29 March 2018

Claude Doucet
Secretary General
Canadian Radio-television and Telecommunications Commission
Gatineau, QC K1A 0N2

Dear Secretary General,

Re: Asian Television Network Limited on behalf of a Coalition, *Application to disable on-line access to piracy sites,* Application 8663-A182-201800467 (Markham, 29 January 2018)

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including telecommunications. As required by section 22(2)(g) of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277), the Forum requests the opportunity—should the CRTC decide to hold a public hearing—to appear at the hearing, to address the submissions of the applicant and of other parties and to respond to questions from the CRTC.

The Forum supports a strong Canadian communications system that serves the public interest. Our concerns about procedural fairness notwithstanding, we welcome the opportunity to comment on this application, and look forward to reviewing other parties' submissions.

Our intervention is attached.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,

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Asian Television Network International Limited for FairPlay Coalition

"What's the worst that could happen?": The worst that could happen

Intervention of
Forum for Research and Policy in Communications (FRPC)

on

Application to disable on-line access to piracy sites,
Application 8663-A182-201800467
(Markham, ON, 29 January 2018)

29 March 2018

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Synopsis of the Forum's facts and arguments

Application 8663-A182-201800467 asks the CRTC to order ISPs to block Canadians' access to websites, transforming the Internet from a global 'Information Highway', into a Canadian tollroad with exits that often lead nowhere. A survey by FRPC in March 2018, however, found that a majority of Canadians (58%) thinks there is a risk that the CRTC would block sites that had done nothing wrong, and that a majority (64%) also thinks there is a risk that over time, the federal government would block sites for reasons other than online copyright infringement. The widely-touted fact at the core of its submission – that people in Canada made 1.88 billion visits to sites that allegedly contained or enabled online copyright infringement in 2017 – is based on studies with seriously flawed assumptions and methods, and is countered by the fact that in March 2018, 7 out of 10 Canadian Internet users said they had visited sites by accident in the past year.

The Forum opposes application 8663-A182-201800467 because of Canadians' concerns over the risks of misblocking and expanding censorship, because the application has failed to make its case, because approval would be contrary to Canadian law, and because, at its core, the application is a colourable attempt to rewrite Canadian copyright law using telecommunications sleight of hand.

The CRTC should deny application 8663-A182-201800467 not simply because it is based purely on self-interest, and ignores the public interest, but because it ignores the interest of the nation, is not desirable and once approved, cannot be corrected.

Executive Summary

Introduction

ES1 Application 8663-A182-201800467 asks the CRTC to block Canadians' access to Internet sites, purportedly to reduce online copyright infringement.

ES2 The Forum opposes the application because its arguments are not supported by the evidence, it is asking the CRTC to exceed its authority, it is attempting through the *Telecommunications Act* to revise Canadian copyright law and because a majority of Canadians believe not only that the CRTC will block sites that have done nothing wrong, but that site blocking will expand beyond online copyright infringement.

Summary of application 8663-A182-201800467

ES3 The application

- proposes that the CRTC authorize an 'Independent Piracy Review Agency' (the agency) as a permanent 'inquiry' that would hear, consider and make recommendations to disable Canadian telecommunications users' access to Internet "piracy sites"
- defines 'piracy sites' as including websites, applications, services or devices that engage or facilitate the infringement of owners' copyright.
- asks the CRTC to establish the criteria that it and the agency would use to evaluate whether a website is "blatantly, overwhelmingly, or structurally engaged in piracy".

ES4 Confusingly, the agency's guiding mind – its Board of Directors – would have little to do with its work. The agency's part-time staff – whose other part-time employment is not discussed – would instead hear applications from rightsholders and others to add "almost exclusively hardcore piracy sites" to a list of sites to which users' access would be disabled, sometimes with an oral hearing by teleconference, and make recommendations to the CRTC. If the CRTC approved the recommendations, it would order ISPs to disable access to the sites.

ES5 Parties could appeal the CRTC's decisions to the CRTC, or the Federal Court of Appeal, but application 8663-A182-201800467 expects such appeals to be rare, because online 'pirates' are unlikely to defend their 'indefensible' conduct. It is unclear whether parties could in any way challenge the agency's process or its recommendations.

ES6 The application proposes that the agency's governance structure be considered in a follow-up proceeding, and for that reason the Forum has not addressed the agency's many operational problems in this submission.

The Forum opposes the application

ES7 The Forum opposes the application, not simply because it purports, under the guise of telecommunications *qua* broadcasting law to revise Canadian copyright law, but also because it

- proposes that the CRTC exceed its legal mandate and authority, by disregarding telecommunications policy objectives in favour of broadcasting and copyright objectives, and by ordering websites to be blocked and
- misconstrues key facts, in particular the very small incidence of alleged online copyright infringement
- has little to no chance of achieving its purported objectives, and
- risks eroding Canadians' trust in Canada's telecommunications system.

ES8 Moreover, a national survey undertaken on behalf of the Forum in early March 2018 found that

- 70.3% of Canadians believe it is possible to visit Internet sites by accident (although only 59.6% of those over 65 years of age believe it is possible to visit websites by accident)
- 70.4% of those who thought it was possible to visit websites by accident or who were unsure whether this was possible, said they had visited a website by accident in the previous year (with 84.2% of those between 18 and 24 years of age, but just 56% of those over 65 years of age, admitting they had visited websites by accident in the previous year)
- 57.7% of Canadians think there is a risk that the CRTC will block websites that are not infringing copyright, with 69.3% of those 18 to 24 years of age sharing this view, and
- 63.8% of Canadians think there is a risk that, over time, the federal government will block Canadians' access to online sites for reasons other than copyright infringement, with 73.4% of those 18 to 24 years of age sharing this view.

Conclusion

ES9 The CRTC should deny application 8663-A182-201800467 because the proposal has no foundation in Canadian telecommunications law; the CRTC lacks jurisdiction to approve the agency, the application's arguments are not supported by its own facts or by those we have adduced.

ES10 Canadian broadcasting faces many challenges, and the Forum would strongly support measures to increase the level of well-funded programming produced by Canadians for Canadians which is available. This application is not such a measure, being motivated by self-interest, rather than by any concern for the public interest.

ES11 Application 8663-A182-201800467 is colourably a back-door attempt to change copyright law primarily to the benefit of a very small number of very large and already very profitable communications companies. Some might wonder if the application has been brought forward not because of any prospect of success before the CRTC, but to test the idea of a one-lane information tollroad so as to identify the strengths and weaknesses of opposition to the idea.

ES12 Even if application 8663-A182-201800467 were lawful - but it is not, and were certain to strengthen Canada's broadcasting system - but it is not, the Forum would still oppose it.

ES13 Censorship by any name ('anti-piracy'), by any means (any website, application, service or device), to the benefit of any party (corporations, or the state) remains censorship.

ES14 Canadians rejected censorship more than thirty years ago, when Parliament adopted the *Canadian Charter of Rights and Freedoms*.

ES15 This ignores the interest of the nation, and of Canadians. It is not desirable. Once approved, it cannot be corrected.

ES16 The Forum asks the CRTC to deny application 8663-A182-201800467.

I. Introduction

A. The Forum opposes the application

1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including telecommunications. The Forum supports a strong Canadian communications system that serves the public interest, as defined by the legislative objectives set by Parliament for Canadian communications.

2 Filed by a 30-member coalition, the application ("the application") asks the CRTC to approve the establishment of an 'Independent Piracy Review Agency' (IPRA, or "the agency") by Canadian telecommunications companies,[1] and to then consider recommendations from the agency's staff to block Canadian ISP subscribers' access to certain websites. If the CRTC accepts the staff recommendations, the CRTC asks that it then order ISPs to block their subscribers' access to those sites. A careful review of the application has led the Forum to conclude not only that the CRTC should deny the application, but that it should warn others going forward that the CRTC's scarce resources should not be used to test-run proposals for legislative change.

3 The Forum's opposition to the application is based on Canadian law, Canadian public policy and the results of a survey of Canadians undertaken on behalf of the Forum in March 2018 with respect to their online behavior and their thoughts on increased government and industry-driven control of the Internet. In brief, our analysis of the application has led us to conclude that its approval would be unlawful, would make Canada's telecommunications system less worthy of Canadians' trust, and because it offends Canadian values and beliefs, would be contrary to Canadian public policy.

4 In the remainder of this submission the Forum discusses the fundamental deficiencies that make approval of the application impossible. The Forum's fundamental concern is that approval of this application will shift the CRTC from its mandate of regulating Canada's telecommunications system in the public interest, to blocking Canadians' access to the Internet to serve the interests of a small number of media companies.

5 In the remainder of this Part we describe the process adopted by the CRTC to date in this matter. We then summarize the application, briefly describe the results from a March 2018 survey addressing issues raised in the application, and list the questions that the Forum would have asked the applicant, had the CRTC granted the 2 February 2018 request of the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) and which the Forum supported.[2] Parts II, III, and IV of our intervention address three major areas raised by the application, while Part V sets sets out some additional conclusions. Appendices follow, including a report on the results of a survey undertaken for the Forum in March 2018 which addressed Canadians' experience in visiting Internet sites by accident, their views on the likelihood that the

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1 Application 8663-A182-201800467 (29 January 2018), at ¶19.

2 By letter dated 7 February 2018.

CRTC will permit the blocking of sites that have done nothing wrong, and on the likelihood that the federal government will expand site-blocking to encompass matters beyond online copyright infringement.

B. CRTC process left public record incomplete

6 On 29 January 2018 Asian Television Network Inc. (ATN) filed an application on behalf of 30 parties described as "directly affected stakeholders" (¶13). The 30 parties consist of fifteen Canadian and non-Canadian4 broadcasters, ten guilds or associations, four theatre companies and a film festival (see Table 1):

Table 1 Parties to the application

Broadcaster	Associations,, guilds and unions	Cinema companies	Festivals
Asian Television Network (ATN)	Academy of Canadian Cinema and Television	Les Cinémas Ciné Entreprise Inc.	TIFF
Bell Canada	Alliance of Canadian Cinema Television and Radio Artists (ACTRA)	Cinémas Guzzo	
Bell Expressvu	Association québecoise de l'industrie du disque du spectacle et de la video (ADISQ)	Cineplex	
Bell Media	Association québécoise de la production médiatique (AQPM)	Landmark Cinemas	
CBC / Radio-Canada	Canadian Association of Film Distributors and Exporters (CAFDE)		
Cogeco Connexion	Canadian Media Producers Association (CMPA)		
Corus	Directors Guild of Canada (DGC)		
DHX Media	International Alliance of Theatrical Stage Employees (IATSE)		
Entertainment One	Movie Theatre Association of Canada (MTAC)		
Ethnic Channels Group	Union des artistes (UDA).		
Fairchild Media Group			
Maple Leaf Sports and Entertainment (MLSE)			
Québecor Média Inc.			
Rogers Media			
Television Broadcasts Limited (TVB)			
Subtotal: 15	Subtotal: 10	Subtotal: 4	Subtotal: 1

[3] Paragraph (¶) numbers shown in parentheses refer to paragraph numbers in Application 8663-A182-201800467.

[4] Television Broadcasts Limited (TVB) is a non-Canadian company of which 27.8% is owned by the Shaw Family: CRTC ownership chart 92a, https://crtc.gc.ca/ownership/eng/cht092a.pdf (accessed 15 March 2018).

7 Somewhat puzzlingly, in light of the experience with CRTC process held by so many of the members of the applicant Coalition, the application does not state the Part of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (*CRTC Rules*)[5] under which it has been made. The Forum is taking the liberty of assuming that it was made pursuant to Part I of the *CRTC Rules.*

8 The CRTC posted the application on the telecommunications side of its website[6] one day after receiving it, on 30 January 2018, setting 1 March 2018 as the deadline for comments.

9 On 2 February 2018 CIPPIC wrote the CRTC's Secretary General to point out that the application "raises far-ranging and complicated questions of law, fact and policy, including many of which are novel in the sense that the Commission has never before been called upon to engage with them", is complex, makes "extensive factual allegations", raises "areas of law which fall outside the Commission's historical area of expertise" and has the "potential for far-reaching impact and unintended consequences". CIPPIC therefore asked the CRTC to

- extend the usual 30-day limit usually granted for Answers and Interventions to at least 60 days;
- replace the 10-day time limit usually granted for an applicant's reply with a second 30-day comment period for all parties, including interveners, after the deadline for answers and interventions;
- include phases for interrogatories and requests for information after the deadline for the applicant's reply;
- extend a second reply phase to all parties after the interrogatories deadline;
- hold a public hearing to consider "the more complex aspects" of the application; and
- include an opportunity for final comments after the public hearing.[7]

10 CIPPIC's procedural request was supported by the Public Interest Advocacy Centre (PIAC), on 6 February 2018; by the Canadian Network Operations Consortium Inc. (CNOC),[8] and the Forum[9] on 7 February 2018; and by the Union des consommateurs (Udc) on 8 February.

11 The applicant did not object to the request to extend the intervention deadline or to a public hearing, but opposed all remaining procedural requests as being "unduly lengthy and complex". It said that these requests "will only lead to repetition and inefficiency, without contributing to the creation of the record … while imposing an unreasonable burden on all participants and the Commission."[10] The applicant concluded by alleging that CIPPIC had mischaracterized the

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5 SOR/2010-277.

6 In line with section 23 of the *CRTC Rules* ("The Commission must post on its website all applications that comply with the requirements set out in section 22.").

7 Procedural Request of CIPPIC (2 February 2018).

8 CNOC proposed that a request-for-information stage follow the intervention process and that there be one round of reply comments (as well as a final reply phase after the public hearing).

9 The Forum proposed that the CRTC issue a Notice of Consultation.

10 Applicant's reply, 7 February 2018, at ¶¶3-4.

CRTC's experience, its expertise and the relevant issues, and that it had conflated copyright law and telecommunications policy.[11]

12 CIPPIC submitted its reply on 9 February 2018, pointing out that

> … a proceeding wherein interveners are precluded from providing reply and final comments or from challenging the evidentiary basis of the Applicants' extensive claims will not prevent the Commission from arriving at a full and informed decision and, in the long run, will lead to more length and complexity as it can be anticipated that such a decision will be promptly the object of review and vary applications.[12]

13 The CRTC's staff did not grant CIPPIC's request to extend the deadline for comments from 30 to at least 60 days, instead extending the deadline by 58 days (from the original date of 1 March 2018, to 29 March 2018). The staff said that "[t]he Commission will determine at a later time whether further process is warranted, and if so, in what form."[13] The staff letter did not explain why Commission staff, rather than the CRTC or its representative (Secretary General Claude Doucet), answered CIPPIC's procedural request.[14]

14 As of today's filing deadline the CRTC has not stated whether 'further process' is warranted with respect to the application. The Forum submits that the CRTC procedures adopted in this proceeding have been inadequate to protect to the public interest, in light of the significance of this application. That is to say, the application proposes establishing an inquiry of indefinite duration whose role would be to authorize Internet service providers (ISPs) to restrict access by all Internet users in Canada to an unknown number of websites in Canada and around the world, for an indefinite period of time.

15 The absence, in particular, of an interrogatory process enabling interested parties to discover information about the application and to become better informed, has deprived Canadians—and the CRTC—of a complete public record. The CRTC's decision to deny the 2 February 2018 request by CIPPIC for an interrogatory phase means that interveners that chose to respond to the application had no opportunity to ask questions about the application, to clarify the applicant's statements. The Forum remains concerned that the CRTC denied CIPPIC's request, as clarification would have benefitted interveners, the applicant and the CRTC. If the CRTC had permitted interveners to ask the applicant questions, the Forum would have submitted a number of questions, including those set out in Appendix 1, attached..

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11 *Ibid*., ¶8.

12 CIPPIC reply, 9 February 2018 at 2.

13 A/Senior General Counsel and Executive Director, CRTC, *Re: Application to disable on-line access to piracy sites—Procedural Request*, Letter (Gatineau, 15 February 2018), https://crtc.gc.ca/eng/archive/2018/lt180215.htm.

14 As the Federal Court of Appeal explained in *Centre For Research-Action On Race Relations v. Canadian Radio-Television and Telecommunications Commission*, 2000 CanLII 16685 (FCA), at ¶6, "the "Commission" consists of the full-time and part-time members thereof appointed by the Governor in Council. From the affidavit of [then-Executive Director, Broadcasting, CRTC] Mr. Blais it is obvious that his letter of August 9, 2000 was not a "decision" of the "Commission …."

C. Context of Application 8663-A182-201800467

16 This application is unusual as it asks the CRTC to make decisions under the *Telecommunications Act* ostensibly to further the aims of the Canadian *Copyright* Act, and indirectly assisting objectives of the *Broadcasting Act*. A limited number of large companies operate in both telecommunications and broadcasting in Canada: the CRTC's most recent (2017) communications monitoring report said that just three companies operate in all sectors of Canada's communications system, taking in more than half (60%) of the system's total revenues in those sectors in 2016.[15] (Though not identified in the report, these three companies are likely Bell, Quebecor and Rogers.)

17 As Table 1 showed, four parties to the application have interests in both broadcasting and telecommunications: Bell (Bell Canada, Bell ExpressVu and Bell Media), Cogeco, Quebecor and Rogers. The CRTC publishes limited statistical information about these companies' telecommunications operations, but publishes aggregated financial information about their broadcasting operations.[16]

18 In 2016, the four telecommunications companies that are party to the application took in nearly 90% of the broadcasting system's revenues (Appendix 2), with their revenues growing by 17.7% between 2012 and 2016. They took in just under half (47.5%) of its employment (Appendix 3), with the level of full-time employees decreasing by 2.4% between 2012 and 2016. In terms of their BDU operations, the four largest telecommunications companies enjoyed mixed results, with subscription levels decreasing between 2008 and 2017 for Cogeco and Rogers, but growing for BCE and Quebecor (Appendix 4). Average revenue per subscriber (user)grew, however, for all four of the telecommunications companies' BDU operations (Appendix 5).[17]

19 The Forum also reviewed information about Canadians' income, and their capacity to afford telecommunications and broadcasting services.

D. Application 8663-A182-201800467

20 This section summarizes the application for the reader's convenience.

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15 CRTC, *Communications Monitoring Report 2017*, at 83, Table 3.0.5. The companies operated in the radio, television, BDU, discretionary & on-demand TV, local & access telephone, long-distance telephone, Internet, wireless and private line. *Ibid.*

16 See the 'aggregated annual returns' at: https://crtc.gc.ca/eng/industr/fin.htm.

17 It should be noted that it is difficult to compare broadcasting data over time, due to changes in the CRTC's presentation of information. For example, the CRTC's 2011-2015 BDU report published data for direct-to-home (DTH) distribution services in combination with data for multi-point distribution system (MDS) services. The CRTC excluded data for MDS systems beginning with the 2012-2015 BDU report. As DTH data were not reported separately in previous BDU reports, it is impossible to construct a complete and valid time series for BDU revenues over time. Similarly, the CRTC began reporting IPTV separately in its 2012-2016 BDU report, but reported it in combination with cable data in previous reports.

1. Online infringement

21 Telecommunications application 8663-A182-201800467 deals with online copyright infringement. It focusses on an aspect of infringement that encompasses websites, applications, services that enable, induce or facilitate the reproduction, communication :

In this application we refer to a specific aspect of the piracy problem – namely, the availability on the Internet of websites, applications, and services that make available, reproduce, communicate, distribute, decrypt, or decode copyrighted material (e.g., TV shows, movies, music, and video games) without the authorization of the copyright holder, or that are provided for the purpose of enabling, inducing, or facilitating such actions. In this application "piracy" refers to this range of activities ….

22 The applicant claims, based on the 'MUSO report', that in 2016 Canadians made "1.88 billion visits" to online infringement websites, and estimates that "1 million households in Canada" use or subscribe to services that facilitate online copyright infringement (¶31).

