefferson and Madison.) A second concern is that the traditional antitrust approach to such mergers is inadequate because the advertising markets related to different media are perceived to form distinct antitrust markets such that an investigation of an inter-media merger, between a newspaper and a television station for example, would not reveal any potential for the exercise of market power. These fears have resulted in a call for antitrust agencies to abandon the traditional (advertising market) approach and to apply a methodology that rests on 'marketplace for ideas' concepts.

We are not alone in our reservations concerning the validity of the argument that concentration of media ownership leads to a lessening of diversity, especially as limiting diversity would appear to be inconsistent with profit-maximizing behaviour. Still, there are many dimensions to this debate.[21] That aside, our view is that while the traditional antitrust approach may be inadequate, adopting the methodology suggested by 'marketplace for ideas' advocates would likely render antitrust enforcement in this area even more ineffective. Given this unsatisfactory state of affairs, we present an alternative methodology for the antitrust assessment of inter-media mergers. It is traditional in the sense that the relevant advertising markets are examined, but non-traditional in that it derives from unilateral effects theories which, so far, have not been incorporated into the analysis of such mergers. Section V concludes.

[21] See Allen & Townley (2003a) for a full discussion of this issue.

II. Issue 1

The question is this: Is there a fundamental conflict between the stated objectives of the *Broadcasting Act* and the *Competition Act*, or does the conflict observed between the CRTC and the Competition Bureau arise because of the way these objectives are pursued rather than the objectives *per se*? Again, we are interested in only those objectives and the criteria flowing from them peculiar to the assessment processes of the two agencies, not more general considerations.

As the 'purpose' sections of the two acts reveal no obvious conflict, and as the Competition Bureau's decision rule is straightforward, we turn to the objectives pursued and criteria applied by the CRTC. Public statements made by the CRTC are rather vague and, thus, not very helpful in this regard. Moreover, what the CRTC does and what it says it means to do sometimes differ. Therefore, it is necessary to deduce the CRTC's objectives from its actions.

To this end, Townley (2003a) investigates fifteen decisions made by the CRTC between 2000 and 2002 (all made after a number of relevant CRTC policy statements). By short title, CRTC decision number and type, they are the following: (1) ***CHUM***, Decision 2000-219, competing applications for a new television station in Victoria; (2) ***CanWest***, Decision 2000-221, acquisitions by CanWest Global of television stations (five in British Columbia, four in Alberta, one in Ontario, and one in Québec); (3) ***CTV-BCE***, Decision 2000-747, acquisition by BCE of control of CTV (involving television broadcast licences); (4) ***TSN***, Decision 2000-86, CTV acquiring various television properties, one potential result being common ownership of TSN and SportsNet; (5) ***Power***, Decision 2000-87, acquisition of radio and television assets in Ontario, New Brunswick and Québec; (6) ***CTV***, Decision 2001-457, renewal of licences by CTV (after BCE's acquisition of CTV and the *Globe & Mail*); (7) ***Standard***, Decision 2002-91, acquisition of radio and television assets; (8) ***Rogers***, Decision 2002-92, acquisition of various radio stations and a radio network; (9) ***Winnipeg***, Decision 2002-224, competing applications for a new radio station in Winnipeg; (10) ***Newfoundland***, Decision 2000-141, transfer of ownership of seven radio stations in Newfoundland; (11) ***Global***, Decision 2001-458, television licence

renewals (after the acquisition of the *National Post* by CanWest Global); (12) ***Astral***, Decision 2002-90, acquisition of radio stations in Québec and the Maritimes; (13) ***Quebecor***, Decision 2001-384, acquisition of television assets; (14) ***Wawa I***, Decision 2002-258, acquisition of radio assets; and, (15) ***Wawa II***, Decision 2002-259, acquisition of radio assets.[22]

What becomes clear is that the CRTC's principal preoccupations, as revealed by its own decisions, are the support of Canadian cultural industries (both individuals and firms) and the protection of the diversity of editorial voices.

II.1 Diversity

The CRTC is concerned about the impacts of media mergers on editorial diversity and programming diversity, and it has developed rules concerning these matters, although it will be seen that they are waived in various circumstances and conflict with its other principal objective. Also, although the CRTC does not control newspaper ownership directly, cross-media ownership issues involving newspapers have arisen (recently in ***CTV***, ***Global*** and ***Quebecor*** decisions).

II.1.a Policy statements

In 1998 the CRTC revised its rules with respect to ownership of radio stations :

> …[I]n markets with less than eight commercial stations operating in a given language, a person may be permitted to own or control as many as three stations operating in that language, with a maximum of two stations in any one frequency band. In markets with eight commercial stations or more operating in a given language, a person may be permitted to own or control as many as 2 AM and 2 FM stations in that language.[23]

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[22] All CRTC public statements and decisions are available at http://www.crtc.gc.ca by decision or notice number (which we will include in this paper rather than full citations).

[23] Public Notice CRTC 1998-41, ¶-5. The policy prior to this notice was to restrict ownership by a single entity in an area to one AM and one FM radio station in the same language.

The CRTC expressed it opinion regarding the potential impacts of common ownership on the diversity of news voices, programming variety and competition thus:

> In the Commission's view, increased consolidation of ownership will enable the radio industry to strengthen its overall performance, attract new investment, and compete more effectively with other forms of media. […] The Commission is satisfied that the revised policy will provide for a strengthened radio industry, while responding to longstanding concerns regarding diversity of news voices, media cross-ownership and fair competition.[24]

The CRTC's reasoning seems to rest on a belief that radio licence holders, now with excess profits because of increased concentration, spending them on investments that, before acquiring market power, they chose not to pursue, presumably because they were not worthwhile. That is, we are to believe that they are profit-maximizing in advertising markets but not with respect to investment behaviour. In any case, to some extent, the statement reveals that the CRTC is aware of potential links between ownership concentration and programming/news diversity, while perhaps not being aware that consolidation may have different impacts depending on the type of diversity in question. For example, the music industry argues that programming diversity "would best be served by increasing the number of licensees in a market than by allowing increased consolidation."[25] Meanwhile, others are concerned with the impacts on the diversity of news voices and related impacts on independent stations. In its Commercial Radio Policy (Public Notice CRTC 1998-41), the CRTC laid out its views on these topics:

- "In determining a model for a new common ownership policy, the Commission has sought to strike a reasonable and acceptable balance between its concerns for preserving a diversity of news voices in a market, and the benefits of permitting increased consolidation of ownership within the radio industry."

- Common ownership of different media (radio, television, newspapers, etc.) would "give rise to concerns such as the potential for gate-keeping with respect to

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[24] Public Notice CRTC 1998-41, ¶-6. Although the CRTC uses the term 'fair competition', it is clear that its intention is to allow (encourage) profits in media advertising markets greater than those that could be earned in competitive markets; i.e., profits resulting from the exercise of market power. We turn to this topic below.

[25] Public Notice CRTC 1998-41 at ¶-25.

information, and the concentration of the advertising market in one person's hands."[26]

- Whereas the CRTC accepted the usual economic notion that concentration of ownership of radio stations within a market would likely increase format diversity, "it is not convinced that this owner would maintain formats that differ from those employed by stations that are owned by other broadcasters in that market."[27]

Regarding television broadcasting, the CRTC's views with respect to ownership concentration are expressed in "Building on success: A policy framework for television."[28] The current ownership policy is that, in any geographical market, no broadcaster can own more than one television station in any one language. Moreover, with respect to its desire to promote local news programming, at ¶-47 the CRTC states:

> The Commission believes that, in the new television environment, there are sufficient market incentives to ensure that audiences will continue to receive a variety of local news without regulatory requirements. News programming is a key element in establishing a station's identity and loyalty with viewers and is generally profitable. Further, licensees may not solicit local advertising in a market unless they provide local news or other local programming.

Of course, if market incentives (of the first sentence) were truly believed to be sufficient, we question the need for the regulatory threat (in the third).

In Public Notice CRTC 1992-42, the CRTC reveals the view that common ownership holds the promise of significant 'tangible benefits' and the threat of loss of diversity: "The

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[26] Armstrong & Fox (1996: 5) report the Australian policy: "Broadly speaking, a group may not control any combination of television, newspapers or radio in the same geographical area."

[27] The CRTC does not explain its views regarding the incentives involved or the benefits of competition. Berry & Waldfogel (1999), using 1993-97 data (thus after the FTC relaxed ownership rules), conclude that increased concentration in the radio industry led to an increase in programming variety. Part of this phenomenon can be explained by owners of multiple stations covering the programming spectrum as best they can in order to preempt entry. Moreover, duplication of programming type (e.g., classical music) across commonly owned stations within the same geographical market would not be a profit-maximizing strategy.

[28] See Public Notice CRTC 1999-97.

Commission has therefore consistently weighed proposed benefits against the potential for concentration of ownership and concerns regarding any reduction in the diversity of expression available in a market." However, instead of stating precisely how it would address this trade-off, the CRTC advises that it will deal with it "on a case-by-case basis."

