

# Convergence Compass

## Complementing Advocacy with Private Trust Systems and Other Long-Term Collaboration

By [Kyle Dixon](#) and [Ray Gifford](#)

Last week, the UK's communications regulator, Ofcom, issued a consultation concerning when to adopt "self-regulation" or "co-regulation." In the U.S., as uncertainty mounts regarding the economy, technological developments and the regulatory and political environment, communications and Internet companies seek creative alternatives to addressing issues such as network management and consumer protection. To complement vigorous advocacy before regulators, Congress and the courts, companies may seek collaboration among players on multiple sides of legal and policy debates on a permanent or semi-permanent basis. These activities extend beyond episodic coordination of advocacy to include ongoing industry consortia, standard-setting organizations and other entities designed to build trust among typically antagonistic parties for their mutual benefit.

Although there is much to recommend these "private trust systems," the decision whether to invest time and money in such activities should turn on (1) their potential upside to participating companies and consumers; and (2) a company's willingness to marshal the expertise and other resources needed to make long-term collaboration succeed.

### Factors Suggesting Substantial Upside From Collaboration

Several factors suggest a company may expect substantial upside from private trust systems or other ongoing collaboration. Many of these factors mirror those that companies should consider in evaluating the prospects for shorter-term collaboration:

#### Factor 1: Government Faces Strong Incentives to Intervene

One of the chief benefits of ongoing (as opposed to episodic) collaboration is the possibility that the former can obviate certain types of current or future regulation. This benefit tends to be greatest for a company where policymakers can and have demonstrated a willingness to determine how companies should behave. In contrast, where regulators lack the desire to intervene, ongoing collaboration may be less necessary. For example, policymakers' long-standing concerns about "network neutrality" make long-term collaboration in the broadband and Internet arenas especially compelling. There may be correspondingly less need to continue collaborating on issues such as long distance competition, now that most policymakers' interest in these issues has faded.

#### Factor 2: There Are Real Business Problems to Be Solved

Internet application, content and broadband service providers face real economic dilemmas. Each type of company needs some assurance of long-term cooperation with the others. Unless a company "vertically integrates" to provide complementary products, each company needs others to enhance product delivery or overall value to consumers. Companies must continue to run their businesses in ways that minimize unnecessary uncertainty and enable them to innovate and discover new revenue streams before competitors do. Video programmers need to anticipate how new products and services will reach consumers over multi-channel video or broadband networks. Peer-to-peer applications need to know that their services will still work well as network technology and management continue to evolve. At the same time, each type of company fears opportunism by suppliers of complementary products.

Kamlet Shepherd & Reichert, LLP  
Attorneys at Law

1747 Pennsylvania Avenue NW,  
Suite 800  
Washington, DC 20006  
202.204.8600

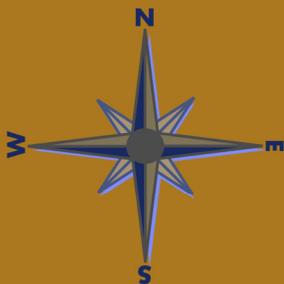
1515 Arapahoe Street  
Tower 1, Suite 1600  
Denver, CO 80202  
303.825.4200

[www.ksrlaw.com](http://www.ksrlaw.com)

© 2000-2008 Kamlet Shepherd  
& Reichert, LLP  
All rights reserved.

**KAMLET**  **SHEPHERD**

A POWERFUL ADVANTAGE



# Convergence Compass

Private trust or other collaboration cannot alleviate the inherent business tensions between providers of complementary services. Indeed, there is no set formula by which companies share the profits resulting from the consumer value their products collectively generate. Private trust systems can, however, create a framework to channel business tensions productively and predictably, even as compared to public regulation.

## Factor 3: Companies Face Substantial Downside Risk

There are many ways in which government action may hurt companies' bottom lines or competitive positions, sometimes without yielding much benefit to the public. Companies must act when they suspect the likely outcome of policymaking is significantly reduced revenues, increased expenses or foreclosed opportunities (i.e., opportunity costs).

Again, companies with these suspicions understandably devote much of their activity to influencing policymakers directly. But where policymakers will face continued pressure to intervene, companies probably should not rely on traditional advocacy alone. Rather, companies should consider showing that policymakers have no (or at least less) reason to get involved.