23 The applicant defines "piracy sites" broadly, including online locations of websites, applications, services or devices said to be engaged in this range of activities:

> … locations on the Internet at which one accesses the websites, applications, services that are blatantly, overwhelmingly, or structurally engaged in piracy.[8]
>
> …
>
> FN8 Accordingly, piracy sites could include not just a traditional website but also, for example, a location on the Internet dedicated to the delivery of an illegal piracy subscription service accessed directly from a server through an illicit streaming device.

24 The applicant claims that conventional domestic legal remedies fail to, will fail to address,[18] and are "impossible" for addressing, online copyright infringement (¶13), because

- those operating online infringing sites "may reside in one jurisdiction, use servers or websites registered in one or more other jurisdictions, and cause damage" globally (¶12)
- traditional legal efforts are slow and expensive (¶12),
- even if legal efforts are successful, new sites will "quickly emerge to provide access to the same" infringed works (¶12), and
- the CRTC's process for hearing applications directly is untimely and inefficient (¶23).[19]

---

18 The applicant's claim is somewhat confusing, as it is unclear whether it is arguing that conventional legal remedies will be doomed to failure, or that the Canadian creative sector is doomed to failure: "… the nature of online piracy means that if the Canadian creative sector is left to rely solely on conventional domestic legal remedies, it [*sic*] will be doomed to fail."—Application 8663-A182-201800467, ¶13. It is un

19 Application 8663-A182-201800467, ¶23: "… The IPRA would be designed to ensure procedural fairness while its specialized mandate would allow for a significantly more timely and efficient process than would be possible through applications made at first instance directly to the Commission."

25 The application claims that online infringement "causes significant harm to Canada's social and economic fabric" (¶33), though it also says that "it is impossible to determine the full extent of the financial harm from this volume of piracy", "let alone non-financial harms" …. (¶31). It argues that "[l]eft unchecked", copyright infringement "will dramatically erode the contribution of these companies and their employees to Canada's digital and creative economies" (¶34). The applicant claims that infringement denies rightsholders "the compensation they are entitled to seek in the market" for their work (¶35). As a result, rightsholders' earnings and profitability is "negatively" affected, "leading to reduced employment and fewer opportunities" in the cultural sector and a reduced ability to "develop, produce, and disseminate new content, undermining Canada's social fabric" (¶35).

26 The application then goes on to claim that the losses of Canada's cultural sector—all of which are merely alleged, rather than proven—are "increasing" (¶37). It claims that "piracy directly harms the legitimate Canadian broadcasting system" (¶40). It predicts that broadcasting distribution undertakings (BDUs), presumably including the BDUs controlled by members of the application's coalition, will not invest in new telecommunications infrastructure and technologies in the face of copyright infringement (¶42). It also asserts that other countries have implemented website blocking regimes (¶15), to bolster its claim that the regime is suitable for Canada as well.

27 The applicant then argues that stopping copyright infringement is an "an essential step" to enable rightsholders to monetize their content (¶39), and that the impact of copyright infringement is evident from declining BDU subscriptions (¶43). The applicant argues that "all players" have a role in dealing with copyright infringement (¶14)— namely ISPs, hosts, payment processors, search engines, domain name registrars, and advertising networks.

2. Independent Piracy Review Agency

28 To address online infringement the application proposes that the CRTC establish an "Independent Piracy Review Agency" ("the agency", IPRA), whose "role and purpose … would be to manage the workload imposed on the Commission and create a significantly more timely and efficient process for considering applications than would be possible for the Commission…." (¶88). Application 8663-A182-201800467 says the agency would expedite the proposed application process for banning websites, including receiving copyright owners' applications, reviewing any evidence, holding teleconference hearings if required, and making recommendations to the CRTC (¶74).

29 The applicant writes that

> IPRA's role will be to consider applications from rightsholders and other applicants regarding the addition of a website to the list of piracy sites, receive and review evidence from the applicant, the alleged piracy site, and ISPs, hold an oral hearing by teleconference if required, and then submit a recommendation to the Commission on whether to add that site to the list of sites to which ISPs are required to disable access. (¶74)

30 Finally, the applicant asks the CRTC to establish criteria used to assess whether or not a particular website is engaging in a set threshold level of copyright infringement. Such criteria would include: the degree and impact of infringement; demonstrated disregard for copyright; marketing; significance of non-infringing uses; infringement prevention measures; efforts to evade legal action; and any other relevant findings (¶85).

31 The Forum notes that the proposed regime's ambit may be larger than described above, due to the statement in Appendix 1 of the application (legal opinion by McCarthy Tétrault, for BCE Inc.), that BCE has sought legal advice not only with respect to sites that engage in online copyright infringement, but also sites that 'enable or facilitate' online copyright infringement.[21]

3. IPRA - organization

32 While the applicant recommends that the details of IPRA's organization and process be determined by the CRTC at a subsequent proceeding (¶24), it proposes that IPRA

- be established as an independent, not-for-profit corporation resembling the Commissioner of Complaints for Telecommunications Services Inc. (CCTS) (¶23, ¶77)
- consist of its Members, an unpaid Board of Directors, and a "small number of part-time staff with relevant experience" who would receive, review and make recommendations about applications (¶¶78-79), and
- be funded initially by "members of the coalition" comprising the applicant (¶83), later becoming "self-funding" by charging fees to applicants that want Internet sites designated as copyright infringers (¶81)

33 The application also proposes that IPRA's Board of Directors would

- consist of its members (Application, ¶80)
- be nominated by its Members, rightsholders, ISPs, and consumer advocacy and citizen groups (Application, ¶79)
- "be responsible for financial oversight", and "for ensuring that IPRA has appropriate policies, procedures, and staff" (Application, ¶79), and would
- not be involved in evaluating applications (Application, ¶79).

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21 Appendix, at 1 (bold font added):
You have asked for our opinion about whether the Telecommunications Act (the "Telecommunications Act")1 grants the Canadian Radio-television and Telecommunications Commission (the "CRTC") jurisdiction to implement a regime (the "Proposed Regime") under which all Canadian Internet service providers ("ISPs") would be required to disable access for residential and mobile customers to sites that have been determined—upon review by an independent agency—to be blatantly, overwhelmingly or structurally engaged in the infringement of copyright, **or the enablement or facilitation of the same**.
...

a. Agency process

34 The application says that IPRA's staff would

- work for IPRA part-time
- be responsible for and make all decisions about piracy sites and recommendations to the CRTC (Application, ¶79)
- only recommend adding a site to a list of infringing sites "if the evidence presented establishes that it is blatantly, overwhelmingly, or structurally engaged in" infringement (¶75), meaning "almost exclusively hardcore piracy sites" (¶89).

35 IPRA would … consider applications by rightsholders and other interested parties ("applicants") seeking to add a site to the list of piracy sites to which access must be disabled", might hold "an oral hearing by teleconference if required", and then "make recommendations" to the CRTC. The CRTC would then consider IPRA's evidence and recommendations, and "if approved", would require ISPs to disable access to these sites (¶19, ¶74). The application states that the applications received by IPRA would be considered

> … based on the evidence presented. It would only recommend adding a website to the list of piracy sites if the evidence presented establishes that it is blatantly, overwhelmingly, or structurally engaged in piracy. (¶75)

36 The applicant writes that

- Applicants would file applications with IPRA, identifying a site and providing evidence about the site's activities in terms of evaluation criteria
- Applicants would serve all ISPs and the website owner
- Website owners and ISPs would have 15 days to notify IPRA and the applicant of their intent to respond
- Website owners and ISPs would have an additional 15 days to provide evidence
- "the IPRA" – but, presumably, its staff (as the Board of Directors does not participate in consideration of applications) – would consider whether an application has sufficient evidence, even if it received no response to its original notification
- "If it considers it necessary, the IPRA would have the discretion to hold an oral hearing by teleconference within 15 days of receiving the response" – and presumably would not hold an oral hearing if it received no response, and
- IPRA would then decide whether to recommend that the CRTC add a site to "the list of piracy sites" (¶86)

37 The CRTC would then decide whether to accept or decline the recommendation of IPRA staff (¶87)

38 If the CRTC accepted the IPRA staff recommendation "it would provide reasons to the site operator and issue a decision varying the list of piracy sites", and "then quickly or automatically extend the site blocking requirement to additional locations on the Internet to which the same piracy site is located" (¶87)

b. Appealing CRTC decisions on agency recommendations

39 Those objecting to a CRTC decision on IPRA staff's recommendations could ask the CRTC to review and vary its decision under section 62 of the *Telecommunications Act* (¶89), and/or seek judicial review of, or appeal the decision to, the Federal Court of Appeal (¶¶26, 89).

40 The applicant anticipates that such appeals will be rare, however, because proprietors of these "hardcore piracy sites … typically recognize the indefensible nature of their conduct and do not attempt to defend it in these types of forums" (¶89).

c. Follow-up proceeding on agency governance

41 The applicant concludes by asking the CRTC – if it approves the application – to direct the Canadian carriers that are members of the coalition "to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop a proposed governance structure and constating documents for IPRA ….", and to then initiate another proceeding to consider these steps and the criteria to be used to "evaluate whether a particular site is blatantly, overwhelmingly, or structurally engaged in piracy" (¶¶82, 84).

42 While the applicant recommends that the details of the proposed agency's organization and process be determined by the CRTC at a subsequent proceeding (¶24), it proposes that the agency be established as an "independent, not-for-profit corporation" such as the CCTS (¶23, ¶77), comprising Members, a Board of Directors, and part-time staff (¶¶78-79), and be funded by members of the coalition behind this application (¶83), before becoming "self-funding" through charging fees to those applying for websites to be blacklisted for copyright infringement (¶81).

43 The application says that the agency's part-time staff would be responsible for and make all decisions regarding websites alleged of copyright infringement, as well as make recommendations to the CRTC (¶79). The staf would purportedly only recommend blacklisting sites "if the evidence presented establishes that it is blatantly, overwhelmingly, or structurally engaged in" infringement (¶75), meaning "almost exclusively hardcore piracy sites" (¶89).

44 the agency would … consider applications by rightsholders and other interested parties ("applicants") seeking to add a site to the list of piracy sites to which access must be disabled", might hold "an oral hearing by teleconference if required", and then "make recommendations" to the CRTC. The CRTC would then consider the agency's evidence and recommendations, and "if approved", would require ISPs to disable access to these sites (¶19, ¶74). The application states that the applications received by the agency would be considered "based on the evidence

presented" and only recommend blacklisting a website "if the evidence presented establishes that it is blatantly, overwhelmingly, or structurally" engaged in online infringement. (¶75)

45 The applicant writes that

- Applicants would file applications with the agency, identifying a site and providing evidence about the site's activities in terms of evaluation criteria
- Applicants would serve all ISPs and the website owner
- Website owners and ISPs would have 15 days to notify the agency and the applicant of their intent to respond
- Website owners and ISPs would have an additional 15 days to provide evidence
- "the the agency"—but, presumably, its staff (as the Board of Directors does not participate in consideration of applications)—would consider whether an application has sufficient evidence, even if it received no response to its original notification
- "If it considers it necessary, the the agency would have the discretion to hold an oral hearing by teleconference within 15 days of receiving the response"—and presumably would not hold an oral hearing if it received no response, and
- the agency would then decide whether to recommend that the CRTC add a site to "the list of piracy sites" (¶86)

46 The CRTC would then decide whether to accept or decline the recommendation of the agency's staff (¶87)

47 If the CRTC accepted the staff recommendation "it would provide reasons to the site operator and issue a decision varying the list of piracy sites", and "then quickly or automatically extend the site blocking requirement to additional locations on the Internet to which the same piracy site is located" (¶87)

4. Appealing CRTC decisions on agency recommendations

48 Those objecting to a CRTC decision on the agency staff's recommendations could ask the CRTC to review and vary its decision under section 62 of the *Telecommunications Act* (¶89), and/or seek judicial review of, or appeal the decision to, the Federal Court of Appeal (¶¶26, 89).

49 The applicant anticipates that such appeals will be rare, however, because proprietors of these "hardcore piracy sites … typically recognize the indefensible nature of their conduct and do not attempt to defend it in these types of forums" (¶89).

5. Follow-up proceeding on governance

50 The applicant concludes by asking the CRTC—if it approves the application—to direct the Canadian carriers that are members of the coalition "to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop a proposed governance structure and constating documents for" the proposed agency, and to then initiate another proceeding to consider these steps and the criteria to be used to "evaluate whether a particular site is blatantly, overwhelmingly, or structurally" infringing copyright (¶¶82, 84).

II. Application Violates Canadian Telecommunications Law and Policy Objectives

A. Available facts contradict application

51 Given the breathtaking step that the application wishes the CRTC to take – to take charge of Canadians' visits to the Internet to decide which sites Canadians may and may not access – the Forum expected that the applicant would present extremely strong, uncontrovertible evidence to support its arguments.

52 The application's evidence is insufficient to make its case.

1. Visits to online copyright infringing sites are falling

53 The application claims that "there is compelling evidence that" online copyright infringement "is huge and growing" (¶31). The application's own study contradicts this statement, however.

54 The MUSO study states that "[alleged] Canadian piracy rates declined during the study period. It points to the trends in the first six months vs. the last six months […] for every type of site measured by MUSO, Canadian traffic declined during the study period."[22]

55 Other research confirms that online copyright infringement is declining. In 2003 peer-to-peer file sharing (likely involving online copyright infringement) represented 60% of total downstream traffic. In 2016 one of the main torrent sites, BitTorrent, made up just 2% of downstream traffic during peak periods (while Netflix accounted for over 35%). Cisco Systems has reported that online file sharing is the only component of online traffic that is not on the rise.[23]

56 The Forum submits that the CRTC should deny the application because the basis for establishing a website blacklisting regime—growth in visits to infringing websites—does not exist.

2. Blocking websites does not reduce copyright infringement

57 Even if online copyright infringement were not decreasing (and it is), numerous studies have shown that blocking access to copyright-infringing materials does not, for the most part, result in views redirected to legal avenues and sales. Infringing activity is reduced (and legal sales rise) by providing reasonable legal avenues for accessing content. A 2017 report from the European

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22 Michael Geist, "The Case Against the Bell Coalition's Website Blocking Plan, Part 2: Weak Evidence on the State of Canadian Piracy" (13 February 2018), online: <www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-2-weak-evidence-state-canadian-piracy/>; MUSO Report, at pages 4-7..

23 Canadian Media Fund, "Adjust Your Thinking: The New Realities of Competing in a Global Media Market" (November 2017), online: <https://trends.cmf-fmc.ca/media/uploads/reports/Adjust_Your_Thinking_-_The_New_Realities_of_Competing_in_a_Global_Media_market_-_CFM_Trends.pdf> [CMF, "New Realities", Report at "New Realities"], at page 8.

Commission shows that online copyright infringement did not displace legal sales in a statistically significant way.[24] The report also showed that

> … the proportion of the internet using population that is willing to pay at least the market price for the last illegal online transaction is the lowest for films and TV-series. […]
>
> This impact [of online copyright infringement on legal sales] can be anywhere from total substitution of legal offer, through no effect on sales, *to even positive effects on creators' revenues* (thanks to stimulation of legal demand for some types of uses). Thus, to a large extent, the jury is still out when it comes to the size *or even the sign* of piracy effects on legitimate sales.[25]

58 Another report from Germany found that while users of a blocked copyright-infringing website reduced their access to such content while the website was blocked, sales of non-infringing content did not increase:

> [T]heir consumption through licensed movie platforms increased by only 2.5%. Taken at face value, these results indicate that the intervention *mainly converted consumer surplus into deadweight loss*. If we were to take the costs of the intervention into account (raid, criminal prosecution, etc.), *our results would suggest that the shutdown of kino.to has not had a positive effect on overall welfare*.[26]

59 A report from the Canadian Media Fund found instead that the most effective way to reduce online copyright infringement is to provide legal and affordable services with competitive offerings:

> One of the outcomes of the move away from DVDs toward subscription-based streaming services that charge a single monthly fee for unlimited monthly viewing is that the incentive to create illegal copies and downloads has been greatly reduced. It's worth noting that a similar trend exists in the music industry, a market that lost approximately half of its revenue base in the years following the arrival of peer-to-peer file sharing online, and that *in 2017 reported its highest revenue growth in 20 years*. While statistics vary from one research report to another and from one format to another, *the trend is clear: Less illegal downloading is taking place, of both music and video as a result of the arrival of subscription streaming services*.[27]

60 The Forum submits that broadcast programming and distribution undertakings are better placed to address changes in their business models than the CRTC, with respect to increasing revenues.

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24 Martin van der Ende et al, "Estimating displacement rates of copyrighted content in the EU: Final Report" (May 2015), online: <https://cdn.netzpolitik.org/wp-upload/2017/09/displacement_study.pdf> ["Estimating displacement rates"], at page 7.

25 *Ibid*., at pages 16 and 19 (emphasis added).

26 Luis Aguiar, "Online Copyright Enforcement, Consumer Behavior, and Market Structure" (Institute for Prospective Technological Studies Digital Economy Working Paper 2015/01), online: <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC93492_Online_Copyright.pdf> (emphasis added).

27 CMF, "New Realities", Report at "New Realities" Report, at page 8 (footnote omitted, emphasis added).

3. Proposed regime undermines and does not further telecommunications objectives

61 In terms of Parliament's policy for Canadian telecommunications, the application and Appendix 1 claim that establishing the proposed regime will further the objectives in sections 7(a), 7(h), and 7(i). We address these claims below.

a. Section 7(a): Canada's social and economic fabric

62 Section 7(a) of the *Telecommunications Act* affirms that one of Parliament's objectives for Canadian telecommunications policy is that it "facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions."[28] The applicant argues that the online copyright infringement "threatens the profitability, viability and employment generated by Canadian creative and broadcasting industries",[29] undermines "the creation and legitimate dissemination of Canadian works", and "also harms consumers and undermines Canadian's trust in, and therefore the development of, the digital economy" (¶95(i)).

63 In terms of law, the application has not explained why — if it expects the regulation of telecommunications to strengthen, or at last support, the profitability, viability and employment of Canadian broadcasters or Canada's creative sector — Parliament then separately enacted the *Broadcasting Act*.

64 The *Telecommunications Act* focusses on Parliament's objectives for the telecommunications system — while the *Broadcasting Act* addresses matters such as broadcasters' viability and employment and compensation for Canada's creators. When Parliament considered Bill C-62 (the 1993 *Telecommunications Act*), the Minister of Communications confirmed that "[t]he two pieces of legislation were largely developed in tandem. It is clear from the legal definitions in them that broadcasting is an integral part of telecommunications *which has been removed from the scope of Bill C-62 because it is the subject of separate legislation*."[30] The Minister explained that in drafting the *Telecommunications Act*, "There was no intention to undermine the ability of the federal government to legislate in the field of culture *or to operate in any way in the field of culture*."[31]

65 Even if the *Telecommunications Act*'s policy objectives enabled the CRTC to support Canada's cultural and creative sectors—and they do not, the application has not explained how eliminating the principle of network neutrality (in traditional terms, common carriage) will strengthen Canada's broadcasting or the creative sectors. The applicant has not submitted any evidence to establish that Canada's creative sector will benefit from website blocking, and it has not explained whether or to what degree the alleged benefits from this change would outweigh the negative effects for the telecommunications system and its users—who are increasingly interchangable with Canada's creators.

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28 *Telecommunications Act*, SC 1993, c 38, s 7(a).
29 Application 8663-A182-201800467, at para 95.
30 House of Commons Debates, 34th Parliament, 3rd Session: Vol. 15, at page 20181 (emphasis added).
31 *Ibid*. (emphasis added)

66 Finally, the application's claims that online copyright infringement "undermines Canadian's trust in, and therefore the development of, the digital economy",[32] are contradicted by available evidence. In 2015, for example, ComScore found that Canadians have some of the highest Internet usage in the world,[33] and in 2011, Canadians spent twice as much time online as the worldwide average.[34] Canadians are not only among "the most engaged users in the world", but are also "among the most diverse, seeking out an average of 3,238 unique web pages per month."[35] These results indicate higher, rather than lower, levels of trust in the digital economy.