II.1.b Decisions

As Townley (2003a) provides a detailed discussion of how the CRTC treats diversity issues in actual decisions, we offer only a brief summary here. Essentially, the CRTC applies structural remedies when a merger raises concerns about news and/or editorial diversity. Its remedies differ depending on whether the transaction is intra- or inter-media.

Astral, perhaps with foresight regarding potential diversity concerns, proposed its own structural remedy which was acceptable to the CRTC. In this decision (at ¶-47) the CRTC states:

> With respect to news, Astral Media stated that its first challenge would be to repatriate radio audiences by offering large amounts of high-quality news programming from various sources. It also indicated that, during peak morning hours, separate teams of journalists for the three networks would ensure diversity in the delivery of news. Further, the Commission notes the applicant's statements concerning the broadcast of news on weekends as part of the overall improvement in local content and news that will result from the establishment of a central newsroom in each local market.

In ***Winnipeg***, a concern arose because CanWest Global, already owned a Winnipeg television station. As a remedy, the CRTC (at ¶-7) ordered the following:

> In order to ensure that the radio station's newsgathering and news management activities are separate from those of CKND-TV, the licensee shall maintain a separate radio newsroom and employ a separate radio news director and a team of journalist/announcers. The news director shall control the news stories that the radio station will broadcast, and the presentation of news on the radio station shall be accomplished by dedicated radio station personnel.

The ***Global*** and ***CTV*** cases raised similar concerns. Although the principals in each instance owned a variety of media outlets and related assets, it was the common ownership of newspapers and television stations (networks) that caused the greatest concern.[29] As the CRTC's decisions in these cases with respect to diversity are almost identical, we report only parts of the ***Global*** decision.

CanWest Global argued that common ownership of television and newspapers would enhance efficiency and news gathering. At ¶-14 of the decision,

> Global considers that its links with *The National Post* and local papers will help it to free up journalistic resources to cover additional stories and to undertake more investigative reporting. For example, in some instances, a newspaper and a television station could pool resources to cover routine news stories such as news conferences so that more reporters would be available to cover additional stories.

This argument did not seem to impress the CRTC. At ¶-116, it states:

> Global will maintain its own news management structure for Global television operations which is separate and distinct from that of Global newspaper holdings.[30] Journalistic content and presentation decisions for Global will be made by Global television news management;
>
> Global news managers will not sit on editorial boards of any newspapers owned or controlled by Global; and,
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> Global will establish an internal mechanism to deal with complaints arising from any of the principles and practices included herein, and will report back to the Commission on an annual basis.

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29 The ***Quebecor*** case also raised similar concerns. However, before the CRTC could act, the Competition Bureau entered into a Consent Agreement with this conglomerate resulting in Quebecor undertaking to divest a majority interest in the French-language TVS television network.

30 Damsell (2003) reports CanWest Global's plans to centralize its newspaper editorial operations in Winnipeg.

One difference between ***Global*** and ***CTV*** decisions, however, concerns a potential role for the Canadian Broadcast Standards Council (CBSC). The CRTC (at ¶-125) offers a proviso to the above:[31]

> The Commission will be prepared, however, to consider suspending application of the conditions of licence respecting cross-media issues if the licensee is able to enter into an agreement with the CBSC resulting in an industry-wide code approved by the Commission and while Global is a member in good standing of the CBSC. The CBSC code of conduct must include an appropriate monitoring mechanism to be administered by the CBSC.

We observe three other facets related to diversity. First, in ***TSN***, the CRTC states, “In order to ensure a diverse offering of programming services, it has been the Commission’s practice to license no more than one specialty service per programming genre.” We leave readers to mull over this statement. Second, although the CBC is funded largely out of general tax revenues, it would appear that amending its mandate in order that it fill ‘diversity gaps’ has not received much attention.[32] Third, as will be discussed in the next section, the CRTC restricts entry — and thus diversity — in pursuit of its other (revealed) principal objective.

II.2 Tangible benefits tests

The CRTC’s other revealed objective is the support of members of Canada’s cultural industries. The CRTC requires applicants for the transfer of owner or control of television and radio licences to incur costs in addition to the purchase price of the asset. The CRTC calls these ‘tangible benefits tests’. The television test is somewhat more complicated than the one for radio transactions, and both are set out below. Certainly, more economically sound methods of pursuing this objective exist.

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[31] A potential role for CBSC is also mentioned in ***Quebecor***.

[32] See Townley (2003a).

II.2.a Stated radio 'tangible benefits' policy

When the CRTC receives an application to transfer a radio broadcasting licence due to an acquisition or change in control, a benefits test is administered. In addition to satisfying various Canadian content and ownership rules, the applicant is required to pay an additional (minimum of) 6% of the value of the transaction to beneficiaries approved by the CRTC. These payments are to be incremental to whatever monies the applicant is already 'donating', and the applicant must assume any outstanding 'donation' commitments, such as those made by the pre-transfer licence holder.[33] According to Public Notice CRTC 1998-41, the 6% levy is to be distributed as follows:

> 3% to be allocated to a new Canadian music marketing and promotion fund; 2% to be allocated, at the discretion of the purchaser, to FACTOR[34] or MusicAction[35]; and 1% to be allocated, at the discretion of the purchaser, to either of the above initiatives, to other Canadian talent development initiatives, or to other eligible third parties directly involved in the development of Canadian musical and other artistic talent, in accordance with Public Notice CRTC 1995-196, as may be amended from time to time.

Seven of the decisions between 2000 and 2002 examined (thus subject to Commercial Radio Policy: Public Notice CRTC 1998-41) involved the transfer of radio broadcasting licences. As some are mixed television-radio transaction, we will describe the television 'tangible

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[33] See Public Notice CRTC 1998-41 at ¶-71.

[34] FACTOR is *The Foundation to Assist Canadian Talent on Records*, a private, non-profit organization that provides financial support to all facets of the Canadian recording industry (artists, labels, distributors, producers, engineers *et cetera*.) See http://www.factor.ca/geninfo.html#.

[35] According to http://www.cbsc.org/alberta/search/display.cfm?Code=2942&coll=FE_FEDSBIS_E,

> MusicAction is a non-profit organization which specializes in providing assistance with sound recordings, video, tours, promotion and the marketing of recordings. MusicAction is an autonomous organization which provides financial support to the independent Canadian sound recording industry.

In order to qualify for support, applicants must satisfy citizenship and French-language requirements.

benefits' policy before itemizing actual levies.

Still, ***Wawa I*** and ***Rogers*** provide examples of the benefits test applied to radio-only transactions. In ***Wawa I***, H.F. Dougall Company Limited sought to acquire from North Superior Broadcasting Limited two radio stations, *CJWA-FM* in Wawa, Ontario and *CFNO-FM* in nearby Marathon. The value of the transaction was $600,000, and the applicant's offer to donate $36,000 over five years — exactly 6%, divided evenly between the Canadian Music Marketing and Promotion Fund and FACTOR — was accepted. In ***Rogers***, $6-m was paid in addition to the $100-m price tag of the assets.[36] One notes that these applicants adhered exactly to the 6% rule, much as they would to a tax rate.

II.2.b Stated television 'tangible benefits' policy

The CRTC also requires satisfaction of a benefits test for the transfer of ownership or control of television stations, but the 'public interest benefits' involved differ in form and magnitude from those exacted in radio transactions.[37] The dollar value of the benefits required to satisfy the CRTC was clarified in Public Notice 1999-97 (at ¶-22, italics added):

> The Commission hereby amends its benefits policy in respect of all transfers of ownership or control involving television broadcasting undertakings, including conventional, pay, pay-per-view and specialty television undertakings. *It will generally expect applicants to make commitments to clear and unequivocal tangible benefits representing a financial contribution of 10% of the value of the transaction, as accepted by the Commission*. This policy will apply to any application filed on this date or after.

[36] Rogers' $6-m was distributed as follows: $3-m to Radio Starmaker Fund, $2-m to FACTOR, $700,000 to Historica, and $300,000 to VoicePrint.

[37] Having dismissed the notion of an auction or similar mechanism for allocating available licences in Public Notice CRTC 1992-42, at ¶-25 of Public Notice 1999-97, the CRTC states: "In the Commission's view, the absence of a competitive process for changes to the ownership or control of programming undertakings makes the benefits test an appropriate mechanism for ensuring that the public interest is served." The CRTC provides no analysis in support of this decree.

A guide to what expenditures would be considered acceptable by the CRTC is provided in Public Notice 1993-68. These include the following: expenditures on new programming and production, with qualifications on place of production and nationality of personnel; expenditures involving the development of Canadian talent; grants and contributions to various cultural agencies and associations (e.g., Canadian Women in Radio and Television); research and development expenditures, with the proviso that the projects benefit the public or the industry as a whole; and, incremental capital expenditures for technical improvements.