## Factor 4: Policymakers May Resolve Issues Too Broadly or Narrowly

Once they step in, legislators and even agency experts may find it undesirable or impossible to resolve legal and policy disputes so that companies can anticipate how they should conduct business in specific cases. For example, if the FCC were broadly to prohibit broadband providers from "discriminating" among other companies, those providers would have to request additional guidance regarding whether the agency would excuse contrary activities that arguably promote the agency's policies (e.g., treating third-party content or applications providers differently in some cases to protect consumer privacy or to police activity harmful to children).

Conversely, policymakers may believe an issue warrants detailed and comprehensive public supervision. Examples include the FCC's heavily-detailed instructions governing how incumbent local phone companies could provide voicemail and other "enhanced services" (the Computer Inquiry requirements) and the FCC's detailed specifications for the "operational support systems" phone companies had to offer competitors so that phone companies could begin providing long distance service (under section 271 of the Communications Act).

This painstaking supervision -- for all its intended and resulting benefits -- often can delay or prevent future actions by companies that would not undermine regulators' goals and could even further those goals. This is especially challenging for companies involved with the Internet and other advanced technologies, where detailed regulation can discourage new ways to "skin the cat" in terms of expanding value to consumers and earning returns that encourage further innovation.

Of course, no amount of ongoing industry collaboration will keep policymakers from taking action where they cannot be persuaded that intervention poses risks to consumers (hence the need to pursue collaboration and advocacy simultaneously). But assuming policymakers see some downsides to regulation, private trust systems and other forms of long-term collaboration can help companies address broad policy concerns while preserving flexibility to respond effectively to customer's present (and future) needs.

Kamlet Shepherd & Reichert, LLP  
Attorneys at Law

1747 Pennsylvania Avenue NW,  
Suite 800  
Washington, DC 20006  
202.204.8600

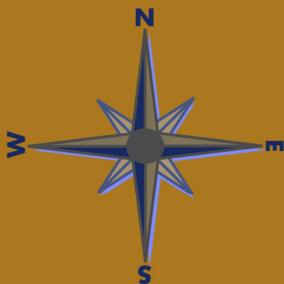
1515 Arapahoe Street  
Tower 1, Suite 1600  
Denver, CO 80202  
303.825.4200

[www.ksrlaw.com](http://www.ksrlaw.com)

© 2000-2008 Kamlet Shepherd  
& Reichert, LLP  
All rights reserved.

**KAMLET**  **SHEPHERD**

A POWERFUL ADVANTAGE



# Convergence Compass

## Factor 5: Arguments Over Principles Begin Yielding to Practicality

This factor is illustrated most vividly by the convergence of digital communications and computing technologies, which has empowered consumers in unprecedented ways. Convergence, in turn, has increased the appeal of advocacy based on what might be termed "democratic" principles -- those that satisfy the appetite for equity and individual liberty among leaders and the general public. Device makers defend the principle that consumers be allowed to attach gadgets freely to broadband networks. Broadband providers defend the principle of deploying higher bandwidth to all Americans based on their view that ubiquitous investment requires that they manage the networks they build. Similar debates over principles involve topics ranging from competition among companies to public safety, homeland security, law enforcement and privacy. And no "side" in these debates enjoys a monopoly of compelling points.

Yet as described above below the surface of these debates over principles lie practical realities. Companies who hope to benefit from government action lose patience as concrete policy outcomes remain elusive. Companies who fear government action have more time to imagine just how much they will dislike the outcome once government acts. Ironically, deep-pocketed companies that play leading roles in debates over principles often are the first to abandon those debates (e.g., AOL's ratcheting down its campaign to demand "open access" from broadband networks once competitive imperatives led it to merge with network owner Time Warner). These larger companies have the most to gain or lose by taking their destinies into their own hands through private negotiations.

Moves by larger companies lessen the overall pressure for a government solution and raise the likelihood that smaller players will follow suit. As this snowball continues to roll downhill, private trust systems and other forms of ongoing industry collaboration seem increasingly advantageous, whether companies fear the "policy gods" will giveth or taketh away.