67 The Forum believes it is important to note that if Canadians lack trust in some aspects of the digital economy, online copyright infringement is not the cause. In our view, Canadians may mistrust the digital economy for other reasons. For example, in early March 2018 the Forum's national survey of people in Canada found that 57.7% think there is a risk that the CRTC will block websites that are not infringing copyright, and that 63.8% think there is a risk that, over time, the federal government will block Canadians' access to online sites for reasons other than copyright infringement.[36]

68 Canadians may also mistrust the digital economy for other reasons, including but not limited to

- lack of competition in the Internet and mobile wireless service markets
- frequent and seemingly synchronized price hikes in Canadians' Internet and mobile wireless access
- privacy concerns due to consumer data being exploited by multinational online companies
- growing market power and societal influence of these same online companies
- threats to common carriage principles from Canadian telecommunications service providers, and
- substantive decisions being made on Canadians' behalf at high-level, distant, opaque venues such as negotiations concerning the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership (TPP, now the Comprehensive and Progressive Trans-Pacific Partnership, or CPTPP).[37]

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32 Application 8663-A182-201800467, at para 95.

33 CBC News, "Tax SeasonCBC SecureDrop Desktop internet use by Canadians highest in world, comScore says" (27 March 2015), online: <www.cbc.ca/news/business/desktop-internet-use-by-canadians-highest-in-world-comscore-says-1.3012666>.

34 Omar el Akkad, "Canadians' Internet usage nearly double the worldwide average" (8 March 2011), online: <https://www.theglobeandmail.com/technology/tech-news/canadians-internet-usage-nearly-double-the-worldwide-average/article569916/>.

35 CIRA, "Internet Factbook 2016: Internet use in Canada" (2016), online: <https://cira.ca/factbook/domain-industry-data-and-canadian-Internet-trends/internet-use-canada>.

36 See Appendix 6.

37 Meghan Sali, Let's Talk TPP Citizens' Report: Rebuilding public trust in trade processes (March 2017), OpenMedia.org, online: <https://openmedia.org/sites/default/files/letstalktppreport-digitalcopy-march10.pdf>.

69 A recent World Economic Forum (WEF) survey, for example, "which examined a wide range of digital media services, platforms and technologies" found that "over half of respondents said they did not trust their main providers to define fair terms and conditions around the use of their personal data."[38] The OECD Digital Economy Outlook 2015 found that where users lack trust in the digital economy, it is primarily due to concerns over consumer rights and privacy rights, rather than concerns about copyright owners' lost revenues.[39] A recent report from Consumers International, "Building a Digital World Consumers Can Trust" concluded that people's trust in business, government and media is declining because of gaps in transparency, and failures to serve the public interest[40] - not because of online copyright infringement.

70 Last, the Forum notes that the application does not explain how interference with and hindering Canadians' access to the Internet facilitates the "orderly development" of Canada's telecommunications system—another aspect of section 7(a). Approving the application would upend the most basic principles of providing Internet access: common carriage. As well, however, and supposing that the application's claims that broadcasters are losing money due to online copyright infringement, were true (they are not), approval would also undermine competition among telecommunications carriers due to the asymmetrical distribution of costs and benefits from the proposal. Though all ISPs would bear the costs of implementing the proposed blocking regime, vertically integrated ISPs would benefit financially from higher BDU

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38 Andy Cheema, "We don't trust the internet. And it's putting our digital future at risk" (13 April 2017), online: <https://www.weforum.org/agenda/2017/04/we-dont-trust-the-internet/>.

39 "Drawing from surveys undertaken in most of the OECD's 34 member countries, the OECD found that two-thirds of survey respondents are more concerned about their online privacy than they were last year and believe countries are not putting enough investment into dealing with these concerns."
Cynthia O'Donoghue, "Consumer Trust should be at the heart of the Digital Economy" (30 October 2015), online: *Technology Law Dispatch* <https://www.technologylawdispatch.com/2015/10/privacy-data-protection/consumer-trust-should-be-at-the-heart-of-the-digital-economy/>. See also: OECD Digital Economy Outlook 2015, online: <op.bna.com.s3.amazonaws.com/pl.nsf/r%3FOpen%3ddapn-9yfpup>.

40 Consumers International, "Building a digital world consumers can trust: Proposed recommendations from the consumer movement to G20 member states Building a digital world consumers can trust" (March 2017): online <www.consumersinternational.org/media/1822/ci-summary_english_updated.pdf>, at pages 4, 6:
Trust in business, government, media and NGOs is in decline in part because people feel these institutions can't protect them from the negative effects of globalization and technological change. For the technology sector, consumers regard it as falling short on transparency, authenticity, contributing to the greater good, protecting consumer data and paying taxes. Seventy one per cent of consumers worldwide think brands with access to their personal data use it unethically,3 around the same number don't even know what information companies hold about them. A survey of selected G20 countries found 59 per cent of consumers were concerned that new digital technologies like self-driving cars and smart homes were not safe. […]
For companies, a willingness to listen and a more in-depth understanding of the major demand-side dynamics should help guide an increase in the levels of trust consumers place in business. […]
The lack of clear, meaningful and verifiable information on many digital products and services causes a number of problems from being unclear on the speed and cost of broadband, to not being able to trust the authenticity of online reviews or simply not knowing where a company is based and how to contact them if things go wrong. It is ironic that this problem is so prevalent in a sector that prides itself on the ability to use technology to simplify information. […]

subscription levels, and reduced losses to online copyright infringement. Approval of the application would therefore trigger anticompetitive effects.

b. Section 7(h): Users' economic and social requirements

71 Section 7(h) of the *Telecommunications Act* affirms that one of Parliament's objectives for Canada's telecommunications system is that it responds "to the economic and social requirements of users of telecommunications services".[41]

72 The applicant appears to argue that 7(h) establishes that all telecommunications users are not merely consumers of cultural content, but consumers of the specific cultural content produced by the applicants or their affiliates. It then submits that, any indirect harm trickling down to telecommunications users — as telecommunications users — from the existence of online copyright infringement justifies the extraordinary site-blocking measures it is proposing.

73 The Forum disagrees. If this argument is accepted, the CRTC will be obligated to intervene in other issues that involve nearly any product or service that telecommunications users access or purchase online. This could include financial software, retail clothing, educational and office supplies, furniture, consulting services, health supplements, or any other number of products or services. The only distinguishing factor between these and the application at hand is that the purveyors of these products and services do not also own and operate major Internet service providers across Canada.

c. Section 7(i): Protects users' privacy

74 Lastly, the application claims that its disproportionate enforcement regime will further the policy objective in section 7(i) because blocking websites that engage in copyright infringement will "contribute toward the protection of the privacy of Canadian Internet users."[42] As Dr. Geist recently wrote,

> [T]he privacy argument is not only weak, it is incredibly hypocritical. Bell is arguably the worst major Canadian telecom company on user privacy and its attempt to justify website blocking on the grounds that it wants to protect privacy is shameful. There are obviously far better ways of protecting user privacy from risks on the Internet than blocking access to sites that might create those risks. Further, with literally millions of sites that pose some privacy risk, few would argue that the solution lies in blocking all of them.[43]

75 The Forum submits that the CRTC should consider the application's pro-privacy positioning with a kilo of salt, for three reasons. First, one of the main threats to Canadians' online privacy is the fact that "a great deal of Canadian domestic Internet communications boomerang through the

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41 TA, s 7(h).

42 Application 8663-A182-201800467, at para 95. See also Application, Appendix 1 (McCarthy-Tetrault memo), at page 24.

43 Michael Geist, "Bell's Latest Privacy Solution: Enhance Internet Privacy By Blocking Access to It" (5 December 2017), online: <www.michaelgeist.ca/2017/12/bells-latest-privacy-solution-enhance-internet-privacy-blocking-access>.

United States and are subject to NSA surveillance."[44] Boomerang routing, so called because the traffic's starting point and destination are both in Canada, occurs because major Internet service providers such as Bell and Rogers refuse to peer with public Internet exchange points, due to their reluctance "to exchange traffic with their smaller competitors and [as they have] an incentive to make it difficult for them to reach destinations outside their immediate networks."[45] Boomerang routing may breach Canadian privacy law,[46] and leading researchers suggest that Canadian ISPs that allow it may be in breach of their legal duties under *PIPEDA*.[47]

76 Second, Bell, which evidence suggests is the main driving force of this coalition and application,[48] has been penalized at least twice in major decisions by the Office of the Privacy Commissioner of Canada (OPC) and the Federal Court of Canada. In 2013, the Federal Court of Canada awarded damages to a customer after Bell breached PIPEDA by using the customer's personal information for a credit-check, without the customer's consent. The court was unsparing in its decision, awarding not only damages, but exemplary damages:

> Bell's conduct in this matter is reprehensible in respect to [the customer's] privacy rights. Not only did Bell violate those rights, it has shown no interest in compensation or apparently any interest in addressing the CSR's actions nor in following the Privacy Commissioner's remedial recommendations. Its failure to appear in this Court is consistent with its disregard of [the customer's] privacy rights.
>
> …
>
> Therefore, I would award [the customer's] damages of $10,000. I would also award exemplary damages of $10,000 for Bell's conduct at the time of the breach of the privacy rights and thereafter. I take account of Bell's dealings with [the customer] as well as its

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44 Andrew Clement and Jonathan A Obar, "Internet Surveillance and Boomerang Routing: A Call for Canadian Network Sovereignty" (13 February 2014) , online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311792> (SSRN), at page 14:

> Canada's privacy laws, notably the Personal Information Protection and Electronic Documents Act (PIPEDA), as well as various public sector laws, already require that when a data custodian passes personal information to a third party, the custodian must ensure that the data enjoys comparable or higher levels of protection. The weaker legal protection that Canadian data have in the United States, and the overwhelming evidence that the NSA has largely unfettered access to foreigners' data passing through the United States, strongly suggests that Canadian carriers that route domestic Internet traffic via the United States or even simply hand data over to US companies inside Canada for domestic delivery, are not on the face of it in compliance with Canadian law

45 Ibid., at page 20.

46 Ibid., at pages 33-34. See also:

47 Andrew Clement and Jonathan A Obar, "Keeping Internet Users in the Know or in the Dark: A Report on the Data Privacy Transparency of Canadian Internet Carriers" (12 March 2015), online: <https://www.ixmaps.ca/docs/DataPrivacyTransparencyofCanadianCarriers-2014.pdf>, at page 6.

48 Robert Hiltz, "Inside Bell's Push To End Net Neutrality In Canada" (4 December 2017), online: <www.canadalandshow.com/bell-pushing-end-to-net-neutrality-in-canada/>.; Standing Committee on International Trade, 42nd Parliament, 1st Session, Number 076, Evidence (20 September 2017), available online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-76/evidence> (Evidence of Rob Malcolmson, BCE Inc., and Pam Dinsmore, Rogers Communications Inc.).

> reactions to the Privacy Commissioner and her recommendations and its failure to take these proceedings seriously.[49]

77 In 2015, the OPC determined that a complaint against Bell for its Relevant Ads Program (RAP) was "well-founded":

> In the weeks following Bell's August 2013 announcement that it would use customers' network usage and account information to enable the serving of targeted ads, our Office received an unprecedented number of public complaints, and ultimately decided to commence a Commissioner Initiated Complaint, in lieu of those complaints, to consider the breadth of privacy issues surrounding the Relevant Advertising Program ("RAP"). […]
>
> We found that Bell was not, via its opt-out model, obtaining adequate consent for the RAP. We are disappointed that Bell has refused to implement our recommendation that it give customers an express choice regarding whether or not they wish to participate in the RAP. […]
>
> We found that Bell was not allowing its customers to withdraw their consent to the RAP. More specifically, upon receiving a customer's opt-out request, Bell would cease serving the customer "relevant ads" but continued to track the customer and augment the customer's profile, in case the customer were to change his or her mind in the future, and opt back in to the program.[50]

78 Bell's track record does not lend credibility to the current application's claims with respect to contributing to Internet users' privacy.

79 Third, while the application notes that some copyright infringement websites have hijacked users' computers for their own ends,[51] it fails to mention that Canada's major ISPs have done the same thing:

> In a move that has some privacy experts raising their eyebrows, Bell Canada is forcing advertisements directly into the web browsers of customers who are in the process of leaving the Internet provider. Even more worrisome, say those same experts, is that Bell isn't the only Internet provider doing this. […]
>
> Several days after cancelling, I reached for my tablet, opened a web browser and — without tapping anything — watched as the browser was automatically redirected from its intended destination to an online advertisement for Bell.
>
> "We have received a request to cancel one of your Bell services," it blared across the top of the screen.
>
> After a total of four phone calls with the company, Bell felt it was necessary to tamper with my Internet stream directly, hijack my web browser and force an advertisement for its services onto my tablet's screen. […][52]

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49 *Chitrakar v. Bell TV*, 2013 FC 1103, at paras 18-19, 28.

50 PIPEDA Report of Findings #2015-001: Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program (7 April 2015), available at: <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-001/>.

51 Application 8663-A182-201800467, at para 49.

52 Vito Pilieci, "Pilieci: Bell Canada ads hijacked my web browser" (30 January 2017), online: *Ottawa Citizen* <ottawacitizen.com/business/local-business/bell-hijacked-my-web-browser-with-ads>.

80 Rather than introducing a new website-blocking regime under the thin pretext of protecting users' privacy, the ISP members of the coalition supporting this application are themselves best placed to protect Canadian Internet users' privacy. They should reform their own internal business practices and norms, rather than introduce telecommunications system-wide collateral damage through a circuitous and ineffective regime that either fails to further or outright undermines the cited telecommunications policy objectives, including strengthening users' privacy.

81 In fact, according to a paper by the Internet Society, *Perspectives on Internet Content Blocking*, website blocking regimes may *introduce* privacy harms that would not exist otherwise. [53]

82 For all the reasons above, the application is not justified by its reliance on section 7(i) of the *Telecommunications Act*, nor does it advance any of the other telecommunications policy objectives as claimed. The Commission should reject it accordingly.

4. Proposed regime violates net neutrality and indicts vertical integration

a. Section 7(g): Encouraging innovation

83 Section 7(g) of the *Telecommunications Act* affirms that one of Parliament's objectives for Canadian telecommunications policy is "to … encourage innovation in the provision of telecommunications services …."

84 Appendix 1 of the application ("the Memo", Appendix 1) claims that online copyright infringement leads to lower levels of subscriptions for Canadian broadcasting distribution undertakings (BDUs), and to more cancellations, and this in turn "dissuad[es] BDUs from investing in critical new telecommunications infrastructure….".[54] Blocking websites that offer, enable or facilitate online copyright infringement will somehow encourage Canadians to purchase or resume their BDU subscriptions, thereby encouraging BDUs to invest in telecommunications facilities.

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53 Internet Society, "Perspectives on Internet Content Blocking: An Overview" (March 2017), online: <https://cdn.prod.internetsociety.org/wp-content/uploads/2017/03/ContentBlockingOverview.pdf> ["Perspectives on Internet Content Blocking"], at page 15:

> Several of the techniques discussed in this paper, including Deep Packet Inspection (DPI)-based blocking and URL-based blocking, have a very real limitation: they must be able to see the traffic being evaluated. Web servers that offer encryption or users who add encryption to their communications (typically through application-specific encryption technology, such as TLS/SSL) cannot be reliably blocked by in-the-network devices. Many of the other techniques are also easily evaded when user have access to VPN technology that encrypts communications and hides the true destination and type of traffic. Although researchers and vendors have developed some ways of identifying some types of traffic through inference and analysis, these techniques often are simply guessing at what type of traffic they are seeing.
>
> …
>
> When proxies are used, these cause significant security and privacy concerns. By breaking the TLS/SSL model, the blocking party gains access to all encrypted data and can inadvertently enable third-parties to do the same. The proxy could also change the content. […] Proxies installed for content blocking reasons may also introduce performance bottlenecks into the flow of network traffic, making services slow or unreliable.

54 Application, Appendix 1 (McCarthy-Tetrault memo), at page 23.

85 The Memo's argument that ISPs should block subscribers' access to online sites so as to reduce BDU cancellations is difficult to reconcile with Parliament's approach to telecommunications.

86 First, the fact that *broadcasting* distribution undertakings are losing subscriptions is not a problem for *telecommunications* policy. Canadians' keen interest in using the Internet represents successful telecommunications innovation on the one hand, and a technological shift in broadcasting on the other. Parliament cannot have intended that the CRTC would attempt to block innovation under the *Telecommunications Act*, to somehow counter technological shifts under the *Broadcasting Act*.

87 Second, even if it were appropriate for the CRTC to regulate Canadians' access to a telecommunications service to protect financial interests in the broadcasting sector—and it is not, the fact that BDUs are losing subscriptions arguably represents consumers' exercise of choice and control—something the Commission deliberately strove to achieve in its *Let's Talk TV* policy. Again, Parliament cannot have intended that the CRTC would undo with one statute, that which it has attempted to achieve with another.

b. Application violates Net Neutrality by proxy

88 Network neutrality is key to the CRTC's current Internet policies, and is based on section 27(2) of the *Act*:

> [n]o Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an unue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

89 The application's coalition claims that it "supports net neutrality" and that its proposed regime "does not raise net neutrality issues". This is despite the fact that at the outset, the application only requests that *residential and mobile (i.e. individual) users are blocked*—implying that its business and enterprise customers would be exempt. Yet, according to its own evidence:

> [T]he top bandwidth-consuming channels on every network examined are 24/7 cable news channels. … Sandvine hypothesizes that the reason why news channels have relatively steady traffic rates throughout the day is that a group of users are watching the same news channel for the entire day. This use case makes us believe that pirate TV services could be common in locations like waiting rooms, office lobbies, or bars where a television is installed to help distract clients while they are waiting for an appointment.[55]

90 Even though it appears that much copyright infringement arises from other businesses engaging in such *for commercial purposes*, the applicants insist on going after and restricting individuals alone, certainly raising concerns of equity, powe dynamics, and selective enforcement.

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55 Sandvine, "2017 Global Internet Phenomena: Spotlight: Subscription Television Piracy" (2017), online: <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf>, at page 11.

91 Overall, the application argues that Canada's net neutrality policy "does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online" (¶76).

92 The application's arguments are both disingenuous and misleading.

93 First, several of the stated[56] members of the coalition in fact have a track record of opposing, violating, or being willing to disregard net neutrality, undermining the application's credibility with respect to the application of section 27(2), as well as the *Internet Traffic Management Practices Framework* (*ITMP Framework*), and the *Differential Pricing Practices Framework* (*DPP Framework*).[57]

94 In 2015, for example, the CRTC found that Bell's Mobile TV program violated section 27(2): the company zero-rated its own mobile video programming while counting all other mobile programming against customers' data caps.[58] In 2017 the CRTC determined that Videotron violated section 27(2) via its Unlimited Music program, which zero-rated mobile data associated with commercial music streaming services that had entered into an agreement with Videotron.[59] The Canadian Media Producers Association (CMPA) recommended violating net neutrality for the sake of promoting Canadian content during the Commission's differential pricing practices proceeding.[60] The applicant's claim that it supports net neutrality therefore merits a certain level of healthy skepticism - and it is telling that telecommunications service providers that are not vertically integrated, such as TELUS, and that do not have media divisions to encourage the undermining of their common carrier obligations, have not joined the coalition.

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56 Some evidence suggests that Bell is the main if not sole driving party: Robert Hiltz, "Inside Bell's Push To End Net Neutrality In Canada" (4 December 2017), Canadaland, online: <www.canadalandshow.com/bell-pushing-end-to-net-neutrality-in-canada/>. See also (CIIT NAFTA Bell/Rogers panel: https://www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-76/evidence) and https://motherboard.vice.com/en_us/article/59d5na/a-telecom-giant-wants-to-block-websites-in-canada-bell-piracy; https://mobilesyrup.com/2017/09/28/bells-aim-for-nafta-is-to-introduce-sweeping-piracy-controls/

57 Telecommunications Act, SC 1993, c 38, s 27(2); Telecom Regulatory Policy CRTC 2009-657, Review of the Internet traffic management practices of Internet service providers (21 October 2009); Telecom Regulatory Policy CRTC 2017-104, Framework for assessing the differential pricing practices of Internet service providers (20 April 2017).