The ***BCE-CTV*** 'tangible benefits' package provides a useful illustration of the kinds of expenditures the CRTC approves. The value of the transaction was $2.3-b, and BCE offered a package of incremental benefits (expenditures) of $230-m to be paid over seven years, thus meeting exactly the CRTC's 10% requirement dictated in Public Notice 1999-97. The following table is drawn from this decision in order to provide a degree of detail that may be instructive.[38]

[38] We find it odd that news is categorized as "non-priority programming" (whereas drama is "priority programming") given CRTC statements favouring the 'diversity of news voices' and that it does not allow broadcasters to solicit advertising in markets unless it airs sufficient local news and programming. See ***Power***, ***CTV*** and ***Global***.

BCE-CTV ‘Tangible Benefits’

Priority programming benefits	($140,000,000)
New movie series	$45,500,000
Drama series extensions	$25,000,000
Documentaries	$18,000,000
Canadian Variety Show	$10,500,000
Other priority programming	$23,000,000
Cross-cultural development initiatives	$2,000,000
Drama development	$5,000,000
Third-party promotion	$7,000,000
National Broadcast Reading Service	$2,000,000
The Toronto Documentary Forum	$1,000,000
Documentaries at Banff	$1,000,000

Non-priority programming benefits	($72,600,000)
Journalism training for graduates in science, engineering and other disciplines	$14,000,000
Reporter training and coverage of events of significance in different cultural communities	$3,500,000
A weekly 30-minute current affairs show produced by and for youth using Web tools and technologies	$11,000,000
Five news bureaus will be established in New York, Hong Kong, New Delhi, Johannesburg and Berlin	$12,000,000
A system to deliver coverage, for local broadcast, of international issues of particular interest to individual communities or regions in Canada	$10,000,000
Funding for the creation of six Aboriginal Television Service news bureaus across Canada	$3,000,000
Creation of a network linking various Canadian film, new media and other organizations for the purposes of training and collaboration	$5,000,000
National Screen Institute	$1,000,000
Women in the Directors Chair workshops	$100,000
iTV specialists in the development offices	$3,000,000
Bell Broadcast and New Media Fund	$10,000,000

Non-programming benefits	($17,400,000)
Canadian Media Research Consortium	$3,500,000
BCE Chair in convergence and creative use of advanced technology at Ryerson	$2,500,000
BCE New Media Centre of Excellence – BC Institute of Technology	$1,500,000
Community journalism initiatives	$2,000,000
Aboriginal production training – Capilano College	$250,000
CFTPA/APFTQ mentorship program	$800,000
St. John’s Women's Film and Video Festival	$100,000
Canadian Women in Communications	$750,000
History of Canadian Broadcasting	$250,000
Museum of Canadian Broadcasting	$250,000
Canadian Television Image Bank	$3,500,000
Academy of Canadian Cinema and Television	$1,000,000
Mnet: Media Awareness Network	$500,000
Leave Out Violence (L.O.V.E.)	$500,000

II.2.c Levies

Townley (2003a) provides much detail regarding the ‘tangible benefits’ in each case and their composition. Eleven of the cases examined involved these payments.[39] Listed by licence type, value of the transaction and levy paid, they are: ***CTV-BCE*** (TV; $2.3-b; $230-m); ***CanWest*** (TV; $692-m; $82.29-m); ***Quebecor*** (TV; $489-m; $48.9-m); ***TSN*** (TV; $352-m; $35.22-m); ***Standard*** (radio and TV; $245.6-m; $15.378-m); ***Astral*** (radio; $255-m; $15.3-m)[40]; ***Power*** (radio and TV; $107.5-m; $8.75-m); ***Rogers*** (radio; $100-m; $6-m); ***Newfoundland*** (radio; $17.75-m; $1,066,250); ***Wawa I*** (radio; $600,000; $36,000); and, ***Wawa II*** (radio; $165,400; $9,924). In the case of mixed transactions, the total value of the transaction is divided into radio and television parts and the 6% and 10% levies are applied accordingly.

Two main issues are of importance to us. First, in return for these tangible benefits, licensees are awarded various degrees of market power in media advertising markets. Moreover, the CRTC protects this market power by restricting entry. For example, in ***CHUM***, one Commissioner stated: “I would not approve an application for a second television station in Victoria because the advertising revenue available is not sufficient to support another locally oriented television station.” Similar sentiments are expressed in other decisions. In ***Power***, the CRTC ruled, “The licensee shall not solicit local advertising in the Baie-Comeau market and the surrounding areas served by local stations.” In CTV it stated:

> The Commission considers that the Halifax region remains unable to support further local advertising. It therefore denies the request to remove the condition of ASN's licence that prohibits the solicitation of advertising in the Halifax/Dartmouth area.

Despite its public statements, the CRTC does attempt to assess the financial impacts of licence

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39 Tangible benefits tests were not relevant in four cases; ***CHUM*** and ***Winnipeg*** involved new licences, and ***CTV*** and ***Global*** were applications for licence renewals.

40 The value of the Astral transaction and thus the levy are subject to change. Presumably, if Astral divests in accordance with its Consent Agreement with the Bureau, it will not be obliged to pay a levy on the value of those assets.

transfers and entry. Obviously, it is encouraged to do so by encumbent licence holders who routinely appear as intervenors at hearings. Moreover, the CRTC is aware that dissipation of these excess profits would diminish the ability of these licence holders to fulfil their 'tangible benefits' commitments. Rent-seeking behaviour abounds and the CRTC is one of the seekers.

Second, in the case of television licences, the CRTC's tangible benefits test restricts vertical arrangements that are potentially welfare-enhancing. It would appear that the lessons of Australia and the United States have not been learned.[41] We deal with these in turn.

II.3 Alternatives

II.3.a Support of cultural associations

Although acquirers of television licences can also fulfil 'tangible benefits' commitments by paying money to cultural associations, it is convenient to restrict the discussion to the 6% levy on the value of radio assets. These monies are paid to CRTC-approved recipients who would, presumably, be indifferent as to the source of these funds, the obvious question is whether or not a less anti-competitive way of funding their activities exists; i.e., one that is less costly to the Canadian economy.

The thinking may be that the CRTC is simply exacting from radio station owners some of the excess profits it helped to create. There is more to it, of course. Obviously, no radio station buyer would be willing to pay this levy unless it could be recouped from advertisers. Indeed, the excess profits earned on these licences may be many times the 6% levy depending on the market power bestowed on the buyer by the CRTC. And, of course, when advertising rates increase, advertisers will pay only if it is profitable, and this leads to higher prices of the advertised goods

[41] Australia ceased assessing impacts on advertising markets when it went to its one-agency model. The Federal Communications Commission in the United States and the OECD have issued studies concerning vertical arrangements and other aspects of media mergers and acquisitions recently. These are discussed in Section II.3.b.

and services. Ultimately, the incidence of the CRTC's tax, like most taxes, can fall on a variety of economic agents by backward and forward shifting. This is a case of regulatory capture.

As Canadians ultimately bear the burden of this levy in a variety of markets, an obvious alternative to the CRTC's arrangement would be to use general tax revenues to fund the same objectives and not to allow the acquisition of market power. That is, a better policy prescription would be to remove the reason for the CRTC to levy its tax and to protect market power.

II.3.a.i Who benefits?

If it were true that all radio station owners were the sole, ultimate beneficiaries of these cultural grants and promotion schemes, an across-the-board levy on licences might make sense. However, it is not true that the benefits, if they exist, would accrue only to radio licence holders. Presumably, the grant recipients and television broadcasters, for example, would also benefit from augmented music production.

Indeed, if cultural benefits actually result from these cultural grants, would they not accrue to all members of the culture, the general public? If true, then application of the benefit principle would suggest that the activities the CRTC's levy finances be funded from more broadly defined sources. The public purse is an obvious alternative.

II.3.a.ii Transparency

It would appear that knowledge of the CRTC's 'tangible benefits' levy is not widespread. Indeed, it is doubtful that many Canadians appreciate that they ultimately pay this levy and any deadweight losses associated with market power in radio advertising markets. It is worrisome that lack of transparency is consistent with lack of accountability.

Consider the alternative. If these activities were funded out of general tax revenues, the

related expenditures would be public. Taxpayers would have a truer view of their cost to the economy and, thus, they would be better able to assess any net contribution of these expenditures. That is, it would provide the public with fuller information about the activities of government so that they might more meaningfully express their wishes with respect to the allocation of tax dollars.

II.3.a.iii Stability of funding

As described in Section II..2.a, two principal recipients of the CRTC's levy are FACTOR and MusicAction. Examples of what activities they fund are the production of recording demos, songwriting grants, video production grants and touring grants for individual artists.[42]

FACTOR and MusicAction (jointly called FMC) received additional funding from the Department of Canadian Heritage of $5,115,000 and $3,410,000, respectively, in 2001-2002.[43] In their joint 2000-2001 Annual Report, they state: "This year, the Department of Canadian Heritage contribution to FMC remained at $8,525,000, the same as it as been over the past four years." FMC also lists $2,182, 214 in 'Private Contributions', composed of $1,716,547 to FACTOR and $465,667 to MusicAction. Of interest here is what portion of these private contributions were the result of the CRTC's 6% levy. The Annual Report states:

> Voluntary radio contributions to FACTOR from its Sponsoring Radio stations totaled $932,166. As well, FACTOR received $784,381 from radio stations resulting from the recent CRTC decision allowing multiple ownership of stations in a single marketplace.