### **Making Long-Term Collaboration Successful**

Even after observing factors like those described above, companies should spend time and money on private trust systems and other long-term industry collaboration only to the extent they can devote (or acquire) the tools needed to earn the greatest return on this investment. For companies involved in the Internet and communications, these tools include:

1. Broad Expertise -- The provision of suites of services over flexible, high-speed networks means that negotiations over one service will unavoidably affect others. Thus, companies need a broad understanding of how each of those various services (voice, video, data) might be regulated in the absence of industry collaboration. Companies also need to understand law and policy beyond communications regulation. They must understand how content and innovation are typically protected under copyright and patent law. Companies also must know antitrust, which decides when collaboration becomes illegal collusion and shows how private trust systems and the like can operate under the watchful eye of regulators. In addition, companies must understand economics and technological trends, so that current negotiations do not result in missed business opportunities later.

Kamlet Shepherd & Reichert, LLP  
Attorneys at Law

1747 Pennsylvania Avenue NW,  
Suite 800  
Washington, DC 20006  
202.204.8600

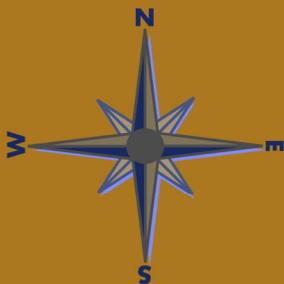
1515 Arapahoe Street  
Tower 1, Suite 1600  
Denver, CO 80202  
303.825.4200

[www.ksrlaw.com](http://www.ksrlaw.com)

© 2000-2008 Kamlet Shepherd  
& Reichert, LLP  
All rights reserved.

**KAMLET**  **SHEPHERD**

A POWERFUL ADVANTAGE



# Convergence Compass

2. Strategic Relationships and Mediation Skills -- One of the hazards of waging war over communications and Internet-related law and policy is that it makes it difficult for companies to maintain agreeable working relationships with adversaries. Even worse, companies may not know whom to call when they are ready to negotiate -- or they fear those calls would not be returned. In these cases, companies must look to intermediaries who know many of the players on all sides of an issue and whose allegiances are not so established that they cannot serve as "honest brokers." Even companies enjoying decent working relationships with past adversaries need to identify people internally or externally who possess the mediation skills to build consensus among long-term collaborators.

3. Experts Who Can Run with the Ball -- There is constant risk that efforts to establish private trust systems or otherwise collaborate long-term will stall, based often on impasses in negotiations and the reality that key players may be distracted by more time-sensitive projects. Companies benefit enormously by making sure they have experts on hand who possess the time and expertise to propose creative solutions when key negotiators run out of ideas, and to move efforts forward while others fight inevitable fire drills elsewhere. Maintaining momentum in this way can prevent long-term collaboration from degenerating into lost time and expense, if not outright failure.

4. Patience -- This key ingredient, while intangible, cannot be overvalued. Companies will need patience to remain focused on their end game as the duration of talks expands from weeks to months and as they get comfortable addressing other parties' concerns they have argued against in the context of advocacy. High-level executives who lead (or at least bless) long-term collaboration efforts must be especially patient. These executives, after all, will play an essential role in explaining the benefits of long-term collaboration even though the company may not get everything it wants.

## Conclusion

By equipping themselves with these kinds of tools and resources, companies can realize the substantial upside that may result from private trust systems and other long-term industry collaboration. In so doing, companies can shift more of their energies from fighting regulatory battles to reaping the rewards of delivering value to consumers.

Kamlet Shepherd & Reichert, LLP  
Attorneys at Law

1747 Pennsylvania Avenue NW,  
Suite 800  
Washington, DC 20006  
202.204.8600

1515 Arapahoe Street  
Tower 1, Suite 1600  
Denver, CO 80202  
303.825.4200

[www.ksrlaw.com](http://www.ksrlaw.com)

© 2000-2008 Kamlet Shepherd  
& Reichert, LLP  
All rights reserved.

KAMLET  SHEPHERD

A POWERFUL ADVANTAGE



## Convergence Compass

*As law and policy governing communications, technology, energy and other network industries converge, companies and policymakers need balanced, creative strategies that straddle several related fields. Providing these strategies, as well as exceptional service, is a hallmark of Kamlet Shepherd & Reichert, LLP. With offices in Washington, D.C. and Denver, Kamlet Shepherd offers a diverse array of services encompassing communications, intellectual property, internet, antitrust and competition policy, convergence law, securities and corporate finance, mergers and acquisitions, strategic alliances and joint ventures, litigation and appellate practice. For more information regarding Kamlet Shepherd or this newsletter, please contact the attorneys listed, or Melissa Murray at 202-204-8600 or [mmurray@ksrlaw.com](mailto:mmurray@ksrlaw.com).*