58 Broadcasting and Telecom Decision CRTC 2015-26, Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv (29 January 2015).

59 Telecom Decision CRTC 2017-105, Complaints against Quebecor Media Inc., Videotron Ltd., and Videotron G.P. alleging undue and unreasonable preference and disadvantage regarding the Unlimited Music program (20 April 2017)

60 "[T]he Commission could allow service providers to eliminate data usage charges for accessing trailers and other promotional materials specific to Canadian programs. […] A broader and deeper approach would be to eliminate usage charges for accessing any qualified Canadian programs." TNC CRTC 2016-192, *Examination of differential pricing practices related to Internet data plans*, Intervention of CMPA (28 June 2016), at paras 10-11.

95 Second, the application misleadingly argues that ISPs would remain neutral and continue meeting their obligations as common carriers, because the ISPs would not decide which websites to block. The ISPs would merely follow the orders of the website blocking tribunal managing the blacklist, or in the applicant's words, "simply implements a Commission determination".[61]

96 Yet Internet service providers are the very parties asking for a tribunal to implement website blocking, and to require them to interefere with Internet traffic and subscribers' online activities. The ownership ties between Canada's largest ISPs and its programming services and its largest broadcast distribuiton companies effectively mean that orders to block websites for allegedly infringing content mean that if ISPs do not benefit directly, their parent corporations will benefit indirectly. This is what distinguishes the application from Google's situation in Equustek.[62] Google did not apply to the Court for injunctions to govern its behaviour on an ongoing and indefinite basis.

97 The net effect is that vertically integrated ISP/broadcasting companies are asking the CRTC to create an intermediary so that the left hand (ISPs) can claim it is not washing the right hand (broadcasting servi es) and that there is no self-dealing. Approving the application would amount to net neutrality violation by proxy. These violations would happen every time companies related to an ISP applied to the proposed agency: if Bell Media asked the tribunal to blacklist a particular website, and Bell Canada then blocked the website "because it was ordered to", Canadians would view the the two hands as belonging to the same body, or company. The substantive anti-competitive dynamics, consequences, and concerns remain the same whether or not Bell has inserted additional steps of formality between wishing a particular website be blocked, and then blocking it.

98 Rather than investing in the programming that Canadians want to watch and hear, both in the past and now, Canada's largest vertically integrated communications companies are instead relying on regulatory sleight of hand to reverse the Net Neutrality policy, and to protect them from the consequences of their own decisions.

99 The Commission must not permit its Net Neutrality policy to be overcome by proxy, and should therefore deny the application.

c. Application Highlights Anti-Competitive Nature of Vertical Integration

100 BCE's initiative in commissioning the Memo from McCarthy-Tétrault raises the question of the degree to which application 8663-A182-201800467 is in fact an initiative of Canada's largest communications companies. Would the application have been made at all if Canada's communications system were not so veritically integrated?

101 Evidence that broadcasting interests are driving this application, rather than telecommunications policy objectives, appears throughout the application. First, as mentioned,

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61 Application 8663-A182-201800467, at paras 76, 94. See also Application, Appendix 1 (McCarthy-Tetrault memo), at page 31.

62 Application, Appendix 1 (McCarthy-Tetrault memo), at page 30.

all of the coalition members belong to the broadcasting, content, and cultural production industries. No telecommunications parties who are not also broadcasting or media companies are part of the coalition.

102 Second, many of the harms said to arise from online infringement have to do with broadcasting and copyright interests, such as loss of broadcasting revenues, loss of broadcasting jobs, loss of copyright monetization, or loss to a broadcasting production funds.[63] Such losses would be unfortunate, but do not directly concern telecommunications law or policy—particularly when broadcasting has its own separate, standalone, self-contained statute and broadcasting policy objectives.

103 If coalition members were not satisfied with Canada's current copyright laws, the appropriate venue to address issues would have been in copyright's own fora: through the courts, or through Parliament, which is even currently reviewing the *Copyright Act* through a Standing Committee.[64] Requiring the CRTC and others to allocate significant time and energy to addressing this proposal, its flaws and its implications is, in our view, an inefficient use of the Part I application system. (Although, of course, the applicant will benefit from this exercise if it were to later pursue the same proposal before Parliament: it will know the opposition it faces, and it will have succeeded in creating a high-profile issue that Parliamentarians and the government may feel compelled to consider.)

104 Third, the application states that, "BDUs will not continue to invest in new telecommunications infrastructure, technologies, and distribution models if" online infringement continues, or as implied, if the Commission does not grant its request. This frank statement is alarming, as it highlights the lack of independence between content and carriage when it comes to vertically integrated companies. The implication that Canadians' telecommunications infrastructure will suffer because they exercised valid choices and purchasing power with respect to their media entertainment is shocking. Again, this is only possible because the same companies benefiting from increased Internet usage are losing cable revenues due to cord-cutting, and they appear to have prioritized the latter at the expense of the former, to the detriment of subscribers and the future of Canada's communications system as a whole.

105 The conflict of interest inherent in vertically integrated companies appears especially stark when compared to the legal test developed by the Court of Justice of the European Union (CJEU), regarding intermediary liability in the context of copyright enforcement. Known as a tripartite analysis, the CJEU requires courts to balance rights between three parties: copyright owners, Internet intermediaries, and Internet users.[65]

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63 Application 8663-A182-201800467, at paras 41-42, 47.

64 Standing Committee on Industry, Science and Technology, Statutory Review of the Copyright Act, 42nd Parliament, 1st Session (December 3, 2015 - Present), online: <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131>.

65 "In follow-up case law, the CJEU has confirmed this 'fair balance' approach. As a general rule, in cases of intermediary liability the CJEU sets up a tripartite dynamic. This distinguishes between the fundamental rights of copyright holders, intermediaries and internet users. For the first, (a) the right to intellectual

106 What is noteworthy is that this test assumes that copyright owners and the Internet intermediary will have divergent interests. That would normally be true—except in Canada and in the application before the Commission, where verticial integration has resulted in the merging of interests of ISPs and programming content owners. The result is that programmers' copyright interests are now prioritized above the "fundamental rights" of the intermediary, to the additional detriment of users' rights. The European tripartite test in Canada becomes a rigged bipartite assessment inherently weighing in favour of copyright owners' interests.

107 Vertical integration concerns usually involve anti-competitive activities in downstream markets, such as programming exclusivity.[66] However, this application represents a different type of vertical integration concern: anti-competitive activity in the upstream market (the distributor, or telecommunications services), and at a macro, systemic level that impairs the industry as a whole, rather than the micro level of specific transactions between individual companies.

108 The CRTC should deny the applicant's request because it would risk violating net neutrality by proxy, in implementation and in subsequent individual website blocking requests by vertically integrated companies. The CRTC should also deny the application because it arises from an inherent conflict of interest within vertically integrated companies, a conflict of interest that the Commission should not encourage or promote by permitting companies to use it to obtain even greater control than they already have over critical components of Canada's communications system.

5. Interpreting Telecommunications Policy Objectives and Policy Direction

a. Telecom policy objectives must be interpreted through the *Telecom Act*

109 The application's Appendix implies that expansively interpreting section 7's telecommunications policy objectives would bring its proposed regime within the realm of telecommunications law and policy.[67] This is untrue, and the cases cited do not support its claim.

110 First, the Appendix notes that "The Supreme Court of Canada has observed that the Canadian telecommunications policy objectives in s. 7 of Act are 'broad'."[68] However, it is unreasonable to conclude from that observation that the Commission may interpret telecommunications

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property (Article 17(2) Charter) is at stake, occasionally bolstered by (b) the right to effective judicial protection (Article 47 Charter). Depending on the particular circumstances of the case, these may collide with (c) the intermediaries' freedom to conduct a business (Article 16 Charter). The rights of end-users to (d) the protection of their personal data (Article 8 Charter), (e) their private life (Article 7 Charter) and (f) their freedom to receive and impart information (Article 11 Charter) must also be taken into account." Christina Angelopoulos: "On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market" (January 2017), online: https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf, at page 15.

66 Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration* (21 September 2011); *Differential Pricing Practices Framework; Broadcasting Regulatory Policy* CRTC 2015-86, *Let's Talk TV The way forward – Creating compelling and diverse Canadian programming* (12 March 2015).

67 Application, Appendix 1 (McCarthy-Tetrault memo), at pages 23-24.

68 Ibid. at page 23.

policy objectives so broadly as to relegate them to an instrumental red carpet upon which copyright interests walk.

111 In fact, the Court goes on in the next sentence to say that the *Telecommunications Act* directs the Commission to implement the policy objectives "balancing the interests of consumers, carriers and competitors *in the context of the Canadian telecommunications* industry."[69] Though telecommunications objectives be but broad, they must be, nevertheless, *telecommunications* objectives. The terms "creators" and "copyright owners" are also notably missing among the groups whose interests the Commission must attend to in this context.

112 Second, the Appendix states:

> It is true that several of these policy objectives involve a cultural component that transcends the immediate relationship between ISPs and their subscribers, but the courts have recognized that the CRTC need not restrict its decisions under the *Telecommunications Act* to policies which are "purely economic", and may instead consider their social impact as well in light of "the Commission's wide mandate under section 7".[70]

113 This also betrays misunderstanding of how the Commission should interpret the section 7 telecommunications policy objectives. There is no notion to begin with that the Commission must restrict its decisions to "purely economic" policies. That would suggest that telecommunications policy and economic policy are inherently one and the same, and that going beyond the "purely economic" automatically means going beyond telecommunications policy altogether. There have been many non-purely-economic decisions, interpretations, and needs at stake before the Commission, that all nonetheless still fall squarely within the realm of telecommunications law and policy. In fact, that the Commission may take non-economic concerns into account is something that public interest and consumer advocacy groups are usually at pains to explain to industry parties in telecommunications proceedings, including several in this application's coalition.

114 For example, in Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services*, large Internet service providers argued against a broadband affordability initiative in favour of relying on more strictly economic measures such as market forces:

> By contrast, most ISPs argued that prices for broadband Internet access services are competitive and affordable, and that they compare favourably internationally. These companies *opposed the imposition of any measure that would distract from continued reliance on market forces*, including the introduction of a mandatory, price-regulated, entry-level tier for broadband Internet access services. These parties generally recognized the issues experienced by certain vulnerable consumers in paying for their telecommunications services. However, *they were of the view that these issues stem from*

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69 *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, at para 1 (emphasis added).

70 Application, Appendix 1 (McCarthy-Tetrault memo), at page 24 (footnotes omitted).

> *broader socio-economic conditions and not exclusively from the pricing of telecommunications services*.[71]

115 As the Forum has previously noted, the current plight of content creators and the legacy broadcasting industry is also due to broader socio-economic conditions combined with general technological advancements and increasing respect for consumer choice and control. It seems incongruous that the applicants would be willing to distort telecommunications law and policy for the sake of copyright owners' interests, grounded in a "broad" interpretation of section 7, yet consider departing from strict economics inappropriate for addressing the actual telecommunications needs of telecommunications users.

116 Moreover, the applicant's particular interpretations of the telecommunications policy objectives do not simply "involve a cultural component that transcends the immediate relationship between ISPs and their subscribers". They disrupt and interfere with that relationship, which is that of providing unmediated access to the open Internet as a neutral conduit, in exchange for a given monetary amount. It is important to note that *Bell Canada v. Bell Aliant Regional Communications* and *Allstream Corp. v. Bell Canada*,[72] cited to support the applicant's overreaching interpretation of "broad", both deal with matters that fall wholly within telecommunications. The former concerned deferral accounts, rate regulation, telecommunications accessibility, and broadband Internet coverage; and the latter concerned tariffs for telecommunications transmission facilities (i.e. optical fibre services).

117 The quotation from the then-Minister of Communications regarding Bill C-62 also does not assist the applicant's position. The legal opinion cites the Minister to justify inserting a gratuitous "cultural component" into interpretation of the telecommunications policy objectives.[73] However, read in full, the Minister's speech in fact indicates the opposite view: the *Telecommunications Act* is not meant to have anything to do with culture at all. The Minister delivered the quoted statements in direct response to concerns that certain provisions in the new *Telecommunications Act* were "inconsistent with the over-all intent of the bill *to regulate the carriage rather than the content* of telecommunications and that some provinces *may have viewed the reference to culture as potentially eroding their responsibilities*."[74] That is why the Minister of Communications removed the specific reference to culture in Bill C-62.

118 To the extent that telecommunications does "perform an essential role in the maintenance of Canada's identity and sovereignty" and is important to cultural identity, that is the case precisely because it is an open gateway through which Canadians may create and access the content of their choosing. It is not for members of the coalition or the Commission to chaperone users in their telecommunications usage and by extension, choices in cultural creation and consumption. Moreover, when it comes to Canada's "cultural identity", it is also crucial to remember that the members of this coalition represent but a tiny and arguably increasingly less relevant fraction of

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71 Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services*, at para 194 (emphasis added).

72 *Allstream Corp. v. Bell Canada*, 2005 FCA 247.

73 Application, Appendix 1 (McCarthy-Tetrault memo), at page 24.

74 House of Commons Debates, 34th Parliament, 3rd Session: Vol. 15, at page 20181 (emphasis added).

the totality of Canadian culture, content, and creativity—much of which has only emerged and reached audiences in recent years due to the availability of the open Internet and adherence to common carriage principles.

b. Telecom Policy Direction Does Not Support Application

119 Lastly, the Appendix 1 claims that the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives* (the "Policy Direction") also justifies the proposed website blocking regime due to contemplating "non-economic measures". The Policy Direction's inclusion of "non-economic measures" is usually something that public interest and consumer advocacy groups must point out, due to it normally being overlooked by parties such as the vertically integrated applicant Internet service providers in favour of section 1(a) of the Policy Direction, which stipulates relying on market forces "to the maximum extent feasible". Again, it is difficult to fathom how an extraordinary measure of a new regulatory body that extends far beyond the scope of telecommunications law and policy is acceptable, for the sake of a particular group of copyright owners; and yet several of these same owners have opposed lesser regulatory involvement for objectives that fall unambiguously within telecommunications law and policy (such as in the recent proceedings regarding differential pricing practices, and competitor quality of service).

120 In any case, the key point regarding the Policy Direction is that whether the measures are economic or non-economic, they must further the telecommunications policy objectives. The next section of this intervention will demonstrate that the proposed regime will not further these objectives, and will moreover violate them.

6. No evidence that existing remedies have failed, are failing or will fail

121 The *CRTC Rules* apply to all matters before the CRTC and require applicants to state relevant facts.[75] Canada's courts have repeatedly confirmed that quasi-judicial tribunals such as the CRTC must consider the evidence provided by parties before them, although they "may go further and draw upon broader industrial, economic, regulatory or technological insights they have gathered from past proceedings and regulatory experience", if "identified by the parties as matters that the administrative decision-maker drew upon in making its decision".[76]

122 In the matter now before the CRTC, the applicant admits that it has no evidence of direct harm to Canadians from actual, or even alleged, copyright infringement.

123 Its evidence is speculative, and based on anecdotes, often from other jurisdictions. It refers (at ¶36) to the alleged impact of copyright infringement on the potential bankruptcy of an Australian television broadcaster, for instance, adding speculation to speculation—to achieve speculation.

124 In asking the CRTC to establish a website blocking regime, the applicant says that

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75 Ss. 2, 22(2)(e).

76 *Bell Canada v. 7262591 Canada Ltd. (Gusto TV),* 2016 FCA 123, at ¶¶14-15.

> … ISPs would not be required to monitor piracy nor could they unilaterally determine which websites are added to the list of piracy sites. Instead, the role of ISPs would be restricted to implementing a legal requirement to prevent access to piracy sites, which are already unlawful, as directed by and identified by the Commission…. (¶76)

125 We note first, that Canada's largest ISPs presumably already to monitor copyright infringement, under the terms of service that form part of their contracts with their subscribers. Under Bell's Terms of Service[77] it

> …may modify, remove or disable the software used in Your Equipment so that Your Equipment no longer works or immediately suspend, restrict, change or cancel all or part of your Bell Services or take other necessary protective measures if Bell has reasonable grounds to believe there is a breach of any of these provisions. For example, you are prohibited from:
>
> ...
>
> d) uploading or downloading,... information, software, content, files or other material which: (i) is confidential or protected by copyright or other intellectual property rights without prior authorization of the rights holder(s); ....

126 Rogers' "Terms of Service and Other Important Information" also list "Prohibited Activities" that include copyright infringement:

> Without limitation, you may not use (or allow anyone else to use) our Services to:
>
> …
>
> i. use, possess, post, upload, transmit, disseminate or otherwise make available content that is unlawful or violates the copyright or other intellectual property rights of others (as described in more detail below);
>
> ...
>
> vii. access any computer, software, data or any confidential, copyright-protected or patent-protected material of any other person, without the knowledge and consent of that person, or use any tools designed to facilitate access, such as "packet sniffers";
>
> viii. upload, post, publish, deface, modify, transmit, reproduce, distribute in any way or otherwise make available information, software or other material protected by copyright or other proprietary or contractual right (such as a non-disclosure agreement)

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77 https://www.bell.ca/Styles/common/all_languages/all_regions/pdfs/Bell_Terms_of_Service.pdf.

or related derivative works, without obtaining permission of the copyright owner or right holder;

127 The application does not provide any evidence to show whether Canadian ISPs are currently enforcing their own contractual prohibitions on copyright infringement, and if they are, why this enforcement mechanism is inadequate.

7. Applicant's Internet traffic evidence is neither valid nor reliable

128 Valid and reliable evidence are necessary in CRTC proceedings, but are of particular importance in this proceeding because the website traffic studies that are at the heart of online copyright infringement are notoriously flawed. The 2016 Imperva Incapsula Bot Traffic Report, for instance, found that *over 50 percent of all Internet traffic is generated by bots*.[78] This has been the case for years, with only a slight reversal in 2015 (when bot traffic briefly became the minority at 48.5% of all Internet traffic).[79] The intellectual property and technology policy website, *Techdirt*, was even more direct, concluding that half of Internet traffic is 'fake':

> [I]nternet traffic is half-fake and everyone's known it for years, but there's no incentive to actually acknowledge it. The situation is technically improving: 2015 was hailed (quietly, among people who aren't in charge of selling advertising) as a banner year because humans took back the majority with a stunning 51.5% share of online traffic, so hurray for that I guess. All the analytics suites, the ad networks and the tracking pixels can try as they might to filter the rest out, and there's plenty of advice on the endless Sisyphean task of helping them do so, but considering at least half of all that bot traffic comes from bots that fall into the "malicious" or at least "unauthorized" category, and thus have every incentive to subvert the mostly-voluntary systems that are our first line of defence against bots... Well, good luck. We already know that Alexa rankings are garbage, but what does this say about even the internal numbers that sites use to sell ad space? Could they even be off by a factor of 10? I don't know, and neither do you.[80]

129 Despite widespread knowledge about the unreliability of Internet data, the application is based on studies that incorporate erroneous assumptions, use flawed methodologies, and overstate their findings. We summarize problems with the applicant's evidence below

Flawed assumptions:

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78 "In 2015 we documented a downward shift in bot activity on our network, resulting in a drop below the 50 percent line for the first time in years. In 2016 we witnessed a correction of that trend, with bot traffic scaling back to 51.8 percent—only slightly higher than what it was in 2012." Igal Zeifman, "Bot Traffic Report 2016", online: Imperva Incapsula <https://www.incapsula.com/blog/bot-traffic-report-2016.html>.

79 *Ibid*.