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42 An accounting of how they distribute funds can be found in their (joint) 2000-2001 annual report, which is available at ttp://www.factor.ca/annrep/FMC_2001_Activity_Report-English.pdf. A separate report for FACTOR for the year 2001-2002 is available at http://www.factor.ca/annrep/FACTOR_2002_Annual_Report.pdf.

43 A member of the Department of Canadian Heritage sits as an observer on the FACTOR Board of Directors.

Thus, it appears that the Department of Canadian Heritage has effectively delegated responsibility for administering cultural grants for music-related activities to FACTOR and MusicAction. Because their activities are specialized, it would not be surprising if these associations performed their tasks in a more informed, efficient manner than possible for employees of the Department of Canadian Heritage. On the other hand, we note that this department funds various music-related activities under a variety of umbrella organizations including Arts Presentation Canada, Canada Council for the Arts, Canada Music Fund (in addition to FMC) and the Cultural Industries Development Fund.[44] If there is considerable overlap of their activities and those of FMC, wasteful duplication may be the result, and a case for more centralized administration of the grant monies involved could be made.

For our purposes, it does not matter if the arrangements with MusicAction and FACTOR are optimal; we simply take them and other funding arrangements as given. One relevant question is whether they would be indifferent between receiving $\$x$ *via* the CRTC's 'tangible benefits' scheme and an additional $\$x$ from the Department of Canadian Heritage. We cannot think of any financial reason why funding out of general tax revenues would be less attractive than *via* the CRTC. Indeed, the Department of Canadian Heritage provided 70% of the funds FMC received in 2000-200l for disbursement — thus from general tax revenues. That same year FACTOR received only 10% of its financing from levied 'tangible benefits'.

In any case, there may be a good reason why direct government funding may be preferred. Financial commitments (tangible benefits) made by parties usually involve equal payments, typically over seven years. The flow of funds to the recipient from a particular licence acquirer, therefore, is stable over this time horizon. However, total funding from all licence acquirers is not likely to be stable from year to year. To be so, the aggregate value of radio station transactions, for which the transfer of licences is required, would have to be stable year after year. This circumstance seems quite unlikely. Theoretically, at least, should the Department of

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[44] Descriptions of these and others are available at http://www.canadianheritage.gc.ca/pc-ch/sujets-subjects/arts-culture/musi/index_e.cfm.

Canadian Heritage increase its contribution to FMC and other funds in order to replace what would no longer be derived from the CRTC's levy, stable (total) funding could result. Presumably, this would allow the various recipients to plan their activities on a longer-term, more forward-looking basis.

II.3.a.iv Transactions and other costs

Although the amounts are not large, if general tax revenues were to replace monies raised by the CRTC's levy, some additional deadweight loss due to taxation would result. It is not clear what, if any, deadweight loss would be eliminated if acquisitions that would result in a substantial lessening of competition were no longer allowed. Changing the rules for new licence transfers would not affect the market power granted by the CRTC previously[45] unless that agency also ceased restricting entry except on the basis of bandwidth (spectrum) capacity.[46] Also, as price discrimination is widespread in radio advertising markets, it is not clear that changing advertising rates for infra-marginal advertisers would have an impact on quantities.

The consequences of the proposed funding arrangement for transactions costs are clearer. They would be negligible for the Department of Canadian Heritage and the associations that are currently funded. Moreover, the latter may save on lobbying effort. Applicants for the transfer of

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45 As it seems unlikely that the Competition Bureau would (or could) proceed under Section 79 of the *Competition Act*, for example, because licence holders behaviour is regulated, expanding the number of licences in such geographical markets may be an adequate remedy to existing, anti-competitive situations.

46 This would require a major change in how the CRTC assesses applications for new licences as it currently examines the impact of entry on market encumbents. In Decision CRTC 99-481 (Introductory statement —Licensing new radio stations, 28 October 1999), it states (italics added):

> The possibility that licensing too many stations in a market could lead to a reduction in the quality of service to the local community remains of concern to the Commission. The economic condition of the market and *the likely financial impact of the proposed station upon existing stations* in the market will therefore be relevant.

If spectrum limits were relevant, presumably an appeal could be made to auction theory specialists.

broadcast licences would save effort because it would no longer be necessary to set out a 'tangible benefits' section in their applications. Perhaps the largest savings would accrue to the CRTC. It would no longer have a reason to assess any economic or financial aspect of an application, including market conditions and the size and composition of its levy. Although this effort is minor in some cases, it is apparent from many of the cases discussed that this effort can be time-consuming and expensive. Obviously, having one rather than two agencies assess the economic impacts of acquisitions (although the Competition Bureau and the CRTC currently do so from different perspectives) would entail major cost savings.

II.3.b Television 'tangible benefits': Vertical restraints

Applicants for television broadcast licences also include grants to various, CRTC-approved cultural groups as part of their 'tangible benefits' offerings. And, like radio cases, the CRTC maintains and erects barriers to entry into advertising markets, thus allowing licence holders the opportunity to exploit market power in advertising markets. To this extent, the analysis of Section II.3.a regarding the treatment radio licence transfers applies to the transfer of television broadcast licences *mutatis mutandis*, as does the policy alternative of funding various CRTC-approved recipients out of general revenues.

Of more particular concern with respect to television broadcast licence transfers is the CRTC's requirement with respect to independent producers. This issue arose in ***TSN***, ***CHUM***, ***Power***, ***CTV*** and ***Global*** cases. The CRTC states its policy at ¶-42 of either the ***Global*** or the ***CTV*** decision:

> …[T]he Commission expects the licensee to ensure that at least 75% of all Canadian priority programming broadcast by the licensee on average over the broadcast year is produced by independent production companies. For the purpose of this expectation, an independent production company is defined as a production company in which the licensee, and any company related to the licensee, owns or controls, directly or indirectly, in aggregate less than 30% of the equity.

This policy, which limits vertical integration and agreements between broadcasters and producers, is similar to the Federal Communications Commission's so-called 'Fin-Syn' rules for American television broadcasters. Levy *et al*. (2002: 114) describe them:

> From 1970 through the early 1990's, the broadcast networks were subject to Fin-Syn. These rules prohibited any network from acquiring financial interest in television programs produced wholly, or in part, by a person other than the television network; networks could only purchase rights from the producer to air such programming, or alternatively, they could produce programming entirely in-house. Later, pursuant to Consent Decree entered into between the Department of Justice and each of the respective networks (NBC in 1978, and ABC & CBS in 1980), the amount of in-house program production activity was limited. Furthermore, under the Fin-Syn rule, the networks could not engage in the business of syndication for programming distributed over the network, but produced outside the network. For programs wholly produced by the networks, the Fin-Syn rule required that, if the program was to be syndicated, the networks were required to sell their syndication rights to others.

As these rules were eliminated in 1995, the American before-and-after experience may be instructive.

Television networks have a number of incentives to integrate vertically or to enter into financial arrangements with production companies. Moreover, as production companies have incentives to enter into arrangements with networks, such agreements can be mutually advantageous, not involving any exercise of market power. Therefore, restrictions on them have the potential to diminish social well-being.

An important reason for entering into agreements to develop television shows and the like is risk sharing. New television shows, for example, are costly to develop, with high front-end costs usually requiring significant (debt) financing, and much risk exists concerning whether they will develop into a property suitable for airing, if they will endure once aired, and if there will be

enough episodes for syndication. As it happens, many series become profitable only if revenues are generated from domestic syndication and the sale of foreign broadcasting rights. In the absence of rules, a network might choose to operate its own development and production facilities in order to have greater control over costs. On the other hand, by entering into an agreement with a production company, the sharing of development and production costs would cause risk to be spread and a social gain to result. Of course, similar behaviour, involving several series and thus multiple risks, may result in the social gains associated with risk pooling.

Nevertheless, it would appear that the rationale for the 'Fin-Syn' rules (and may be the CRTC's for its rules) is the thinking that diversity of ownership across broadcasters and producers encourages diversity of content. Einstein (2003: 1-2 and 24, respectively) summarizes this concern:

> In the 1970s, what led the FCC to institute the financial interest and syndication rules was a concern that the networks were becoming both too powerful and too demanding when it came to this [program] selection process. Too powerful, in that they were the gatekeepers of news, information and entertainment for the American public. This was so because of the limits of the radio spectrum, which made the broadcast networks the only providers of television programming in most U.S. markets.

[...]

> The FCC's contention has been that there is a correlation between who the suppliers of programming are and the diversity of programming that they produce. This is based on the Commission's past minority ownership and EEO policies as well as the fin-syn rules which suggested that more producers, and specifically not the networks as producers, would create more diversity for prime time network viewers.