80 Leigh Beadon, "Traffic Is Fake, Audience Numbers Are Garbage, And Nobody Knows How Many People See Anything" (26 September 2016), online: Techdirt <https://www.techdirt.com/articles/20160915/18183535533/traffic-is-fake-audience-numbers-are-garbage-nobody-knows-how-many-people-see-anything.shtml>.

- The 'threat' of online copyright infringement is overestimated because the Sandvine report assumes that *all* users would subscribe to a traditional cable package in the absence of an add-on service.[81] Yet studies have established that the majority of users who access copyright-infringing material would *not* turn to authorized copyright content in the absence of the former,[82] and Sandvine itself acknowledges that this assumption means its calculations are inaccurate.[83]

- The 'threat' of online copyright infringement is also overestimated because little or no allowance is made for the fact that people often visit websites by accident. In March 2017 two out of three (70.3%) Canadians said that they thought it was possible to visit websites accidentally,[84]and 70.4% said they had themselves visited at least one website by accident in the previous year.[85]

Invalid assumption:

- Conclusions based on the Sandvine and Muso reports are inaccurate in general, and inaccurate for Canada. The applicant uses the estimate from the Sandvine report that "7% of households" access online copyright infringing content, to claim that approximately one million Canadian households subscribe to KODI-style video service add-ons. The 7% estimate is based on North America as a whole, however, and Sandvine does not state how many of those households are in fact Canadian,[86] or why data describing three jurisdictions collectively can be directly transposed to specifically Canada alone.

Invalid data:

- As Dr. Geist has pointed out, the MUSO report has counted websites that would not typically be characterized as providing access to copyright-infringing materials. He points to addic7ed as an example of a website that, rather than undermining what the applicant considers to be the "social and economic fabric" of Canada, instead provides an important social service: applying translations and subtitles to make works more accessible to different segments of the population.[87] MUSO's data also include video-capturing websites with

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81 Sandvine, *2017 Global Internet Phenomena Report*, at 4.

82 See Section X, below.

83 SOURCE

84 See Appendix 6, Survey result 3 ("Belief in the possibility of accidental website visits").

85 Ibid., Survey result 4 ("Personal experience in the past year with accidental website visits").

86 Sandvine, 2017 Global Internet Phenomena Report, cited in Application 8663-A182-201800467, at para 31.

87 "[W]eb download sites include addic7ed.com, a site that contains user-generated sub-titles for television shows and movies. The site includes completed sub-titles and works in progress that allow users to contribute to the translations and sub-titles. It does not contain full video or audio. The legality of user-generated sub-titles may be open for debate (sub-titles can be used for lawfully acquired videos) but few would think of this kind of site as 'blatantly, overwhelmingly, or structurally engaged in piracy.'" Geist "weak evidence" post, http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-2-weak-evidence-state-canadian-piracy/

"considerable non-infringing uses, such as for downloading Creative Commons licensed videos."[88]

Unreliable data:

- The "top bandwidth-consuming channels" that Sandvine alleges to be accessing infringing content through online video add-ons are not being accessed by individual residential or mobile users, but by businesses that access this content (such as news) all day long, to distract waiting clients, or for entertainment purposes. [89]

- MUSO's results rely on SimilarWeb's traffic analytics, whose reliability has been criticized. One analysis wrote that, "[I]f you're trying to determine how much traffic CompetitorX.com receives, SimilarWeb will give you a bit worse than a 1 in 4 shot of being within 70-130% of that number."[90] Another found that on average, "Similar Web reports that websites *usually have the traffic almost double than it is*: 94% more sessions reported by Similar Web compared to Google Analytics."[91] When broken down by levels of traffic, some websites saw up to 360% inflation by SimilarWeb, compared to Google Analytics.[92]

- The MUSO report also records single visits to the same site, multiple times,[93] because it defines a visit to a website as accessing a single page in the site with no more than 30 minutes of inactivity—MUSO therefore counted users who were inactive for more than 30 minutes and then resumed their activity, or who visited separate pages on the same site, as multiple and separate users.

130 Copyright infringement is not a trivial matter—a fact borne out by Parliament's decision to enact statutes to protect copyright owners' rights. No matter how serious, however, —but as noted above, much of the key evidence in the application is either invalid or unreliable.

8. Applicant's evidence about visits to infringing websites is misleading

131 The CRTC should discount much of the remaining evidence in the application because its relevance is exaggerated, and therefore misleading. Supposing, for instance, that the application's repeated claim that Canadians made "1.88 billion visits" to purportedly copyright-

88 *Ibid*.
89 Sandvine, 2017 Global Internet Phenomena Report.
90 Rand Fishkin, "The Traffic Prediction Accuracy of 12 Metrics from Compete, Alexa, SimilarWeb, & More" (2 June 2015), online: SparkToro <https://sparktoro.com/blog/traffic-prediction-accuracy-12-metrics-compete-alexa-similarweb/>.
91 Ioana Lupec, "We analyzed 1787 eCommerce websites with SimilarWeb and Google Analytics and that's what we learned" (22 November 2017), online: Omniconvert <https://blog.omniconvert.com/we-analyzed-1787-ecommerce-websites-similarweb-google-analytics-thats-we-learned.html>.
92 *Ibid*.
93 MUSO Report, at page 13: "The definition of a site visit is a web user entering a website and viewing one or more pages, with no more than 30 minutes of inactivity. If there is over 30 minutes of inactivity and the same user then views another page from the same website, then it counts as an additional visit."

infringing websites[94] were correct (and for the reasons above, it is not, as it seriously overestimates such visits), the applicant has presented the information without context. SimilarWeb's data show that Canadians made over 54 billion (54.74) visits to just the top 10 websites in Canada in the last twelve months.[95] The "1.88 billion visits" to infringing sites therefore made up 3.4% of Canadians' total visits in the last year to just ten websites. Our point is not that online copyright infringement should be ignored, but rather that evidence does not demonstrate there is such widespread abuse by users that warrants the CRTC intervening to block access to Internet websites at the say-so of a handful of companies.

132 In a similar vein, the applicant notes that copyright-infringing websites "generated approximately $227 million in advertising revenue" in one year, globally.[96] Even if Canadian online copyright infringement represented, say 10% of that amount, or $23 million, this level of lost advertising revenues would represent just 0.06% of the $36.8 billion in operating revenues earned just by Rogers and Bell from 2016 to 2017.[97] Cord-cutting, similarly, represented 2% of total BDU subscriptions in 2016.[98] Again, our point is that the Commission must put the application's scare-mongering figures into perspective, upon which its proposed regime becomes apparent as a gross overreaction to a comparatively minor and ever-declining issue.

9. Applicant misconstrues evidence about declining BDU subscriptions

133 Although the application admits that it is impossible to determine precisely how many of these 1.1 million households are lost subscribers due to piracy",[99] it nevertheless goes on to assert that BDUs have lost subscribers precisely due to online copyright infringement. [100] Yet the application does not provide evidence demonstrating that this decline results from online copyright infringement activities by former BDU subscribers. Moreover, based on the steadily

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94 Application 8663-A182-2018004671 at para 3, 31 (emphasis in original).

95 FRPC registered for a trial demo account with SimilarWeb. This gave access to a list of the most popular websites in Canada, according to SimilarWeb, and the following data: total global site visits to each website for the past three months, and the percentage of the total global number that was attributable to Canada. The total site numbers for Canada over the past 12 months was calculated by multiplying the given global number by 4, and then applying the Canadian percentage to the product.

96 Application 8663-A182-2018004671 para 31.

97 BCE Annual Report 2018; Rogers Annual Report 2017

98 News Release, "'Cord-cutting' in Canadian traditional TV service market reaches new record level in 2016, according to new research" (15 March 2017), online: Boon Dog Professional Services <www.boondog.ca/News_files/Boon%20Dog%20News%20Release_Record%20TV%20Subcriber%20Decline%20in%202016_March%2015-2017.pdf>.

99 FFP1. In this paragraph, the applicant also engages in the basic fallacy of mistaking correlation for causation. It is very possible that viewers accessing copyright-infringing websites would have never subscribed to a traditional cable service in the first place, or would have cancelled their subscription in the absence of infringing online materials, due to not being able to afford the high and rising prices of cable packages. This mistake also occurs in paragraph 44, where the applicant assumes reduced or cancelled subscriptions can only be due to the availability of infringing material online, rather than an independent decision based on the expense or insufficient quality of the applicants' respective offerings.

100 Application 8663-A182-2018004671, at para 43.

rising average revenue per subscriber results made available in major BDUs' aggregated financial summaries (Appendix 5), any alleged harm from online copyright infringement is invisible.

134 The Forum submits that if BDUs are losing subscribers, it is because of their business decisions. In February 2018 Shaw Direct raised the price of its satellite TV packages in February 2018 by an average of $3 a month per customer; at the end of February 2018 Rogers raised the price of a number of its BDU television packages by up to $3 per month per subscriber, and in early March 2018 Bell raised its monthly TV prices by $2.[101]

135 As noted by a recent Canadian Media Fund (CMF) Report, *Adjust Your Thinking: The New Realities of Competing in a Global Media Market*, however, the adoption of over-the-top (OTT) online video services in Canada has largely been driven by "the opting out of usually hefty monthly subscription fees".[102] A Media Technology Monitors report estimated that 25% of Canadian paid television subscribers had reduced their subscriptions within the prior 12 months "to try and reduce costs".[103]

136 In the Forum's opinion, Canadian BDUs' decisions to raise prices explain a greater share of subscriber loss than Canadians' alleged interest in online copyright infringement.

137 It may also be that Canadians who cancel their BDU subscriptions are doing so to access new programming content from exempted over-the-top (OTT) services. In October 2017 Netflix announced its plans to spend $8 billion to create and acquire programming for 2018, a 25% increase from its spending in 2017. Amazon reported spending $4.5 billion on content creation and acquisition in 2017, Hulu spent $2.5 billion and YouTube, now home to the premium pay service YouTube Red, has earmarked hundreds of millions annually for content creation. The players in today's content sector are different, revenues are earned differently, and pleasing audiences, not advertisers, matters most.[104] Canadian audiences have clearly taken note.

138 Canadian BDU subscribers' interest in accessible content (rather than in copyright infringement) is demonstrated by the fact that "more people are signing up for streaming services—Netflix in particular—and find them more satisfying than cable or satellite."[105] According to a recent J.D. Power report, "Customers rate their alternative video service higher than their traditional pay

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101 Sophia Harris, "Cable TV price hikes could inspire more cord-cutting" (8 February 2016), online: CBC News www.cbc.ca/news/business/cord-cutting-rogers-1.3435432 [Harris, "More Cord-cutting"]. It is also worth noting that "Quebecers have had access to pick-and-pay for almost a decade, and we haven't seen the same amount of cord cutting", suggesting that it is the inherent quality of traditional offerings that matter, rather than the fact of online copyright infringement.

102 CMF, "New Realities", Report at 9.

103 Regan Reid, "A detailed look at cord cutters and 'cord nevers'" (11 August 2017), online: Media in Canada <mediaincanada.com/2017/08/11/a-detailed-look-at-cord-cutters-and-cord-nevers/>.

104 CMF, "New Realities", Report at at pages 9-10 (footnotes omitted) (emphasis added).

105 http://www.cbc.ca/news/business/cord-cutting-rogers-1.3435432

TV service for overall experience (7.58 vs. 7.04 on a 10-point scale). This is driven primarily by higher ratings for overall cost (7.84 vs. 5.97)."[106]

139 All this said, even if BDU subscription levels were relevant to a *telecommunications* proceeding about blocking websites—and they are not—the applicant's evidence on this point is irrelevant because broadcasters are not *entitled* to a set level of revenues. However desirable revenue growth or maintenance may be in broadcasting, the CRTC has no express jurisdiction to guarantee either under even the *Broadcasting Act*, let alone the *Telecommunications Act*.

140 The simple fact is that broadcasters—not online copyright infringement—are primarily responsible for the direction their businesses take. Consider the HBO series, *Game of Thrones*, considered to have the highest rates of copyright infringement in the world.[107] Canadians' only option for watching this program is to subscribe to HBO, solely through Bell and tied to a Bell cable package. Despite its concern about online copyright infringement and viewers clamoring, "The moment you bring HBO Now to Canada, I will pay for your content,"[108] Bell has decided not to change its approach to distributing *Game of Thrones*, telling "….CBC News that while it continues 'to assess the market,' it has no current plans to make Game of Thrones available without a cable subscription."[109] This application demonstrates that Canada's large, vertically integrated broadcasters would rather wall off Internet sites using their related ISP companies, than change their broadcast business model, and explains why Canadians are unsubscribing from cable television at a higher rate than their southern counterparts.[110]

10. Website blocking does not work

141 The applicant cites several studies to support its claims that website blocking poses an effective solution to online copyright infringement and thus the industry's problem of lost revenues (which is inexplicably portrayed as a public policy issue, rather than a private sector market development like any other).[111] These studies have methodological flaws that undermine their findings, and the application ignores a considerable volume of academic literature that

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106 JD Power, "Canadian Cable TV at Risk for Cord-Cutting as Alternative Video Service Use Grows, J.D. Power Finds" (2017), online: <www.jdpower.com/press-releases/jd-power-2017-canadian-television-provider-isp-customer-satisfaction-study>.

107 Sandvine, 2017 Global Internet Phenomena Report, at page 7.

108 Harris, "More Cord-cutting", http://www.cbc.ca/news/business/ctv-hbo-game-of-thrones-1.3671368

109 *Ibid*. While Bell Media demonstrated some acknowledgement several weeks later, by releasing ten Season 1 episodes of *Game of Thrones* for broadcasting on CTV, this cannot compare to the on-demand and more timely access that viewers would have with an OTT service similar to Netflix or HBO Now. Sophia Harris, "An 'olive branch' to pirates? CTV to air Game of Thrones next month" (9 July 2016), online: <www.cbc.ca/news/business/ctv-hbo-game-of-thrones-1.3671368>.

110 Jordan Pearson, "Canadians Are Cord-Cutting Faster than Americans" (8 April 2016), online: Motherboard https://motherboard.vice.com/en_us/article/gv5y3w/canadians-are-cord-cutting-faster-than-americans-report-netflix-cable.

111 See, e.g., The Effect of Piracy Website Blocking on Consumer Behaviour, Danaher et al., November 2015; INCOPRO, Site blocking efficacy in Portugal September 2015 to October 2016 (May 2017); and others in notes on Application 8663-A182-201800467 page 20 (notes 46-49).

demonstrates website blocking has limited impact, and that offering legal, affordable alternatives more effectively reduce online copyright infringement.

142 For instance, the first Danaher et al. study acknowledged that "access to…attractive legal alternatives" play an important role in decreasing online copyright infringement.[112] Critically, the study also acknowledged the narrow scope of its focus and that it made no attempt to assess the broader societal costs of website blocking, regardless of any marginal benefits to copyright owners:

> [W]e are not able to fully estimate the social welfare implications of these blocks, because our data do not allow us to estimate the value of the impacts (just their relative sizes) or the costs of implementing the blocks, and because we have no data on the impact of increased profitability on industry output.[113]

143 In their later study, Danaher *et al* note that their "research comes with many of the same limitations noted in Danaher et al. (2015), in spite of the fact that the present analysis contains somewhat more nuanced data on legal consumption."[114] This study also found a significant increase in use of virtual private networks during website blocks, suggesting mass circumvention rendering the blocks ineffective and ISPs' efforts wasted.[115]

144 The INCOPRO study cited by the application[116] was commissioned by the MPAA and a similar industry association in Portugal.[117] Its research method contained a key oversight leading to flawed data: the report excluded domain name changes, meaning it failed to account for all copyright infringement activity that simply moved domain names after blocking.

145 One study based in Italy applied the same methodology as the INCOPRO report above, but included the domain name changes in its analysis, and found that website blocking in Italy "actually increased the site's popularity, which went from 106,000 Italian search engine visitors in March 201 to 2,294,000 users a year later."[118]

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112 Ibid. at 26

113 Ibid. at 27

114 Brett Danaher, Michael D Smith, and Rahul Telang, "Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior" (19 April 2016), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795> (SSRN), at page 19..

115 Ibid. at 14.

116 Application 8663-A182-201800467, at para 68.

117 Ernesto Van Der Sar, "Censoring Pirate Sites is Counterproductive, Research Finds" (8 July 2015), online: TorrentFreak <https://torrentfreak.com/censoring-pirate-sites-is-counterproductive-research-finds-160708/>; Italian Blocking Study available at: <https://www.scribd.com/document/270906520/Italian-Blocking-Study>.

118 Ernesto Van Der Sar, "Censoring Pirate Sites is Counterproductive, Research Finds" (8 July 2015), online: TorrentFreak <https://torrentfreak.com/censoring-pirate-sites-is-counterproductive-research-finds-160708/>; Italian Blocking Study available at: <https://www.scribd.com/document/270906520/Italian-Blocking-Study>.

146 Another study of the website kino.to, after it was shut down in Germany, demonstrated that website blocking in fact promoted more visits to copyright infringement websites, as well as had very little effect on the volume of legal sales:

> While users of kino.to decreased their levels of piracy consumption by 30% during the four weeks following the intervention, *their consumption through licensed movie platforms increased by only 2.5%*. Taken at face value, these results indicate that the intervention *mainly converted consumer surplus into deadweight loss*. If we were to take the costs of the intervention into account (raid, criminal prosecution, etc.), our results would suggest that the shutdown of kino.to has *not had a positive effect on overall welfare*.[119]

147 Other researchers have concluded similarly:

> "The efforts of the Italian ISP (must obey the provisions of AGCOM) are completely thwarted" and, "The expenditure of resources and energy leaning intermediaries network seems totally unjustified, and so the activities of the Authority in terms of copyright, given the obvious ineffectiveness of the measures taken."[120]

148 Finally, empirical evidence from the Netherlands also demonstrated that website blocking failed to achieve its purported objective of reducing copyright infringement such that copyright owners would recoup lost revenues:

> [T]he blockade has had *no implications for over three quarters of the customers* of the internet providers mentioned. … No more than 1.9% say they stopped downloading from an illegal source since the blockade and 3.6% say they now download less. So a *total of no more than 5.5%* of Ziggo and XS4ALL customers now download less or have stopped altogether.[121]

11. Impacts of Proposed Regime Go Beyond Confirmed Copyright Infringers and Will Induce Collateral Damage

149 Through Appendix 1 the application claims that its proposed regime "will not violate s. 2(b) of the *Charter*".[122] Its reasoning is unduly narrow, however, and misses the larger threat that its request poses to freedom of expression throughout Canada. For example, both the application

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119 Aguiar; see also Ernesto Van Der Sar, "Shutting Down Pirate Sites is Ineffective, European Commission Finds" (14 May 2015), online: TorrentFreak <https://torrentfreak.com/shutting-down-pirate-sites-is-ineffective-european-commission-finds-150514/>.

120 Aguiar; see also Ernesto Van Der Sar, "Shutting Down Pirate Sites is Ineffective, European Commission Finds" (14 May 2015), online: TorrentFreak <https://torrentfreak.com/shutting-down-pirate-sites-is-ineffective-european-commission-finds-150514/>.

121 Joost Poort and J Leenheer, "File sharing 2©12. Downloading from illegal sources in the Netherlands: Technical Report" (November 2012), available at: <https://www.researchgate.net/profile/Joost_Poort/publication/289531585_File_sharing_2C12_Downloading_from_illegal_sources_in_the_Netherlands/links/568f71be08aeaa1481b0d781/File-sharing-2C12-Downloading-from-illegal-sources-in-the-Netherlands.pdf> (ResearchGate); Ben Zevenbergen, "Empirical Data Suggests That Website Blocking Is A Useless Weapon Against Infringement" (24 October 2012), online: Techdirt <https://www.techdirt.com/articles/20121018/02011120745/empirical-data-suggests-that-website-blocking-is-useless-weapon-against-infringement.shtml>..

122 Application, Appendix 1 (McCarthy-Tetrault memo), at page 3

and the attached legal opinion address freedom of expression almost exclusively in the context of the free expression rights of those who have been proven to have engaged in copyright infringement.[123] Yet the point is that the proposed IPRA regime implicates *everyone else*. The concern is for those who do *not* engage in copyright infringement, but are mistakenly or falsely accused of doing so, two consequences that copyright-driven blocking and takedown requests are globally notorious for promoting. As one academic writes:

> Mandating internet access blocking is perilous. While there is the everpresent threat of over-blocking, there are systemic problems that arise from requiring intermediaries to establish an infrastructure for controlling access, with potential for scope creep, such as creeping censorship, and the prospect of increasing fragmentation of the internet into territorial jurisdictions.[124]

150 Evidence suggests that website blocking such as the applicant proposes does not effectively address concerns with copyright infringement and lost broadcasting revenues;[125] however, even if it were effective, one must ask: at what cost? The fact *alone* that setting up such an overreaching regime *might* go to decreasing online infringement (and *might* then trickle down to a fractional increase in legal sales of content), does not necessarily justify such an institution, when weighed against the significant costs of collateral damage to freedom of expression, Internet accessibility and affordability, and the ability of creators and artists themselves to exercise their creativity and be freely inspired by others, rather than worry about infringing copyright. It is a logical fallacy to assume, as the application seems to, that *any* slight benefit necessitates implementation, without assessing that benefit against the corresponding costs.

151 The applicant suggests its proposal applies only to "directly affected stakeholders",[126] but overlooks or ignores the fact that this group includes all Canadians who are neither Internet service providers, creators, nor copyright owners, and perhaps not even Internet users (but who nonetheless move through and engage with Canadian society and culture generally, which is influenced and shaped by culture and content online as well as off). This is why this application has provoked such widespread and immediate outcry across the country:[127] it is not because Canadians feel so very strongly about the right of confirmed copyright infringers to blatantly infringe copyright as a form of self-expression; but because they are able to perceive the request and its consequences from a broader and more longterm perspective, such as all the perhaps unintended, but nonetheless real, consequences that will flow from the application's drastic measures. These consequences visited upon broader society, regardless of any actual copyright infringement caught, include well documented effects such as chilling online speech, overbroad blocking, false positives, mission creep, and the abuse of takedown mechanisms to remove otherwise legitimate speech or uses that constitute fair dealing.

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123 See Application, Appendix 1 (McCarthy-Tetrault memo), at pages 3, 51-52.

124 BKP 1530 (footnotes omitted)

125 See Section X of this intervention, above.

126 Application 8663-A182-201800467, at para 1

127 At time of writing, the Commission docket for this proceeding contains over 10,000 public comments, with early analysis suggesting the vast majority of them oppose the application.

152 As an example of overreach or false positives, Google's Transparency Report includes several URL takedown requests from Bell Media that Google ultimately declined. In one case, a third-party organization submitted a request on behalf of Bell Media, to delist 585 URLs over 96 different domains. Google ultimately removed only 55.2% of them.[128] Other Bell Media requests demonstrate similar levels of overbroad attempts to remove content, overreaching by hundreds.[129] This is important and concerning in light of Google's reasons for non-removal in response to requests:

> **Reasons we don't remove**
>
> It is our policy to respond to clear and specific notices of alleged copyright infringement. Upon review, we may discover that one or more of the URLs specified in a copyright removal request *clearly did not infringe on copyrights*. In those cases we will decline to remove those URLs from Search. Reasons we may decline to remove URLs include *not having enough information about why the URL is allegedly infringing; not finding the allegedly infringing content referenced in the request; and deducing fair use*. We also may *receive inaccurate or unjustified copyright removal requests for Search results that clearly do not link to infringing content*.[130]

153 In light of the sheer volume of URLs and requests, would the purported tribunal, or the Commission, have resources equal to those of Google in distinguishing genuine claims of copyright infringement from claims that are inaccurate, misguided, or an abuse of the system provided? Without such, the dangers of overblocking, false positives, and wrongful takedowns increase even more.

154 The Lumen project (formerly ChillingEffects.org), a collaboration between the Berkman Klein Centre for Internet & Society at Harvard University, Electronic Frontier Foundation, and several law school clinics, maintains a database that logs and analyzes Internet takedown requests under the United States' *Digital Millennium Copyright Act* (DMCA).[131] Recent research from Lumen has found, "Businesses have become increasingly creative in their attempts to misuse the DMCA to remove negative reviews from the Internet. They have gone to great lengths to falsely claim copyright infringement with the intent of taking down content from Google's search results and review sites." This can involve schemes such as the following:

155 A company (or individual) will come across some undesirable content online, which they believe will cause them reputational harm. Desperate to censor the content at any cost, and lacking a valid case for defamation, they will often seek the assistance of a "reputation management" agency. These agencies will proceed to create a website masquerading as a legitimate news source, whose *sole purpose* is to host the very content their client is seeking to remove, usually disguised in the form of a news article. The article is then backdated to give it the appearance of being published prior to the allegedly infringing content. The reputation management agency

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128 https://transparencyreport.google.com/copyright/request/4617451

129 https://transparencyreport.google.com/copyright/request/5696223 (only 47.2% removed, 233 URLs over 40 domains); https://transparencyreport.google.com/copyright/request/4611640 (448 URLs over 111 different domains, only 64.5% removed)

130 https://transparencyreport.google.com/copyright/overview

131 https://lumendatabase.org/pages/about

then files a DMCA notice on behalf of the "journalist" who wrote the review, claiming it was stolen from their client's website, all the while shielding the true client's name with an alias designed to make it difficult to trace back to them.[132]

156 It is therefore not just that a website blocking regime itself would make mistakes or engage in mission creep, but that the mere existence of such a mechanism invites exploitation and abuse, which results in violating freedom of expression or the removal of completely legitimate speech unrelated to any actual copyright infringement.

157 One study found that the U.S. visual arts community suffered a range of negative impacts due to fear of overzealous copyright enforcement:

> One museum professional, who is also a scholar, noting the institution's rigid and extreme permissions policies, said, "I know that we are too risk-averse, because no one will probably sue us, but …" Another museum professional said, "I don't want to be the test case. I don't want [my institution] to be sued."

158 Even artists, the population in this group most likely to operate outside permissions culture when employing others' copyrighted material, often describe their choices as risky. Some draw from popular culture to make paintings, time-based work, and sculptures that reference their world. Some choose to reframe, echo, or build upon the work of other artists. Some are experimenting with digital applications that generate content in new ways. While they often expressed the felt need to use without licensing, they also did so in ways that registered, variously, bravado, anxiety, and calculation. […] Some cultivate an attitude of transgression; thus, artists engaged in social critique see their copyright choices not as an exercise of legal rights but as a transgressive dare to the larger society.[133]

159 David Vaver—Emeritus Professor of Intellectual Property & Information Technology Law in the University of Oxford, Emeritus Fellow of St Peter's College, Oxford, former Director of the Oxford Intellectual Property Research Centre; former faculty member at Osgoode Hall Law School; and Member of the Order of Canada—has noted, in discussing emerging recognition of users' rights at the Supreme Court of Canada:

> For copyright law is *par excellence* an area that deals with the sensitive area of expression of *not just authors but everyone*—and expression is, as the Supreme Court of Canada has emphasized in its post-Charter cases, a "vital concept" to be restricted only "in the clearest of circumstances." On this theory, *cultural access would be treated as the rule, and copyright restriction as the exception*.[134]

160 Establishing a systematized apparatus of website blocking also raises the likelihood of strategic litigation against public participation, also known as SLAPP lawsuits. The EFF observes, "We've seen abusive DMCA takedown notices from a would-be Senate candidate, small businesses, and

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132 https://lumendatabase.org/blog_entries/800

133 http://sciencepolicy.colorado.edu/students/envs3173/aufderheide2015.pdf at page 8.

134 DVR 669-70

Ecuador's President. We've also seen robots-run-amok and sending takedowns and monetization demands for public domain material and white noise."[135]

161 In Canada, the BC Court of Appeal recently overturned an injunction requested by the Vancouver Aquarium against an independent documentary filmmaker, Gary Charbonneau, and his company, Evotion. The aquarium had sued on grounds of copyright—not defamation—in an attempt to remove from the Internet the filmmaker's documentary, which criticized the aquarium's cetacean program. The Court found:

> The parties have clearly engaged s. 2(b) of the *Charter*. Evotion created the documentary to contribute to the conversation on the social and political issue of keeping cetaceans in captivity. This is an unusual copyright case in that the injunction will, in part, silence criticism of the Aquarium and potentially stifle public debate on a topic of great interest to the community. In addition, the Aquarium is not seeking to protect works that are being unfairly used to profit others, such as was alleged in SOCAM.
>
> On the other hand, it is clear that the debate regarding cetaceans in captivity continues, despite the injunction. It is a matter of public record that the Vancouver Park Board, earlier this year, voted to ban the bringing of new cetaceans to the Aquarium. More litigation may ensue from this, so no more need be said.
>
> The engagement of s. 2(b) in the analysis also responds to the concerns of Animal Justice in terms of bringing the issue of cases of animal cruelty to the public's attention.
>
> In my opinion, the balance of convenience lies with Evotion. The film is part of a public dialogue and debate on the issue of whether cetaceans should be kept in captivity, and thus, the Charter value of freedom of expression must weigh against granting the injunctive relief. In addition, irreparable harm was not shown by the Aquarium, which in and of itself is a reason for not granting the injunction, and in this case, weighs against granting the injunction.[136]

162 There are reasons that many legal requests require judicial oversight. Institutions such as the applicant request the Commission unilaterally establish are "designed to create a quick and easy way to make speech disappear from the Internet without any clear standards or meaningful recourse".[137] Invariably, speech disappearing from the Internet without such standards or recourse is what often occurs, regardless of whether such consequences were intended by copyright owners or not.

B. Commission Must Respect Freedom of Expression and Charter Values

163 The applicant presents several reasons that section 2(b) of the *Charter* may not apply to its request, or is otherwise something that should not necessarily concern the CRTC if it grants this extraordinary request. For example, it points to the fact that section 36 does not explicitly

135 https://www.eff.org/deeplinks/2018/01/copyright-first-wave-internet-censorship
136 Vancouver Aquarium Marine Science Centre v. Charbonneau, 2017 BCCA 395, at paras 79-82.
137 https://www.eff.org/deeplinks/2018/01/copyright-first-wave-internet-censorship

mention freedom of expression in its provision[138], and to cases such as *R. v. CKOY Ltd.*[139] However, these do not help the applicant's case.

164 First, section 36 does not need to explicitly mention freedom of expression in order for section 2(b) or the *Charter* to be engaged. According to the Supreme Court of Canada, administrative tribunals have a standing obligation to take *Charter* values into account in their determinations in any case:

> On review, the Tribunal's conclusion that it could not consider Charter values in deciding whether the Plan was bona fide because there was no ambiguity in the statute was incorrect. The Tribunal could have engaged in a Charter value analysis and taken into account consideration of how the Charter value at issue could be best protected in light of the statutory objectives.[140]

165 Second, *R. v. CKOY Ltd.* is a poor example as the "countervailing interests" that the CRTC had to balance are not analogous to those of copyright owners. In *CKOY*, the CRTC had to weigh a radio station's right to free expression against an individual's right to privacy. Unlike copyright, privacy is also a human right with constitutional protection, as well as enshrined as a telecommunications policy objective in section 7(i) of the *Telecommunications Act.* Privacy therefore carries more weight as a countervailing *right* and as a telecommunications policy objective before the telecommunications regulator, than would copyright owners' lost revenues.

166 As an aside, FRPC takes exception to the notion that the *Charter* does not provide copyright infringers with "any right to the use of private telecommunications facilities".[141] This seems to be a misleading, and unnecessary statement, given that Internet access has been recognized by the Commission as a basic service,[142] and has been recognized by Finland and the United Nations as a human right.[143] That a person is found to have infringed copyright does not remove their status as "human". Moreover, as the applicant noted, Canada does not nor is considering implementing a "graduated response" system in which one could lose access to a critical basic service such as Internet connectivity—and the corresponding ability to participate meaningfully in Canada's digital society and economy—due to having been found to have infringed copyright.

167 Third, the applicant claims that the Commission may implement a website blocking tribunal by balancing *Charter* rights such as freedom of expression against its "statutory mandate".[144] However, when it comes to the applicant's request of setting up a mass website blocking apparatus for the sake of copyright, the Commission *has no statutory mandate*. The applicant's request is outside of the Commission's purview. If anything, as FRPC elaborated upon in Section

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138 Application, Appendix 1 (McCarthy-Tetrault memo), at para 53
139 Application, Appendix 1 (McCarthy-Tetrault memo), at para 53-54.
140 2017 BCSC 2375 British Columbia Supreme Court Duncan v. Retail Wholesale Union Pension Plan, at para 102; see also 2015 ONCA 495 Ontario Court of Appeal Taylor-Baptiste v. OPSEU, citing *Doré*.
141 Application, Appendix 1 (McCarthy-Tetrault memo), at para 53
142 TRP CRTC 2016-496
143 Cite
144 Application, Appendix 1 (McCarthy-Tetrault memo), at page 51, 54.

X above ("Telecommunications Policy Objectives), the Commission's statutory mandate should militate towards rejecting the applicant's request.

1. United Kingdom Operates Under Its Own Legal Regime Driven by Different Policy Considerations than in Canada

168 The applicant also cites case law and copyright-driven website blocking jurisprudence from the United Kingdom, to support its request.[145] This is irrelevant to what the Commission ought to do in the Canadian context, however, as each jurisdiction operates within its own legal norms, policy considerations, and sociopolitical values as developed within each country's cultural and other context. Evidence suggests that the considerations and value driving the UK blocking decisions do not align with those that would drive Canadian decisions, particularly when it comes to weighing of fundamental human rights, such as freedom of expression.

169 First of all, the website blocking regime in the UK occurs according to a legislated four-part test, one criterion of which is that "the users and/or operators of the target websites must use the respondent's services to infringe copyright".[146] This is one restraint that the applicant's proposal does not include, as it would mandate *all* ISPs block the blacklisted websites. Second, analyses of this line of decisions, nearly all of which appear exclusively decided by one judge, Arnold J, demonstrates that to the extent "balancing" or determining proportionality occurs, the court emphasizes a "means/ends" or costs/effectiveness analysis rather than one of rights:

170 This emphasis on factors such as effectiveness and costs seems to confirm the conclusions reached by Rivers that British courts are more concerned with proportionality as a principle for limiting state interference than as a principle for optimising rights."[147]

171 While BKP hastens to note that UK courts do not ignore rights, nonetheless, "The primacy given to 'means/ends' analysis under UK law, however, is clear from other judgments in the series delivered by Arnold J." In fact, "Provided an injunction is sufficiently targeted, the 'rights-based' analysis has bordered on perfunctory."[148] If this is the kind of example that the requested tribunal would follow, that is even more cause for alarm among Canadians who value a free and open democratic society.

2. Power Once Given Only Expands

172 Lastly, the applicant's request poses a danger to freedom of expression online in Canada because history suggests that such powers, once provided for, only ever expand. When it comes systems of top-down control, particularly by State and industry powers over the activities of everyday citizens, mission creep is legion.

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145 Application, Appendix 1 (McCarthy-Tetrault memo), at page 55
146 BKP 1519
147 BKP 1521
148 BKP 1521

173 For instance, the relief that the Court gave to *Equustek* in its decision went beyond what Equustek itself actually requested in its injunction.[149] As the EFF has pointed out, regimes set up to censor one kind of content are often then repurposed towards more expansive restrictions concerning other kinds of content.[150] In the United States, a court granted as-is a particularly broad injunction request:

> [T]he injunction ACS proposed was incredibly broad: it purported to cover not only Sci-Hub but "any person or entity in privity with Sci-Hub and with notice of the injunction, including any Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries." None of these companies were named in the suit. […] ACS bypassed both the DMCA and basic copyright law to get a court order directed at Internet intermediaries. It simply filed a proposed injunction labeling search engines, domain registrars, and so on as "entities in privity" with Sci-Hub. A magistrate judge adopted their proposal as-is.[151]

174 This raises concerns regarding the applicant's statement that targeted sites may not in fact be limited to websites, but also applications, services, and other "locations on the Internet", none of which are specifically defined. In fact, the applicant provides no specific technical mechanism through which it envisions the blocking being implemented, which is more cause for the Commission to reject the application, lest it grant what amounts to a technological blank cheque to the applicant in taking down targeted content, through design of the technical mechanism.

175 With respect to such powers tending to expand, one only has to read the Freedom on the Net reports issued annually by Freedom House. Key findings from the 2017 report included:

a. "Nearly half of the 65 countries assessed in Freedom on the Net 2017 experienced declines during the coverage period, while just 13 made gains, most of them minor"

b. "Online content manipulation contributed to a seventh consecutive year of overall decline in internet freedom, along with a rise in disruptions to mobile internet service and increases in physical and technical attacks on human rights defenders and independent media"; and

c. More governments restricted live video, censorship targeted mobile connectivity, and observers noted a rise on restrictions against virtual private networks (VPNs), which facilitate freedom of expression in repressive or heavily surveilled regimes.[152]

176 The 2016 Freedom on the Net report was similarly concerning, finding a global decline in Internet freedom for the sixth year in a row, and that governments were censoring "more diverse content":

> Governments have expanded censorship to cover a growing diversity of topics and online activities. Sites and pages through which people initiate digital petitions or calls for

149 *Equustek* dissent.
150 https://www.eff.org/deeplinks/2016/09/if-you-build-censorship-machine-they-will-come
151 https://torrentfreak.com/us-court-grants-isps-and-search-engine-blockade-of-sci-hub-171106/
152 FOTN 2017

> protests were censored in more countries than before, as were websites and online news outlets that promote the views of political opposition groups. Content and websites dealing with LGBTI (lesbian, gay, bisexual, transgender, and intersex) issues were also increasingly blocked or taken down on moral grounds. Censorship of images—as opposed to the written word—has intensified, likely due to the ease with which users can now share them, and the fact that they often serve as compelling evidence of official wrongdoing.[153]

177 The 2016 report noted, "It is no coincidence that the tools at the center of the current crackdown have been widely used to hold governments accountable and facilitate uncensored conversations."[154] In fact, Canada is one of only a handful of countries that has remained free of what the report calls Key Internet Controls.[155] The Commission should not jeopardize this in order to implement an overbroad regime that will induce collateral damage and will fail to achieve its purported objectives in any case (as demonstrated in Section X below "Water runs downhill").

C. The CRTC lacks authority to block Canadians' access to websites as proposed in the application

1. Telecommunications Act does not give CRTC authority to block websides

178 The application argues (through its Appendix) that

> … an ISP that is required to block access to a site pursuant to a CRTC or court order is not itself "control[ling] the content or influenc[ing] the meaning or purpose of telecommunications" contrary to s. 36, but is merely carrying a mechanical process ordered by the CRTC or the court, which is the true controlling party.[156]

179 Yet the CRTC has so far denied two previous requests that it block websites on the basis of its uncertainty as to the scope of section 36. These applications involved genuinely serious harms to Canadian society—the promotion of hatred and the promotion of gambling.

180 In 2006 the CRTC denied an application asking it to permit the blocking of two websites alleged to be communicating hate and advocating genocide, on the basis that the scope of its authority to block websites was unknown. The CRTC said that

> … section 36 of the Act would not allow it to require Canadian carriers to block the web sites; rather, under section 36 of the Act, the Commission has the power to permit Canadian carriers to control the content or influence the meaning or purpose of telecommunications it carries for the public. The scope of this power has yet to be explored.[157]

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153 FOTN 2016
154 FOTN 2016
155 FOTN 2017, Canada Report
156 Appendix 1, at 22.
157 CRTC, *Letter* , File No.: 8622-P49-200610510 (Ottawa, 24 August 2006), https://crtc.gc.ca/eng/archive/2006/lt060824.htm.