When the 'Fin-Syn' rules were repealed, the structure of the industry changed significantly. Levy *et al*. (2002: 133) provide great detail:

> The repeal of the Fin/Syn rules allowed networks to take ownership of studios and shows and resulted in considerable consolidation, with all the broadcast networks now sharing the

> same parent with at least one full-service television production studio. While not every television studio owns a network, every network but NBC has a full-service sister studio. Networks have also outsourced production efforts to independent contractors as a way to curb deficit financing of programming. The repeal of Fin/Syn has also led to the networks increasingly taking equity stakes in third-party studio productions, thus ensuring their participation in possible upside from syndication sales, while potentially lowering their costs and potential risk.

As participants in the industry could have chosen not to react when these rules were repealed, yet chose different physical and financial arrangements instead, one can infer that the rules had, indeed, caused various costs, including that of taking risks, to be higher than necessary.

Of course, had these rules actually preserved and enhanced programming diversity, these extra costs may have been deemed worthwhile. However, this would appear not to be so. Einstein (2003: 17) emphasizes, “It is important to note that diversity *increased* after the repeal of fin-syn.” Thus, American evidence suggests that by attempting to prevent an erosion of diversity in this manner, the regulator’s rules likely exacerbated the situation.

Although the lesson would seem to be that diversity results when private sector firms in the television broadcasting business are allowed operate largely unimpeded by content regulators with respect to vertical arrangements, this is not to say that an antitrust agency need not be concerned. The OECD (1999: 13) puts the matter succinctly (italics removed):

> Vertical integration between a content provider and a distributor will not be a competitive concern when there remain adequate substitutes for the content. In addition, vertical integration can reduce transactions costs arising from, amongst other things, difficulties in specifying in advance the quality of the content.

In order to raise concerns of anti-competitive behaviour, dominance at some stage of the broadcast television industry is necessary. Moreover, the OECD’s concern is with exclusive dealing, and we are not aware of evidence of the large networks operating in this manner in

Canada. Nevertheless, we note that the CRTC's policy with respect to specialty channels may actually encourage such potentially anti-competitive behaviour.

In any case, the CRTC's rules requiring networks to deal with independent producers while restricting their financial stakes in such firms likely weakens these broadcasters, causing them to enter into agreements that are more costly than what they would choose if unencumbered by these rules. Moreover, like the American experience, it may be that these rules actually suppress diversity. It is noteworthy that, whereas the CRTC restricts such arrangements, the Competition Bureau would likely examine both the pro- and anti-competitive effects of them. If action were deemed warranted, likely it would proceed under one of the sections in the *Competition Act* dealing with vertical restraints of trade rather than at the acquisition stage. Indeed, given the power bestowed on independent producers by the CRTC, it is not clear whether it would be the activities of the broadcasters or the production companies that would merit investigation.

One notes, of course, that whereas the relevant CRTC rule states 'independent production companies', its decisions make it clear that it means 'independent *Canadian* production companies'. Thus, the objective of the rule is seen to have less to do with diversity and avoidance of anti-competitive acts, and more to do with supporting agents in the Canadian industry. A less distortionary alternative, like the case of radio 'tangible benefits', may be to support these producers out of general tax revenues rather than market intervention.[47] Still, if the true objective is the promotion of Canadian content rather than Canadian producers *per se*, the OECD (1999: 11) provides a critical perspective:

> Many countries within the EU follow the EC Directive which requires that ("where practicable") at least 50 per cent of the content broadcast (outside certain categories) be of "European works".The intention of this rule is to promote European culture to European citizens. However, control of the *origin* of a programme need not have any effect at all on the *content* of the programme.

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47 Again, whereas no support of these individuals may be the optimal policy, our view is that if they are to be supported, it should be in the least distortionary manner.

> Moreover, the regulation introduces a distortion in competition between international producers and is a barrier to international trade. If there is a desire to promote European culture it could be achieved more effectively through a contestable fund open to all (European and international) producers who produce works meeting certain cultural criteria. The EC (DGX) notes that the primary purpose of these controls is not to promote European culture but to protect from international competition the EC audiovisual sector.

II.4 Summing up

The Competition Bureau is concerned with the potential for any media acquisition to result in a substantial lessening of competition, particularly in the relevant advertising markets. Recent decisions by the CRTC regarding the transfer of ownership or control of broadcast licences reveal that agency's two major concerns: diversity of editorial voices and support of Canadians in the music and television industries.

Although the CRTC's public statements reveal a concern with programming (format) diversity, how it treats the issue is somewhat perverse. Not allowing entry (in order to protect the excess profits of existing broadcasters) causes diversity to be forgone. Regarding the diversity of editorial voices, the CRTC has acted by ordering that editorial staffs be kept separate when an applicant for a television broadcast licence also has newspaper holdings. Although we are sceptical of claims linking ownership concentration and lack of diversity, the CRTC's policy of keeping separate editorial staffs while allowing common newsgathering (and the efficiencies thereof) may be a reasonable one. Also, we have pointed out a potential role for the Canadian Broadcasting Corporation should the degree of editorial and/or news diversity provided by private sector broadcasters be deemed inadequate.

The major source of conflict between the CRTC and the Competition Bureau is their different views regarding the creation and strengthening of market power in media advertising markets. The CRTC, in pursuit of its objective of supporting Canadian performers, producers and

the like, applies ‘tangible benefits’ tests when assessing applications for the transfer of ownership or control of broadcast licences. In order to afford these additional costs, broadcasters must earn above-normal profits; i.e., profits greater than what would obtain in competitive advertising markets. In exchange, the CRTC bestows market power in these markets. Moreover, it protects these above-normal profits by restricting entry. As a result of the exploitation of this market power, advertisers pay rates above those which would obtain in competitive markets and, ultimately, this results in higher prices for consumers.

A large part (all in the case of radio) of these ‘tangible benefits’ is in the form of grants to CRTC-approved cultural associations, yet in the cases examined the total dollar amount is small in comparison to what they receive from other government sources, notably the Department of Canadian Heritage. A less distortionary and less costly policy alternative would be to fund all of what these beneficiaries receive out of general tax revenues (*via* Heritage Canada) and for the CRTC to cease applying its ‘tangible benefits’ tests. Such an alternative would have a number of advantages relative to the current one including reduced transactions costs for the CRTC and applicants. Moreover, protection of excess profits would no longer be a rationale for restricting entry, and entry would further the CRTC’s diversity objectives.

This policy alternative would have no impact on the CRTC’s ability to enforce other rules (e.g., Canadian content and ownership rules), at least the same support for current CRTC-approved grant recipients would be achieved and a major source of conflict between the CRTC and the Competition Bureau would be removed. Although other CRTC interventions, usually in response to rent-seeking behaviour by industry participants have negative consequences, the extent to which they interfere with achieving the objectives of the *Broadcasting* Act and the *Competition Act* is less clear.

III. Issue 2

Assume adoption of the above policy prescription such that the CRTC no longer applies any 'tangible benefits' test. Presumably, Canada's policy objectives with respect to intra-media mergers would now resemble those of Australia (which adopted similar reforms) and other jurisdictions: plurality, diversity and competition. The United Kingdom Department of Trade and Industry (2000: ¶-4.2.1) provides definitions of diversity and plurality:

> By diversity, we mean the range of different programmes and services available to viewers and listeners. Plurality, on the other hand, is about the choices viewers and listeners are able to make between different providers of such services. Society benefits from both a diversity of services between and within genres (such as news, entertainment, documentaries, etc) and a plurality of suppliers of such services (since this increases exposure to a variety of editorial styles and a range of views and opinion).

Perhaps because of these multiple objectives, more than one government agency has responsibility for media mergers in some jurisdictions, notably Canada and the United States.[48] (As the following analysis is not specific to Canada, and thus not confined to the Competition Bureau and the CRTC, call these entities the Antitrust Agency and the Cultural Agency.) A policy question arises: To what extent would intra-media merger decisions be compatible or in conflict if the Cultural Agency were to base its decisions *solely* on the protection of diversity and plurality (of listening, reading or watching output) and if the Antitrust Agency's *sole* concern were the maintenance of competition in the related media advertising markets? If the two agencies would consistently reach the same decision (be compatible), even though pursuing different objectives, a resource saving — involving no sacrifice of any of the three objectives — would result if only one agency were mandated to assess media mergers.

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[48] In contrast, Australia follows a one-agency model and the United Kingdom is in the process of rationalizing its regulatory structure from five agencies to one. See UK Office of Communications (17 July 2003).

Our analysis[49] develops as follows: (a) we discuss the possible nature of the agencies' preferences with respect to policy objectives and how they determine decision-making rules; (b) we develop a simple model of intra-media mergers in order to investigate the main question; and, (c) we examine the compatibility issue when competition and diversity are the objective and then when plurality and competition are the objectives. We conclude that it is redundant to have a Cultural Agency examine intra-media mergers even when the two agencies employ different criteria. Whereas the Cultural Agency would be informed by the Antitrust Agency's analysis, the opposite is not true. That is, diversity and plurality objectives would be at least as well served if the Antitrust Agency — acting only to prevent any substantial lessening of competition[50] in media advertising markets — had sole authority over intra-media mergers.