181 In 2016, the CRTC again addressed website blocking, this time because the province of Quebec had enacted Bill 74, which included a provision purporting to permit the province to authorize some online gambling sites, and to block other unauthorized gambling sites. In suspending consideration of PIAC's application for a declaration that Bill 74 was unconstitutional, outside of provincial authority and a breach of the *Charter of Rights and Freedoms*, the CRTC said the *Telecommunications Act* prohibits website blocking. That said, it appeared to crack open what was previously as closed door, by suggesting that it blocking might be permitted if it would further the telecommunications policy objectives:

> Consequently, any such blocking is unlawful without prior Commission approval, which would only be given where it would further the telecommunications policy objectives. Accordingly, compliance with other legal or juridical requirements—whether municipal, provincial, or foreign—does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act.[158]

182 In 2017, however, the CRTC's overall "preliminary view" in the traffic-management proceeding (TNoC 2017-104) was that

> … the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet, whether or not this blocking is the result of an ITMP.

183 When the CRTC again addressed section 36, it decided that it might have to provide its approval under the section—but only if ISPs charged different prices for providing access to content transported online:

> The Commission considers that section 36 is generally not triggered by differential pricing practices that simply involve setting different prices for the provision of access to content transported over the Internet. Such differential treatment based on the content of data being transmitted is better considered in the context of subsection 27(2) of the Act. Nevertheless, certain differential pricing practices may require approval under section 36, **such as those that require a content provider to alter its content or those that control the availability of content accessible by consumers**.[159]
>
> [bold font added]

184 In the Forum's view, section 36 does not state that the CRTC has the authority to direct telecommunications companies to block telecommunications users from accessing given parts of the telecommunications system. Section 36 instead prohibits telecommunications service providers from controlling content, from influencing meaning and from influencing the purpose of telecommunications for the public:

> "[e]xcept where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public."

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158 Secretary General, CRTC, Telecom Commission Letter Addressed to Distribution List and Attorneys General, Ref. 8663-P8-201607186 (Ottawa, 1 September 2016), https://crtc.gc.ca/eng/archive/2016/lt160901.htm.

159 https://crtc.gc.ca/eng/archive/2017/2017-104.htm, at ¶139.

185 Controlling the content or meaning of telecommunications is entirely different from prohibiting telecommunications users' access to the telecommunications system. Had Parliament intended to permit the CRTC to block users' use of the telecommunications system, it doubtless would have said so—and it did not.

186 The CRTC does not, in our view, have the authority to approve (or deny) the Canadians' access to Internet websites.[160] Blocking access to websites controls does not control websites' content or purpose, but limits telecommunications users' access to the telecommunications system. The CRTC therefore does not have the jurisdiction to grant the application.

187 The CRTC has set limits on the content and purpose of communications in the *Do Not Call Rules*, but these *Rules* set limits on the calls that advertisers and others make to recipients. They prohibit advertisers and others from making certain types of telecommunications, and do not block telephone subscribers from receiving such calls.[161]

188 Approval of the application would therefore require the CRTC to overturn its 2016 preliminary determination that the *Telecommunications Act* prohibits Canadian carriers from blocking websites, and clarify the legality of interpreting "no control over content" as meaning "control over users' access to content".

189 The application also argues (in Appendix 1) that the CRTC may have been ready to use its authority under section 36 to "implement a universal blocking regime" under which carriers would "prevent nuisance calls with blatantly illegitimate caller ID from reaching Canadians".[162] This refers to Telecommunications Notice of Consultation (TNoC) 2017-405, in which the CRTC invited comments on the possibility of preventing telephone calls using fraudulent telephone numbers, from reaching their intended recipients. On 31 January 2018, however, the CRTC's staff granted a procedural request made by Bell Canada on 8 January 2018 to suspend the proceeding[163] and consequently the CRTC has not issued a decision on this matter, or its implications with respect to section 36. The Forum therefore submits that it would be

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160 We note the CRTC's silence on the Cybertip or the Cleanfeed programs, which permit complaints to be made with respect to online sites alleged to involve child pornography. Cleanfeed Canada is an "undertaking of the Canadian Coalition Against Internet Child Exploitation (CCAICE)", which "blocks customer access to non-Canadian websites that are hosting child pornography."
Canadian Centre for Child Protection Inc., "Cleanfeed Canada", accessed 24 March 2018, https://www.cybertip.ca/app/en/projects-cleanfeed.
The CCAICE "CCAICE is a voluntary multi-sector group of industry, government, non-governmental and law enforcement stakeholders from across the country." Cybertip.ca, "CCAICE", accessed 24 March 2018, https://www.cybertip.ca/app/en/projects-ccaice.
Our point is not that the Cybertip.ca or Cleanfeed Canada programs should not operate, but only that the CRTC has avoided pronouncements concerning its authority to approve or disapprove of these activities.

161 The DNCL rules were, moreover, only formally established after Parliament amended the *Telecommunications Act* to enable the CRTC to regulate unsolicited telecommunications,[161] due to the thousands of complaints the CRTC was receiving from subscribers about unsolicited marketing calls.

162 Appendix 1, at 23.

163 See CRTC, "All Public Proceedings Open for Comment", https://services.crtc.gc.ca/pub/instances-proceedings/Default-Defaut.aspx?lang=eng&YA=2017&S=C&PA=a&PT=nc&PST=a#2017-405.

unreasonable for the CRTC to rely on any claims with respect to not-yet-issued conclusions about the suspended 2017-405 proceeding.

2. Doubt that CRTC may appoint an 'Inquiry Officer' indefinitely

190 The applicant argues (¶21) that the CRTC has jurisdiction to grant its application because section 70(1)(a) of the *Telecommunications Act* empowers the Commission to appoint an agency to inquire into and report to the Commission on the matter of identifying piracy sites (¶21).

191 Section 70(1)(a) permits the CRTC to

> … appoint any person to inquire into and report to the Commission on any matter
>
> (a) pending before the Commission or within the Commission's jurisdiction under this Act or any special Act; or
>
> (c) on which the Commission is required to report under section 14.

192 Rather than defining the subject of an inquiry and asking for a report about the subject, the application is asking the CRTC to authorize the establishment of, and to accept the recommendations from, a new law-enforcement agency. It writes, "Clearly the Canadian telecommunications system should encourage compliance with Canada's laws" (without explaining why it singled out copyright law out of the many laws that Canada may want to encourage compliance with) and "Those laws exist to foster social and economic objectives important to Canadian society."[164] Appendix 1 of the application makes similar arguments.[165]

193 While the concept of 'inquiry' is not defined by the *Telecommunications Act*, section 70 does not expressly permit the CRTC to create a never-ending commission-like body to investigate and make recommendations about legislative non-compliance. The inquiry power of section 70 instead refers to a "matter" about which a person is to "report"—presumably once, rather than daily, weekly, or—as the application appears to contemplate—for years.

194 In our view the CRTC lacks Parliament's express authorization to create new CRTC-like entities to make decisions about legislative compliance, and we think it is fair to say that Canadian courts would also oppose the creation of such bodies. In 1990 the Supreme Court of Canada declared that Ontario exceeded its jurisdiction when it created an inquiry that circumvented procedures prescribed under the *Criminal Code* for criminal investigations.[166]

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164 Application 8663-A182-201800467, at para 95.

165 Application, Appendix 1 (McCarthy-Tetrault memo), at page 23.

166 *Starr v. Houlden*, [1990] 1 SCR 1366, 1990 CanLII 112 (SCC), per Lamer J., for the majority, https://www.canlii.org/en/ca/scc/doc/1990/1990canlii112/1990canlii112.html?searchUrlHash=AAAAAQAiaW5xdWlyeSAvcyByZXBvcnQgY3JpbWluYWwgb250YXJpbwAAAAAB&resultIndex=5,
… What a province may not do, and what it has done in this case, is enact a public inquiry, with all its coercive powers, as a substitute for an investigation and preliminary inquiry into specific individuals in respect of specific criminal offences. This is an interference with federal interests in the enactment of and provision for a system of criminal justice as embodied in the Criminal Code.

195 If Canada's telecommunications system is to be wielded as an additional arm of law enforcement, and should "encourage compliance" with Canada's laws, then why only the laws regarding copyright? Canada has many laws. Some of them, one might hazard, foster social and economic objectives even more important than copyright.

D. International comparisons are not valid

196 The applicant states that other jurisdictions have engaged in website blocking with respect to online copyright infringement, to support its request for the website blocking regime in Canada.[167]

197 Closer scrutiny (detailedl in Part IV, section D(2), below) shows that such measures regularly result in damaging errors, collateral damage, and broad unintended consequences. Empirical evidence from the Netherlands, United Kingdom, and Germany has also demonstrated that blocking is ineffective and does not significantly improve legal sales of content, as opposed to the market-based solution of providing affordable, convenient, consumer-friendly alternatives such as subscription streaming services.

198 Jurisdictions mentioned by the applicant operate within their own legal regime, approach to copyright, cultural sensibilities, policy considerations, and values—and these differ significantly from Canada not only in terms of concepts such as presumption of innocence, but also enforcement of the law.

199 Some jurisdictions seem to have only implemented their copyright enforcement regimes, including website blocking, after direct influence and sustained pressure from the United States, rather than because of serious infringement identified by copyright owners with valid and reliable data.

200 It is noteworthy that international institutions that are less vulnerable to industry pressure, such as the Internet Society and the United Nations, have largely rejected methods such as the proposed regime, due to their ineffectiveness, high propensity to cause collateral damage, and consistent privacy and other human rights concerns.

III. Application Violates Canadian Copyright Law and Policy

A. Application is colourable attempt to protect copyright interests under the guise of telecommunications policy

201 The application and its Appendix claim that by authorizing a website blocking regime, the CRTC would be "imposing a regulatory measure whose primary purpose is to advance Canadian

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167 Application 8663-A182-201800467, at paras 15, 59-69.

telecommunications policy objectives." The applicant then adds that "supporting copyright" will be a "secondary effect".[168]

202 Simply put, supporting copyright is not the "secondary effect" of this application, but its entire point.

203 While the application does not implicate constitutional division of powers, applying the doctrines of pith and substance and colourability from constitutional law help to illustrate the untenable nature of the application's claim that it is merely advancing telecommunications policy. The Supreme Court of Canada addressed the ccolourability doctrine, in 1993:

> The "colourability doctrine" in the distribution of powers is invoked when a law looks as though it deals with a matter within jurisdiction, but in essence is addressed to a matter outside jurisdiction […] [T]he colourability doctrine really just restates the basic rule … that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing […] Under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about.[169]

204 The substance of the application, and the central mischief it proposes to remedy, is the protection of copyright from online infringement. The application speaks at length about the purported scope, harms, and challenges of online copyright infringement—not from the perspective of telecommunications providers or users, but from that of content creators and copyright owners.[170] It is noteworthy that the majority of coalition members are key players in the *broadcasting* and *content* industries. Meanwhile, the majority of non-vertically integrated telecommunications providers commonly seen in the Commission's *telecommunications* proceedings — *i.e.* service providers who do not have inherent conflicts of interest with their own media divisions— are absent from this application.

205 What this application is "really about" and what it is "really doing" is attempting to circumvent Canada's carefully calibrated copyright laws, and to use the CRTC to enact provisions that Parliament chose not to after years of deliberation and national consultation. The request is not grounded in a *Telecommunications Act* provision or policy that happens to incidentally advance interests normally within the purview of copyright law alone. Rather, it is an attempt to push through substantive reform of Canadian copyright law through a side door, thinly veiled as a telecommunications application.

206 The Supreme Court of Canada stated in *McKay et al. v. The Queen*, "… just as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words effect a result which would be beyond its powers if brought about by precise words." This principle applies to this application. Its use of general words to claim that its proposal advances telecommunications policy objectives, makes it no truer than if it had proposed its regime through more appropriate

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168 Application, Appendix 1 (McCarthy-Tetrault memo), at page 44.

169 R v Morgentaler, [1993] S.C.J. No. 95, 107 D.L.R. (4th) 537, 125 N.S.R. (2d) 81, at paras 50-51.

170 Application 8663-A182-201800467, at paras 28-58.

channels that deal with copyright law directly, such as the ongoing Parliamentary review of the *Copyright Act*.[171] The Commission should reject this application accordingly.

B. Proposed Regime Violates Purpose, Spirit, and Carefully Calibrated Balance of Canadian Copyright Law and Policy

207 One of the many difficulties with this application is that it attempts to import an entire separate area of law into the Commission's purview. This is despite the fact that copyright law already constitutes an exhaustive, comprehensive, robust, and separate legal regime, including a specialized administrative tribunal, standalone all-encompassing legislation, complete set of remedies, legislative history, policy objectives, and distinct lines of common law jurisprudence of its own. However, the applicant has provided the Commission with very little of this relevant context concerning Canadian copyright law and policy and its historical development, context that a fully informed assessment of the application would require.

208 This section of FRPC's intervention will provide that missing context, such that the Commission more meaningfully understands the bigger picture regarding Canadian copyright law and policy, in which to situate the applicant's extraordinary request.

209 On the whole, when one takes into account the full context of Canadian copyright law and policy, addressing infringement is but one among many important aims and considerations. Copyright law and policy must also take into account:

- the core purpose of copyright with respect to making works of art and knowledge available to the benefit of society as a whole; not barring future and next-generation creators;
- not foreclosing on innovative and transformative works that reside in legal grey areas;
- the development of the 2012 *Copyright Modernization Act* and the duration and extent of nationwide considerations that went into it;
- Parliament's specific contemplation of ISP's roles; and
- the consistent, overt emphasis on balance arising from Supreme Court of Canada decisions, copyright legal scholarship, *Hansard* debates, and the *Copyright Act* itself.

1. Origins and Purpose of Copyright Law Necessitate Inherent Fluidity and Balance

210 First, copyright law is inherently fluid and prioritizes balance above all else, due to its origins and core purpose to incentivize new works to be not just created but also *available* for use and enjoyment by society at large. This is due to the role that copyright plays as a social and policy tool meant to maximize the amount of creative works made available for the benefit of society,

171 News Release, "Parliament to undertake review of the Copyright Act" (14 December 2017), online: <https://www.canada.ca/en/innovation-science-economic-development/news/2017/12/parliament_to_undertakereviewofthecopyrightact.html>.

culture, public discourse, access to knowledge, and the public domain as a whole. As copyright scholar Craig Carys writes:

211 The copyright system should be regarded as one element of a larger cultural and social policy aimed at encouraging the process of cultural exchange that new technologies facilitate. The economic and other incentives that copyright offers to creators of original expression are meant to encourage a participatory and interactive society, and to further the social goods that flow through public dialogue. Copyright's purpose is to create opportunities for people to speak, to develop relationships of communication between author and audience, and to fashion conditions that might cultivate a higher quality of expression.[172]

212 Key to the idea of copyright is it protects economic rights to some extent instrumentally, as a means of "promoting the public interest in the encouragement and dissemination of works of the arts and intellect".[173] Thus, any proposal to increase the aggressiveness of copyright enforcement must ensure it does not, in the process, undermine that public interest in a broader sense. Overzealous enforcement works against copyright's purpose by chilling many forms and instances of creative expression, resulting in *fewer* new works being created overall.[174]

213 In the landmark copyright case *Théberge v. Galerie d'Art du Petit Champlain inc.* (2002 SCC 34) at the Supreme Court of Canada, Justice Binnie articulated this concern as follows:

> The proper balance among [encouraging works of the arts and intellect] and other public policy objectives lies not only in recognizing the creator's rights *but in giving due weight to their limited nature*. In crassly economic terms *it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them*. […]
>
> Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative

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172 Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham, UK: Edward Elgar Publishing, 2011), available online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1043&context=faculty_books>, at page 2..

173 *Théberge v. Galerie d'Art du Petit Champlain inc., 2002 SCC 34, at para 30 [Théberge].*

174 Moreover, copyright scholars have increasingly criticized the notion of the creator as a sole genius working in isolation from the rest of the world, including the art already in it. Teresa Scassa, Canada Research Chair in Information Law, writes: "[T]he romantic notion of the creator is problematic generally, as individuals create within a broader cultural context, and draw upon the works of others who have gone before them in creating their own works. In many ways, then, the creator is a user of works, and the interests of creators and users intersect. In contemporary times, the line between the creation of a new work and the use of the work of another has blurred significantly." ." Teresa Scassa, "Interests in the Balance", in In the Pubic Interest: The Future of Canadian Copyright Law, ed. Michael Geist (Toronto: Irwin Law, 2005), available online: <https://www.irwinlaw.com/sites/default/files/attached/One_02_Scassa.pdf>, at page 52.

> innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.[175]

214 Put another way, the marginal cost of capturing all copyright infringement beyond a certain level is too high a cost for society and the public interest to bear. It is in this sense that the proposed regime will absolutely "conflict with the purpose of the *Copyright Act*."[176]

215 Canadian copyright law recognizes the importance of protecting this balance, and provides for and cultivates it in legislation and through the courts. For example, the *Copyright Act* includes a number of provisions that protect users' rights.[177]

216 In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada (SCC) gave important direction in interpreting the fair dealing provisions in the *Copyright Act*:

> [T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "*User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation*."[178]

217 The SCC has since affirmed on multiple occasions its support for and the importance of balance in copyright law, most notably in a set of five decisions released on the same day in 2012, known as the Copyright Pentalogy:

> *CCH* confirmed that users' rights are an essential part of furthering the public interest objectives of the *Copyright Act*. One of the tools employed to achieve the proper balance between protection and access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement. In order to maintain the proper balance between these interests, the fair dealing provision "must not be interpreted restrictively": CCH, at para. 48.[179]

218 Again, the point here is not that proven instances of copyright infringement fall under fair dealing. By definition, they do not. What these *Copyright Act* provisions and SCC decisions

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175 *Ibid*., at paras 31-32 (emphasis).

176 Application, Appendix 1 (McCarthy-Tetrault memo), at page 51.

177 Specifically, sections 29 through 29.7, the fair dealing provisions, set out various uses of works that do not constitute copyright infringement, if used without the creator's or copyright owner's permission. This includes for purposes such as research, private study, criticism, parody, satire, news reporting, private use, back-up copies, education, commentary, or non-commercial user-generated content.[177] The presence of these provisions in the legislation ensures that copyright is not unduly restrictive to the point of becoming self-defeating as described above. They are indicative of the balance that copyright law strives to achieve and maintain.

178 CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, at para 48 (emphasis added).

179 *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Bell Canada, 2012 SCC 36, at paras 10-11.*

demonstrate is that copyright law continually exists in a state of flux, with Canada's cultural milieu and its robustness, quality, freedom, and heterogeneity hanging in the balance. The applicant's proposal, having been neither contemplated nor provided for through any of the established sources of relevant copyright law, and with similar schemes specifically rejected, would severely upset that balance.

2. Fossilizing Copyright Law through Disproportionate Enforcement Forecloses on Innovation, Creativity, and Public Interest Benefits of Copyright

219 The history of the intersection between copyright law, technological advancement, and social behaviours and norms with respect to technology, is a history of legal grey areas. Excessive copyright enforcement forecloses on significant cultural innovation; stymies new, next generation creators; and breaks the social contract that is copyright's *raison d'être*. Examples abound of advanced, innovative, and socially beneficial uses of copyrighted materials that inhabited, for not insignificant durations of time, uncertain legal terrain, but were were also ultimately determined to be legal uses that did not constitute copyright infringement.

220 For example, several everyday uses that the *Copyright Act* now recognizes as unquestionably legal, in the form of fair dealing, also did not enter the *Act* until the 2012 modernization. For many years, seemingly commonsense activities such as time-shifting (recording a show for later viewing); format-shifting for users with perceptual disabilities; and making back-up copies of legally purchased content—were all considered a legal grey zone.[180] Heavy-handed, disproportionate enforcement regimes such as the applicant's would risk foreclosing on such grey zones before the law "catches up", to the detriment of societal progress, the public interest, and the core purpose of copyright law itself.