III.1 The agencies' decision-making criteria

How an Antitrust Agency is expected to make decisions with respect to intra-media mergers is relatively straightforward. Traditionally, if a merger would lead to a substantial lessening of competition in the relevant media advertising market, the Antitrust Agency would likely move to block it. In order to determine if the merged entity would be able to exploit market power, the existence of barriers to entry would be an important factor. Importantly, if a proposed media merger were not to raise anti-competitive concerns, the Antitrust Agency would likely have determined that the merged entity would not be able to exercise market power because it would be disciplined either by sufficient competition from similar, existing outlets or by (potential) entrants.

How a Cultural Agency might make its decisions with respect to mergers is not so straightforward if only because it must weigh more than one factor. Consistent with Taylor (2002), the Cultural Agency is assumed to be concerned with both the diversity and plurality of

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[49] This section is drawn from Allen & Townley (2003b).

[50] We use 'substantial lessening of competition' broadly; that is, to include cases involving a substantial prevention of competition.

media outlets. Therefore, we understand that if an existing broadcaster or newspaper were to change its format in order to differentiate itself from other outlets, the resulting increase in diversity (without loss of plurality) would further — or at least not diminish — the public interest from the Cultural Agency's perspective. Similarly, if a new outlet were to enter, even if it added nothing to diversity because of similarity to existing outlets, plurality would increase and the Cultural Agency would deem the public interest to be served. And, if a new outlet were to enter, offering something truly different, such that both diversity and plurality were augmented, presumably the Cultural Agency would prefer that situation to the preceding ones (where only plurality *or* diversity would be enhanced). Of course, we could reverse the circumstances in order to consider the impact of loss of diversity or plurality separately and the loss of both simultaneously when media outlets exit the business.

As we are not sure what form the Cultural Agency's preferences actually take, but wish robust results, we adopt a rather severe assumption regarding how it views diversity and plurality in its analysis of intra-media mergers. Regarding context, we will only be concerned with mergers where the Cultural Agency *perceives* the pre-merger levels of both diversity and plurality to be at their lowest tolerable levels. Therefore, we expect the Cultural Agency to reject any merger that it believes would reduce diversity *or* plurality.[51]

Nevertheless, we will assume the possibility that the Cultural Agency may not possess complete information, especially regarding the potential for entry a media merger might encourage. This kind of economic analysis is expected to be undertaken by antitrust authorities, but not by agencies concerned more with non-economic objectives. While it is true that the Antitrust Agency may be (and remain) similarly ignorant of aspects of the Cultural Agency's objectives and methodology, incomplete information of this type does not affect the analysis.

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[51] Our view is that if we can generate results subject to this assumption, we have some confidence that they will hold in less severe, perhaps more realistic, circumstances. See Allen & Townley (2003b) for greater detail regarding potential preference orderings.

III.2 The pre-merger situation

Consider three firms operating in the same medium: *A1*, *A2* and *B*. If the newspaper industry is our concern, *A1* and *A2* are two newspapers with similar appeal to readers and the advertisers attempting to reach them, whereas *B* targets a different reading audience and associated advertisers. If radio, *A1* and *A2* are two stations, perhaps formatted for Top 40 listeners, whereas *B* is classical, country & western or some other format dissimilar to that of *A1* and *A2*. If television, *A1* and *A2* might be two general-audience television stations, whereas *B* is more specific, such as a sports, music or all-news station.

Whatever the medium, *A1* and *A2* compete for a target audience (listeners, readers or viewers), and advertisers that wish to reach these same people use *A1* and/or *A2*. Type *A* advertisers would see little point in advertising *via B*. Medium *B* targets an audience quite distinct from the one that enjoys *A1* and *A2*, such that Type *B* advertisers regard advertising on *A1* or *A2* as relatively expensive or ineffective, likely because of the different target audiences.

As above, we assume that the Antitrust Agency would only move to stop a media merger if it would result in a substantial lessening of competition. Further, assume that the Cultural Agency would block a media merger only if it would result in a reduction of diversity or plurality.

Initially, the plurality index (**P**) is three; simply counting the number of firms in the medium. Any merger of two of these outlets would reduce **P** to two, and thus the Cultural Agency would move to block it.[52] Initially, the diversity index (**D**) is two, because *A1* and *A2*

[52] Many media acquisitions, of course, do not result in a lessening of the number of media outlets; for example, when a newspaper chain acquires additional newspapers and simply expands the chain. Here, our 'plurality' concern is limited to mergers that actually reduce the number of outlets; for example, when two newspapers, say the *Times* and the *Mirror,* merge to form the *Times-Mirror*.

exist within the same content genre whereas *B* does not.[53]

Below we will consider three classes of possible mergers.

- Class I is a merger between *A1* and *A2*, leaving *A1* (or *A2*) and *B* as the survivors. Whereas this merger would result in a loss of plurality, diversity would not be affected.

- Class II is a merger between *A1* (or *A2*) and *B*, resulting in *A1* and *A2*. This merger would result in a loss of plurality *and* diversity.

- Class III is a merger between *A1* (or *A2*) and *B*, resulting in *A1-B* and *A2* (or *A1* and *A2-B*). That is, whereas a Class II merger results in the elimination of whatever *B* was offering, a Class III merger results in a new entity that would appeal to both Type *A* and Type *B* audiences and advertisers wishing to reach them. The Cultural Agency classifies this hybrid format as distinct from *A*, so this merger would result in a loss of plurality, but not of diversity.[54]

III.3 When diversity is the criterion

III.3.a Class I mergers

Consider a Class I merger. As the merger of *A1* and *A2* would not reduce diversity, the Cultural Agency would not move to block it. The Antitrust Agency is assumed to act only when a merger would result in a substantial lessening of competition. If the merger were to raise no anti-competitive concern, this agency would not move to block it, and the decisions of the two agencies would be compatible.

Now consider the case where the merger is deemed anti-competitive by the Antitrust

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[53] See Nesvold (1997) for a discussion of content genres within the context of the 'marketplace for ideas'.

[54] Alternatively, we could assume that the *B* format is adopted by the merging firms. What matters is that the resulting entity is seen as offering a format distinct from the firm not involved in the merger.

Agency such that it blocks it. A relevant question involves whether the Cultural Agency would have reason to challenge the Antitrust Agency's decision. It does not because, if the Cultural Agency is only concerned with the protection of diversity, it should be indifferent to whether *A1* and *A2* merge or not because pre- and post-merger degrees of diversity are identical.

Therefore, the two agencies either will concur regarding Class I mergers or the Cultural Agency would be indifferent to the Antitrust Agency's decision.

III.3.b Class II mergers

A merger in this class would result in the elimination of *B*, leaving *A1* and *A2* to serve audiences and advertisers. As this merger would reduce diversity, the Cultural Agency would move to block it. Obviously, if the Antitrust Agency determined that the merger would result in a substantial lessening of competition, it would move to block it as well, and the decisions of the two agencies would be seen to be compatible.

The more interesting situation occurs when the merger raises no anti-competitive concern such that the Antitrust Agency would allow it. Certainly, an inter-agency conflict would be perceived. Consider, however, why the merger would not concern the Antitrust Agency. Its analysis must have led to the conclusion that advertisers interested in the *B* medium could find alternative advertising outlets or that conditions were such that entry would replace firm *B*. In either case, the Cultural Agency would have misjudged the merger's impact on diversity, likely because it predicated its analysis on an overly narrow market definition. Had the Cultural Agency the benefit of the Antitrust Agency's analysis, it would not have blocked the merger.

Therefore, the two agencies will either concur on Class II mergers or a perceived conflict will emerge. No conflict occurs when the Cultural Agency is informed by the Antitrust Agency's analysis.

III.3.c Class III mergers

An example in this class would be *A1* and *B* merging to form *A1-B* (a mixed format attractive to both Type *A* and Type *B* audiences and advertisers) plus *A2*. As diversity is not lessened, the Cultural Agency would not block the merger.

This merger would not raise any anti-competitive concern as the merged entity could not raise advertising rates. If it attempted to raise rates for Type *A* advertisers, it would be disciplined by *A2*. Moreover, Type *B* advertisers would still be able to reach their target audience as before. Therefore, neither agency would move to block the merger and they would be seen to concur. Therefore, the only possible outcome of a Class III merger is concurrence — compatibility of the agencies' decisions.

III.4 When plurality is the criterion

Here the sole concern of the Cultural Agency is plurality. As its perception would likely be that any merger would reduce the number of television broadcasters, radio stations or newspapers — whatever the medium — the Cultural Agency would always move to block the merger. Whenever a merger would result in a substantial lessening of competition, the Antitrust Agency would also move to block it, and the decisions of the two agencies would be compatible. Therefore, the only potential for perceived conflict occurs when a merger would not raise any anti-competitive concern.

For all three classes of merger, if the Antitrust Agency finds no reason to stop the merger, its analysis must yield the result that the merged entity would lack the power to raise advertising rates. This could only be if alternatives for advertisers already existed pre-merger or if entry would ensue. Although it is possible for the two agencies' views of pre-merger plurality to differ, it seems more likely that their differences are rooted in their perceptions of the post-merger situation. That is, whereas the Antitrust Agency's lack of concern may be based on its analysis of

post-merger incentives to enter and entry conditions, such economic considerations may not be a component of the Cultural Agency's analysis, which is understandable given the nature of its primary concerns.

In either case, the Cultural Agency would have a different perception of the impact of the merger on plurality by not defining the market as antitrust investigators would. Had it taken into account the Antitrust Agency's analysis, its concern would either not have arisen or would have been diminished. Therefore, although a perceived conflict might result, it is possible for the Antitrust Agency to inform the Cultural Agency's decision such that an actual conflict is avoidable. That is, the Antitrust Agency could dispel the concerns of the Cultural Agency.

III.5 Implications

When a Cultural Agency is concerned solely with the impacts of an intra-media merger on diversity and plurality, and an Antitrust Agency is concerned only with a merger's impact on competition in related advertising markets, either these agencies agree outright or any perceived conflict could be resolved if the Cultural Agency were informed by the analysis underlying the Antitrust Agency's decisions. Whereas the Antitrust Agency's decisions can inform those of the Cultural Agency, it is important to note that the Cultural Agency's decisions do not inform those of the Antitrust Agency.

What becomes clear is that having two agencies to examine intra-media mergers — even when they employ distinct criteria — is wasteful. As the Cultural Agency's decisions would always parrot the Antitrust Agency's decisions if the reasons for the latter's were taken into account, having the Cultural Agency assess mergers according to diversity and plurality adds nothing to the ultimate decision. Two routes to the same decision with respect to mergers is not necessary. Most certainly, the resources a Cultural Agency uses to examine mergers could be reallocated. Even though the Antitrust Agency is dedicated to a single objective, its actions serve all three: competition, diversity of voices and plurality of choices.

IV. Issue 3

Even if the objectives of media merger policy were to be restricted to diversity, plurality and competition, inter-media mergers pose special problems.[55] Recently, interest has been revived in the 'marketplace for ideas' (MFI hereinafter) with respect to reporting and editorial diversity. Stucke & Grunes (2001: 249), citing Justice Holmes, link "competition among various news and entertainment sources" with "the underlying belief that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources."

Two main issues emerge. The first is whether a relationship exists between the news and editorial diversity and media ownership concentration and, if so, whether it is positive or negative. The second is that even if this relationship is negative, is government intervention warranted or is it better to have 'big' media to counteract the abuses of 'big' government? We do not address these issues here, but Allen & Townley (2003a) do. Their analysis, review of the literature and the available evidence suggest that any link between ownership concentration and constraint of diversity is still a matter of debate, especially when profits motivate media owners.

Here we address another concern. It is that the traditional antitrust focus on advertising markets in order to assess inter-media mergers is inadequate because it is not obvious that different media lie within the same antitrust market. For example, it may be perceived that radio and newspaper advertising are different markets, such that a merger of a radio station with a newspaper may not raise antitrust concerns or, if it does, that the evidence would be inadequate in order to demonstrate a substantial lessening or prevention of competition.

In order to broaden the relevant market definition, promoters of MFI notions suggest that antitrust enforcers focus on news and editorial volume and diversity rather than on advertising. In this scenario, radio and newspaper reporting and editorials might be seen to be in the same

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[55] This section draws on Allen & Townley (2003a).

market for antitrust purposes. Indeed, Nesvold (1997) sets out how to define antitrust markets in this vein. His first step is to group media according to 'content genre'; that is, all media that communicate similar messages. Thus, if the content genre were editorial content, one would at least include radio, television, newspapers, magazines and web pages devoted to commentary. The second step involves excluding media that are not substitutes in a technical sense. For example, Nesvold does not view live sports coverage as a substitute for sports reporting. The third step requires the analyst to incorporate the concept of 'clusters' or 'cluster markets' in the definition of the relevant antitrust market.[56]

Although one might laud the idea that access to more and more varied news and ideas is to be preferred to the alternatives, promoters of the application of MFI concepts to merger analysis should be wary of this approach to antitrust enforcement. Below, we describe and challenge the MFI approach to inter-media merger enforcement. Nevertheless, as we have some appreciation for others' reservations concerning the traditional antitrust approach to advertising markets, we offer an alternative to it and MFI. The proposed analytical framework is broad enough to reveal the potential for the exercise of market power even when merging media may appear to be in different markets.

IV.1 The MFI approach

Using Nesvold's method to define an antitrust market so that it includes different media (whereas a traditional advertising market approach might not) may broaden the market to the extent that there is little role for antitrust enforcement. For example, one may wish to argue that

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[56] Ergas (1998: 3) provides a description:

> "A cluster market arises when the economies of scope are such as to require firms to compete not on individual items but rather on a set of items taken jointly. [...] Thus, to say that good A and good B form a cluster is to imply that a firm selling only A or only B would not be able to compete with one selling both A and B — either because the supply cost of producing A and B jointly is substantially below that of producing them separately, and/or because consumers incur additional costs when they purchase A and B separately as against purchasing them jointly."

the acquisition of a local radio station by a local newspaper is anti-competitive because some of the services they deliver — reporting and editorial comment — are parts of the same content genre, thus the acquisition may cause the overall diversity of reporting and commentary to be reduced. However, surely one might expect the counter-argument that the relevant antitrust market would now have to be broadened even further so as to include not only local radio stations and newspapers but any media alternative offering comparable content; that is, national radio and television stations, national newspapers, magazines, websites *et cetera*.[57] Thus, the content genre (market) would be defined so widely that any outlet's market share — assuming market share could be measured — would be very small. Although market share is not the sole determining factor for the demonstration of a substantial lessening or prevention of competition, thresholds for enforcement exist and would likely not be surpassed.

Although Nesvold's second step would narrow the market definition somewhat, the application of cluster markets, in the way that Nesvold adopts the concept, does not serve to alleviate the broadening of the product market in the way that clustering traditionally has been applied. For example, cluster markets in the context of banking, from which Nesvold borrows the concept, were introduced in order to narrow the relevant product markets to financial institutions offering a distinct bundle of banking products — produced jointly, distributed jointly or purchased jointly.[58] It was found that banking customers, when faced with a price increase of one financial or banking product, were unlikely to switch their banking behaviour by purchasing banking products piecemeal from mono-product suppliers or to divide their purchases among multi-product suppliers. Clustering in this context excluded certain financial institutions, specifically the 'Savings & Loans', thus narrowing the relevant banking product markets. Again, Nesvold (1997: 20) writes of using this concept to justify expanding (instead of narrowing) the relevant product markets in order to include a number of products that have typically been placed

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[57] For example, more than 100 Canadian daily newspapers are available on-line, and websites such as *bourque.org* provide links to several other newspapers world-wide. More than 60% of Canadian households have internet access.

[58] See Guerin-Calvert & Ordover (1992) and Ellehausen & Wolken (1992).

in separate antitrust markets. Probably a more accurate application in this context would be to use the concept of clustering to narrow the number of participants on the supply side to firms offering a specific bundle of media products. That is, the relevant antitrust market would be confined to multi-media firms competing against other multi-media firms, excluding mono-media firms. Whether media markets display clustering behaviour that justifies such an approach is an empirical question that has not yet been addressed. Nevertheless, as this does not seem to be Nesvold's intended usage, application of his method would, again, likely result in a very broadly defined antitrust market.

Our point is simple. The objective of MFI proponents is to strengthen the ability of antitrust agencies to prosecute inter-media mergers.[59] However, the application of Nesvold's procedure would likely detract from this objective even if measurement problems could be overcome.

IV.2 An alternative approach

Although we appreciate the objectives of those who advocate applying MFI concepts to antitrust enforcement, our view is that it is unsuitable and unworkable for antitrust enforcement. Beyond market definition problems, antitrust agencies typically have a burden of proof to demonstrate a substantial lessening of competition, and the kinds of evidence available from the MFI lack precision.[60] Indeed, application of MFI concepts would likely require a degree of arbitrariness we would prefer to avoid.

Tractability and measurability are likely reasons why economists favour examining media advertising markets rather than other media output. Still, what has been missing is an analytical

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[59] We would support an objective of increasing prosecutorial effectiveness to stop 'wrong' media mergers. In the marketplace for ideas, however, discerning 'right' from 'wrong' is a source of much debate, and we are wary of misguided abuses of increased prosecutorial power.

[60] The CRTC is not similarly constrained.

framework with the potential to reveal adequately the potential for the exercise of market power in media advertising markets when the merging firms are different media and thus may appear to be in different markets.

IV.2.a Background

In recent years, unilateral effects models have played an important role in merger analysis yet we are not aware of any applied to advertising markets in the assessment of inter-media mergers. Auction models are a subset of these, but the ones we are aware of are characterized by overly strict assumptions thus limiting their applicability.

Baker (1997) outlines how auction models might be applied to merger analysis. He explains in some detail how two firms among several selling a homogeneous good in a market characterized by production indivisibilities and capacity constraints could, by acting together, exercise market power. Although we appreciate the flavour of his model, we wish to account for heterogeneity of advertising across different media. That is, although firms can advertise on radio stations and in newspapers, both the form of the advertising and target audiences differ.

The following is an advertising media extension of other auction models. Although in the form of an example, it incorporates a degree of heterogeneity and may serve as a useful approach for analysing both inter-media mergers and acquisitions.

IV.2.b The model

Let **A**, **B** and **C** denote major media. By major media we mean the most important local daily newspaper in a city, the most popular television or radio station, a major magazine, a national newspaper *et cetera*. **A**, **B** and **C** could form any combination of these media types, and thus may appear to exist in different advertising markets. Barriers to entry into the set of major

media are high. Let **D** denote an intermediate media outlet such as a secondary local daily newspaper or a medium-size audience television or radio station — not in the same league as **A**, **B** and **C**, but more significant than type **X** outlets. Typical type **X** outlets are lesser television and radio stations, minor daily newspapers, neighbourhood newspapers and the like. The number of type **X** media outlets is large, yet the exact number does not matter, and we can assume that entry is not difficult. (Indeed, we could specify multiple type **D** media as well.)

A key assumption of the model is that advertisers must reach some threshold level of advertising exposure, otherwise there is no point spending a single advertising dollar. Firms, in order to wage an advertising campaign, select a package of media outlet advertising contracts, such that the media in a package are complements. Therefore, a retailer may use television advertising for visual messages, radio for audio reinforcement and various newspapers to provide details of the good or service in question. It is to be emphasized that although the elements of any package are complements, different advertising packages, themselves, are substitutes.

Options ***L1*** through ***L5*** below are low-cost advertising packages. Options containing only two of **A**, **B**, **C** and **D** are not shown as they would be so costly as not to be chosen (because too many type **X** media would have to be retained in order to meet the threshold).

L1 **A** + **B** + **C** + **D** + 2**X**
L2 **A** + **B** + **C** + 4**X**
L3 **A** + **B** + **D** + 6**X**
L4 **A** + **C** + **D** + 6**X**
L5 **B** + **C** + **D** + 6**X**

Implicit in these options is that any one of **A**, **B** or **C** is worth 4 of type **X** media. That is, should an advertiser not advertise *via* **B**, for example, he or she would have to add four minor media advertising contracts in order to reach the advertising threshold. (A minor media advertising contract can be thought of as the *numéraire* in this model.) However, choosing not to advertise *via* any two major outlets would require substitution of twelve minor media advertising

contracts (4**X** for the first and an additional 8**X** for the second) in order to reach the same advertising threshold (consistent with diminishing marginal productivity of advertising outlets of a type). A decision not to advertise using **D** would require substitution of two additional type **X** contracts. We also assume that any advertising package must include at least two major or intermediate level outlets in order to attain the threshold. (An alternative to this assumption would be to specify further the cost of replacing three major or intermediate outlets in terms of minor ones.)

Note that none of **A**, **B** and **C** enjoys any market power. If **A**, for example, attempted to raise its advertising rates, advertisers could switch from any of ***L1*** through ***L4*** (which do include **A**) to ***L5*** (which does not). Similarly, the existence of ***L4*** constrains medium **B**, and ***L3*** constrains **C**.

Now let any two major media outlets merge, say **A** and **B**. The acquisition could involve a radio station and a television station, a television station and a daily local newspaper, a daily local newspaper and a national newspaper, a national newspaper with a television station *et cetera*. As long as they qualify as 'major' media, the precise combination of media types is not relevant.

The principal antitrust question concerns whether or not **A** and **B** could now exercise market power. If both raised their advertising rates, presumably no firm would advertise in both, an ultra-high cost option (for which reason we do not show these options below). This leaves the following options, ***H1*** through ***H5***.

H1	**A** + **C** + **D** + 6**X**
H2	**B** + **C** + **D** + 6**X**
H3	**A** + **C** + 8**X**
H4	**B** + **C** + 8**X**
H5	**C** + **D** + 14**X**

Advertisers can avoid both **A** and **B** only by choosing Option ***H5***. If one compares ***H1*** or ***H2*** with ***H5***, one notes that the advertising rates of **A** and **B** would have to be raised by more than whatever the total cost of eight type **X** contracts is less the cost of a type **A** or type **B** contract in order to make either less attractive than Option ***H5***.[61] Similarly, comparing ***H3*** or ***H4*** with ***H5*** yields the result that the price of an advertising contract with **A** or **B** would have to be raised by more than the cost of six contracts with type **X** media plus one type **D** contract less the cost of a type **A** or type **B** contract before advertisers would be induced to switch to Option ***H5***. Therefore, it is apparent that **A** and **B** could exercise market power if they acted in concert, perhaps *via* a merger.

IV.2.c Discussion

Note that the fact that **A** and **B** (or **A** and **C**, or **B** and **C**) could be different media is not relevant. Of course, a more direct approach would likely be appropriate if the merging firms were seen to be in the same output market; for example, two daily newspapers or two local radio stations in the same municipality. (Geographic market definition, of course, will be peculiar to the specific circumstances of the merger.)

Note also that it is possible to be led astray by entry conditions. **A** and **B**, for example, could be newspapers, but so could many of the type **X** media. The result depends on entry into the major media classification being restricted, not entry into a particular media industry as a whole. Of course, if entry were free across all media by type and importance, media mergers would not likely cause concern, as it should be.

The key assumption involves how advertisers behave, thus the validity of the analysis depends on whether the notion of an advertising exposure threshold is reasonable. We know agencies exist that broker multimedia advertising packages (campaigns), and this would appear

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[61] We assume that the cost of ***H5*** does not exceed all advertisers' reservation prices.

to be consistent with the model.

IV.3 Summary

Increased attention paid to the marketplace for ideas is due, in part, to dissatisfaction with the effectiveness of traditional antitrust advertising models, especially with respect to cross-ownership issues. However, attempting to define antitrust markets according to ‘content genres’, in our view, would yield even less desirable results, perhaps eliminating the role of antitrust enforcement in this area.

We have provided an alternative approach, traditional in that it focuses on advertising yet non-traditional because of its unilateral effects features applied to media mergers. This framework is suitable for examining questions regarding the substantial lessening or prevention of competition in a variety of media merger cases, even when the merging media are seemingly unrelated with respect to physical characteristics and content.

V. Conclusion

The Senate of Canada Standing Committee on Transport and Communications (chaired by Senator Joan Fraser) commenced a study of Canadian news media in late April of 2003. If the committee's inquiry extends to an examination of the methods and criteria for assessing mergers and acquisitions in the radio and television broadcasting industries, Canada will become one of a number of countries to do so recently. These other initiatives have culminated in several studies including the following: the Productivity Commission's "Inquiry into Broadcasting" in Australia, the OECD's research culminating in Regulation and Competition Issues in Broadcasting in the Light of Convergence, and a series of research projects commissioned by the Federal Communications Commission in the United States. Allen & Townley (2003a, 2003b) and Townley (2003a, 2003b) build on those studies and the literature.

Here, we do not challenge the objectives of the *Competition Act* and *Broadcasting Act*. We simply accept them and ask how both sets of objectives could best be achieved. Currently, not only do we observe an inter-agency conflict between the CRTC and the Competition Bureau, but also a conflict of CRTC objectives. All of this is quite unnecessary. The CRTC administers 'tangible benefits' tests meant to advantage members of Canada's cultural industries — either in the form of cash or market interventions. In order that the acquirers of broadcasting licences might afford to fulfil the financial commitments these tests require, the CRTC grants and protects market power in media advertising markets. If the Government of Canada, perhaps *via* the Department of Canadian Heritage, were to assume support for these cultural industries out of general tax revenues, the same objective could be achieved without the associated anti-competitive impacts and with considerable resource savings to the Canadian economy. The CRTC would cease administering these tests and abandon all artificial barriers to entry.

Should this happen, the objectives of media merger policy would be reduced to diversity, plurality and competition. Whether defined narrowly or broadly, Canadian objectives would become more aligned with other jurisdictions. Whereas some jurisdictions mandate responsibility

of media mergers to a single agency, others have more than one (usually two). When one agency (the Cultural Agency) assesses media mergers according to diversity and plurality, while the other (the Antitrust Agency) examines the impact of mergers in media advertising markets, is there still a potential for conflict? We find that there is, but only if the one in charge of diversity and plurality is not informed of the reasons for the other's decisions. The obvious conclusion is that a government need only mandate assessment of inter-media mergers to its Antitrust Agency and reap the resulting resource savings.

The last issue we addressed concerned dissatisfaction with the traditional way antitrust agencies examine inter-media mergers. We agree, but we disagree that antitrust enforcement based on the 'marketplace for ideas' would be effective. We offer an alternative that extends existing unilateral effects models. It has yet to be tested by antitrust agencies or the courts. Still, as it requires analysis, we prefer it to arbitrary rules governing cross-media ownership.

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