221 This danger is particularly concerning in the case of what has traditionally been known as user-generated content (UGC) (an increasingly outdated term given increasingly overlap between users and creators). Such content may include copyrighted material incidentally, or intentionally transform and build upon it in such a way such that the final work is of a wholly different nature and clearly distinguishable from the material under copyright. As such, UGC acts as a socially beneficial "disruptive force."[181]

222 The phenomenon of fan fiction, and by extension fan art and cosplay, provides an illustrative case study of the dynamics described above: it is user-generated content that has long existed in a legal grey area, as it incorporates works subject to copyright, but is often transformational and used to disrupt or subvert hegemonic norms by consumers of the original work, who are

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180 Jennier A Marles and Christopher C Scott, "The Copyright Modernization Act: Big Changes to Copyright Law in Canada" (4 March 2013), online: Oyen Wiggs <https://patentable.com/the-copyright-modernization-act-big-changes-to-copyright-law-in-canada/>.

181 Samuel Trosow, "Copyright as Barrier to Creativity: The Case of User-Generated Content" in Intellectual Property for the 21st Century: Interdisciplinary Approaches, eds. Courtney Doagoo, Mistrale Goudreau, Madelaine Saginur and Teresa Scassa (Toronto: Irwin Law, 2014), available online: <http://www.irwinlaw.com/sites/default/files/attached/IP_21st_Century_25_trosow.pdf>, at page 527.

themselves authors and artists. Many have explored the legal status of fan fiction and attempted to determine its legality in Canadian copyright law.[182]

223 Given the integration of copyright material, by definition, would fan art and fan fiction websites such as DeviantArt and Archive of Our Own be considered to be "blatantly, overwhelmingly, or structurally" engaged in infringement? Blocking such sites would constitute a devastating loss of cultural enrichment. It would also deliver a serious blow to underrepresented and marginalized groups who use fan fiction and fan art as an avenue through which to create culture and media they find more relevant and meaningful, than appears in popular culture or works by professional or commercial creators:

> Consequently, fan fiction sometimes provides a means by which people whose voices are underrepresented in media may engage with cherished narratives in a way that is more meaningful to them. *Copyright owners demanding that fan writers or web sites "cease and desist" their activities can have the troubling effect of silencing already marginalized voices and reinforcing gendered control of media narratives*.[183]

224 While there is a compelling case such works fall under the section 29.21 UGC exception in the Canadian *Copyright Act*,[184] this exception was not legislated into the *Act* until 2012. For many years, then, it may have been vulnerable to attack at a website blacklisting tribunal such as the applicant proposes, despite its range of important public interest benefits. The application at hand does not give any indication of these complexities and broader societal implications of copyright law and associated enforcement.

3. Parliament Ostensibly Emphasized Balance and Engaged in Extensive Consultation and Considered Calibration in Designing Current Copyright Laws

225 The previous sections provide but a brief snapshot of the backdrop against which Parliament attempted to reform the *Copyright Act* in 2012. Reading the Hansard debates for each session leading up to the third reading of Bill C-11, formerly Bill C-32 (the *Copyright Modernization Act*),

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182 Rebecca Katz, "Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada's Copyright Reforms" (2014) 12 Can J L & Tech 73; Grace Westcott, "Friction over Fan Fiction: Is this burgeoning art form legal?" (2008), online: Literary Review of Canada <reviewcanada.ca/magazine/2008/07/friction-over-fan-fiction/; Bob Tarantino, "Fan Fiction – After the Copyright Modernization Act" (11 December 2012), online: Dentons: Entertainment & Media Law Signal <www.entertainmentmedialawsignal.com/fan-fiction-after-the-copyright-modernization-act>.

183 Katz, at pages 77-79 (footnotes omitted, emphasis added). See also Mariam Awan "The User-Generated Content Exception: Moving Away from a Non-Commercial Requirement" (11 November 2015), online: IP Osgoode <https://www.iposgoode.ca/2015/11/the-user-generated-content-exception-moving-away-from-a-non-commercial-requirement/>: "Fan fiction at its most basic is homage to the pre-existing work it is based on but at its most sophisticated, it can be a criticism of the pre-existing work. Alice Randall, in Wind Done Gone, recasts the American novel Gone with the Wind by Margaret Mitchell, from the viewpoint of the slaves. Likewise, Peggy Ahwesh's machinima, She Puppet, which was created within the videogame Tomb Raider, provides a feminist critique of both Tomb Raider and the male dominated world of gaming in general. All UGC at its core is a creative endeavor and encouraging such creativity is at the base of any copyright regime." (footnotes omitted)

184 Katz, at 97

demonstrates a consistent, emphatic, pan-partisan prioritization of achieving balance above all else. This occurs both in government's defenses of the bill, as well as forms the grounds on which opposing parties criticized the bill, as indicated in Appendix 7.

226 Even while the government at the time declared balance achieved, other parties critiqued the new legislation for being weighed too heavily *towards copyright owners*.[185] The applicant's ill-conceived proposal would at best distort what Parliament determined was an appropriate balance for Canadian copyright law, and would at worst cause already imbalanced law to be even more inequitably tilted towards owners.

227 Furthermore, Parliament arrived at its decision after a staggering amount of consultation and consideration spanning multiple years.[186] It is this extensive, years-long, deliberative, consultative process that the current application seeks to circumvent with little justification or evidence.

4. Canadian copyright law is self-contained and already provides for sufficient enforcement and remedies

228 As the Supreme Court of Canada held in *CCH*, "In Canada, copyright is a creature of statute and **the rights and remedies provided by the *Copyright Act* are exhaustive**" (bold font added).[187] In terms of rights and remedies, including enforcement, Canada not only meets but exceeds international standards and its own treaty obligations in protecting the interests of copyright owners. One example of this is a new provision imposing infringement liability for "enabling" acts of infringement, which Parliament added to the *Copyright Act* in 2012 along with the notice-and-notice regime.[188]

229 Canadian courts have also proven effective at enforcing remedies on behalf of copyright owners, most recently in *Bell Canada v. Lackman*[189] and *Wesley (Mtlfreetv.com) v. Bell Canada*.[190] These

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185 Hansard, 41st Parliament, 1st Session, Number 124 (15 May 2012), Guy Caron (Rimouski-Neigette—Témiscouata—Les Basques): "I believe it really shows that this bill is unbalanced in that it grants all the protections demanded by the companies. However, creators, craftspeople and musicians have not been quoted in support of the bill."

186 Hansard, 41st Parliament, 1st Session, Number 124 (15 May 2012), Mark Adler (York Centre): "We heard the perspectives of thousands of Canadian businesses and stakeholder organizations on copyright modernization. This includes all the Canadians we heard from during the nationwide consultations we held in the summer of 2009. More than 1,000 Canadians attended live events across the country. An additional 8,000 written submissions were also received. This also includes all the Canadians who attended or made submissions to the two legislative committees that studied the copyright modernization act. Combined, the two committees heard testimony from over 120 organizations and received over 250 written briefs. Finally, it includes all of the Canadians who have informed the many hours of debate on the bill in this House and in the one before it.".

187 *CCH*, at para 9 (emphasis added).

188 *Copyright Act*, RSC, 1985, c C-42, ss 27(2.3) and 27(2.4).

189 2018 FCA 42, https://www.canlii.org/en/ca/fca/doc/2018/2018fca42/2018fca42.html.

190 2017 FCA 55, https://www.canlii.org/en/ca/fca/doc/2017/2017fca55/2017fca55.html.

cases confirm copyright owners' ability to effectively pursue those who sell devices that enable online copyright infringement.

230 A document prepared for federal ministers around the passing of Bill C-11 in 2012 demonstrates that the federal government itself is aware that "all other remedies typically available in business litigation—including actual damages, accounting for profits and injunctions" are also available.[191]

231 Finally, we note that in 2016 Bell also advocated that a similar blocking regime be included in the North American Free Trade Agreement (NAFTA), when it appeared before the House of Commons Standing Committee on International Trade.[192]

232 It is thus an error to attempt to seek to modify Canadian copyright law for a particular group's interests through a separate, unrelated, and inappropriate forum, such as the CRTC.

5. Canadian Copyright Law Already Contemplates Specific Extent of ISP Involvemenet

233 Both the application and Appendix 1 argue that ISPs must "have a role"[193] or "may be required to take actions"[194] in assisting copyright owners to enforce against online infringement. However, ISPs already have a role and take action: it is called the notice-and-notice system. Again, this was not an uninformed decision on Parliament's part, but a deliberate and uniquely Canadian choice rooted in balance.[195] As indicated by the following speech, delivered with the passing of Bill C-11, *the Copyright Modernization Act*, Parliament specifically introduced the notice-and-notice system to maintain balance and ensure that Canadian users would continue to have "open access to the dynamic online environment":

> Copyright is not only about creators and users; it is also about the companies that act as mediators and intermediaries to connect users and creators across the globe. […]
>
> The importance of the people who connect others through technology has long been recognized in Canada. Bill C-11 follows this theme, while reflecting the evolution of technology. It delivers safe harbour or shelter from liability under copyright law to those who merely provide the platform and tools that let people use and find things on the Internet. *Bill C-11 recognizes the absolutely vital role played in realizing the potential of the Internet by mutual intermediaries such as Internet service providers and search engines.* […]
>
> In the digital environment, *it is crucial that neutral intermediaries are not held liable for the activities of their customers.* So long as they are simply providing a connection, caching, hosting or helping to locate information, they should be exempt from copyright

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191 https://www.scribd.com/document/65726239/c32ministerqanda

192 CIIT NAFTA Transcript: https://www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-76/evidence

193 Application 8663-A182-201800467, at para 14

194 Application, Appendix 1 (McCarthy-Tetrault memo), at para 47

195 See, e.g. Hansard, 41st Parliament, 1st Session, Number 141 (15 June 2012), Statements of Hon. Christian Paradis (Minister of Industry and Minister of State (Agriculture), CPC) and Hon. James Moore (Minister of Canadian Heritage and Official Languages, CPC).

> liability. *Bill C-11, by providing clear limitations on their liability, would ensure that these services would continue to provide users with open access to the dynamic online environment.* […]
>
> Under this system, when an ISP receives notice from a copyright holder that a subscriber might be infringing copyright, the ISP forwards the notice to the subscriber. *I am proud to say that notice and notice is a uniquely Canadian solution to this problem***.** It would ensure that *we would not view a truly neutral Internet service provider in the same light that we would an actual copyright pirate.* […]
>
> Only ISPs that fail to live up to the notice and notice requirement would be liable for civil damages. Again, this approach to addressing online infringement is unique to Canada. It provides copyright owners with the tools to enforce their rights while respecting due process and protecting users.[196]

234 As the applicant noted, the Supreme Court of Canada recently granted a request to limit ISP users' capacity to find certain information, in *Equustek*. This case differs from the applicant's request, however, in almost every way. *Equustek* asked it to assist a single company attempting to limit the harm caused when its intellectual property was stolen, and it had exhausted all other remedies without success—by blocking search results about the party that had stolen the IP. The court was not asked to establish a national blocking system, or to block users from visiting the offending site. ISPs and search engines differ in several important ways for the purposes of this application: they provide different functionalities to users, operate at different layers of the Internet, are subject to different legal regimes, and have different legal statuses. Moreover, while the CRTC's net neutrality policy prevents ISPs from discriminating with respect to online content, Google already exercises a level of content moderation over its search results. This fact formed part of the Court's reasoning in Equustek:

> Google did not suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing the Datalink websites. It acknowledges, fairly, that it can, and often does, exactly what is being asked of it in this case, that is, alter search results. It does so to avoid generating links to child pornography and websites containing "hate speech". It also complies with notices it receives under the US Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2680 (1998), to de-index content from its search results that allegedly infringes copyright, and removes websites that are subject to court orders.

235 ISPs avoid altering the websites they serve up to users—as they are obligated to, in keeping with the Commission's net neutrality frameworks regulating internet traffic management practices and differential pricing practices.[197] More critically, as common carriers, ISPs cannot block or alter or in any way influence content delivered over their networks, not without violating section 36 or section 27(2) of the *Telecommunications Act* (which Google is not subject to). There is thus a much stronger imperative against interfering with ISPs and their functionality as neutral conduits, as well as their legal status as common carriers, compared to asking an

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196 Hansard, 41st Parliament, 1st Session, Number 123 (14 May 2012), Stephen Woodsworth (Kitchener Centre, CPC) (emphasis added), available online: <http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-123/hansard>.

197 ITMP Framework (TRP CRTC 2009-657); DPP Framework (TRP CRTC 2017-104)

Internet application-layer service to do more of what it has already acknowledged it regularly does on its own.

236 The additional legal analysis and jurisprudence in Appendix A, regarding ISP liability, *Voltage Pictures, LLC v. John Doe* (2017 CA 97) ("*Voltage*"), and *BMG Canada Inc. v. John Doe* (2005 CC 193) ("*BMG Canada*"), also do not support the application's proposal.

237 The legal memo attempts to distinguish the proposed regime on the presence or absence of legal liability for ISPs;[198] however, that distinction is irrelevant, given that Parliament rejected additional remedies as well as new rights. The memo's arguments also unduly focus on the route or mechanism of blocking, and ignore that the central concern is the very fact and consequences of blocking itself.

238 It does not matter that Parliament did not explicitly reject the specific scheme that the application proposes. It would be unreasonable to expect Parliament to expressly reject every potential model *not* before it while contemplating legislation. The pertinent point is that Parliament rejected *any regime beyond the one they actually legislated*. It is therefore not for the coalition to assume approval from silence in order to read in an entirely new and superfluous enforcement regime into the *Copyright Act*.

239 The *Voltage* decision largely turned on a plain reading of the *Copyright Act*, rather than substantive merits that speak to negotiating a balance between users and owners and corresponding implications for ISPs. Section 41.26(2) states outright, "If no maximum is fixed by regulation, the person may not charge any amount under that subsection," and the Minister simply had (and has) not fixed a maximum fee.

240 As for *BMG Canada*, the Court may have "observed that the privacy rights of file-sharers" must yield to the claims of copyright owners, but what the applicant did not show is that the Court qualified that observation and limited in several ways the extent to which copyright owners could intrude on privacy (such as in the event of lengthy delay, caution against extracting unrelated information in violation of PIPEDA, and using only initials or a confidentiality order).[199]

241 Further, both *Voltage* and *BMG Canada* relied in part on the existence of *Norwich* orders to make determinations regarding ISPs disclosing information. Passing on particular information is a very different request both in nature and in terms of technical requirements, than requiring ISPs to block websites and ongoingly enforce copyright claims on behalf of owners, indefinitely. *Norwich* orders are also still based on the idea that owners would then target the actual wrongdoer, as opposed to the intermediary, which is what the proposed regime would do.

198 Application, Appendix 1 (McCarthy-Tetrault memo), at page 43.

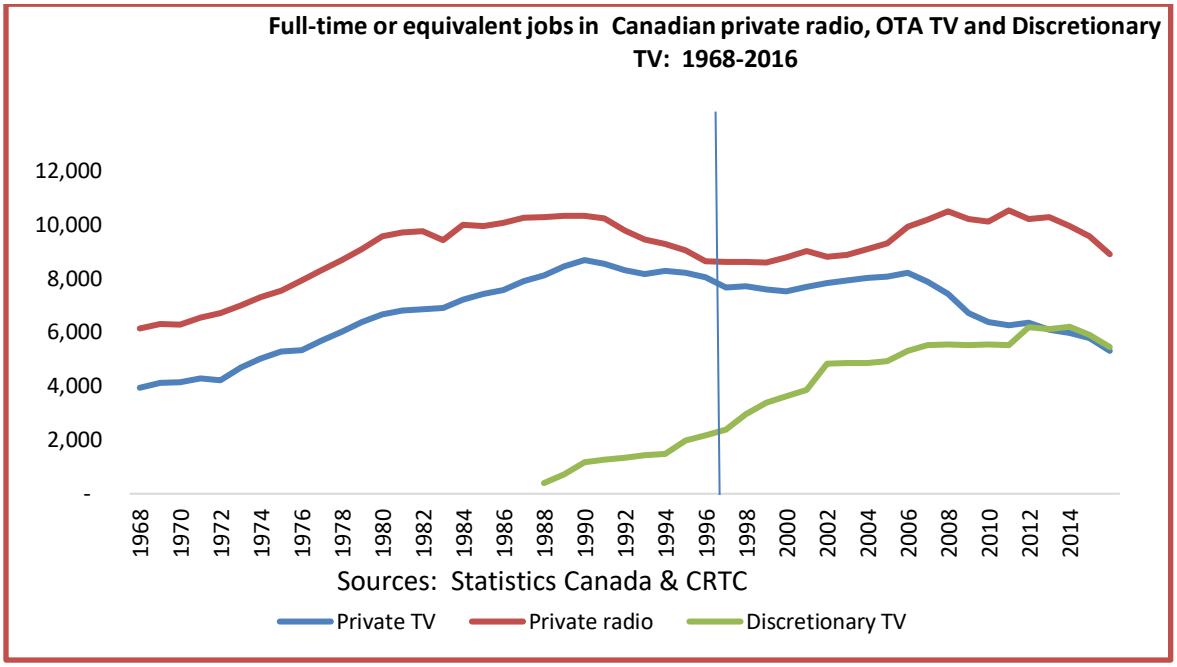
199 *BMG Canada Inc. v. Doe, 2005 FCA 193, at paras 43-46.*

C. Relevance of the "Social and Economic Fabric" of Canada

242 The application repeatedly refers to the impact of online copyright infringement on the "social and economic fabric"[200] of Canada, and speaks of "the contribution of Canada's cultural sector to the country's social fabric and democratic life."[201] It addresses lost jobs[202] and lost government tax revenues,[203] as well as the importance of ensuring the creation of stories reflecting Canada's "diverse cultural identity".[204]

243 The applicant provides insufficient evidence to establish that online copyright infringement has resulted in job losses. The Forum notes, however that Canada's private broadcasters began

Figure 1 Employment in Canadian radio and television, 1968-2016



cutting jobs in the early 1990s, and subsequently began to expand employment opportunities at the turn of the century, and have begun to reduce employment opportunities in the past five years. These reductions are why the Forum's broadcasting submissions consistently advocate in favour of measures under the *Broadcasting Act* to require broadcasters to provide more employment opportunities in Canada's broadcasting system. It is frankly difficult to imagine that the CRTC might consider addressing broadcast employment losses under the *Telecommunications Act*, when it has failed to do so under the *Broadcasting Act*—despite

200 See, e.g., Application 8663-A182-201800467, at paras 2, 35, and 37. See also the Appendix 1, at page 4, and additional references cited as part of section 7(a) of the *Telecommunications Act*.
201 Application 8663-A182-201800467, at para 33.
202 Application 8663-A182-201800467, at para 34.
203 Application 8663-A182-201800467, at para 46.
204 Application 8663-A182-201800467, at para 52.

express authority to do so,[205] unlike the inappropriate reach required to achieve such a goal under the *Telecommunications Act*, which has no corresponding objective. The application has not clarified the inconsistency on this point.

244 The fact is that broadcasters are currently free to operate without any staff at all. We recently reviewed the 2016 statistics published by the CRTC about discretionary television services, and found that one in five of the 117 services with profits in 2016, operated without no staff, and another five operated with just one staff person:

Table 2 Staff of Canadian discretionary television services in 2016

Staff levels	# of services	PBIT ($M)
No staff (0)	22	$ 38.8
.1-1	5	$ 5.2
1-1.9	4	$ 41.4
2	5	$ 32.2
3-3.9	7	$ 0.8
4-4.9	2	-$ 5.1
5-9.9	8	$ 41.0
10-49.9	37	$ 319.8
50-99	18	$ 148.5
100-503 staff	9	$ 216.0
Total	117	$ 838.6

Source: CRTC Statistical and Financial Summaries for discretionary television services, 2016

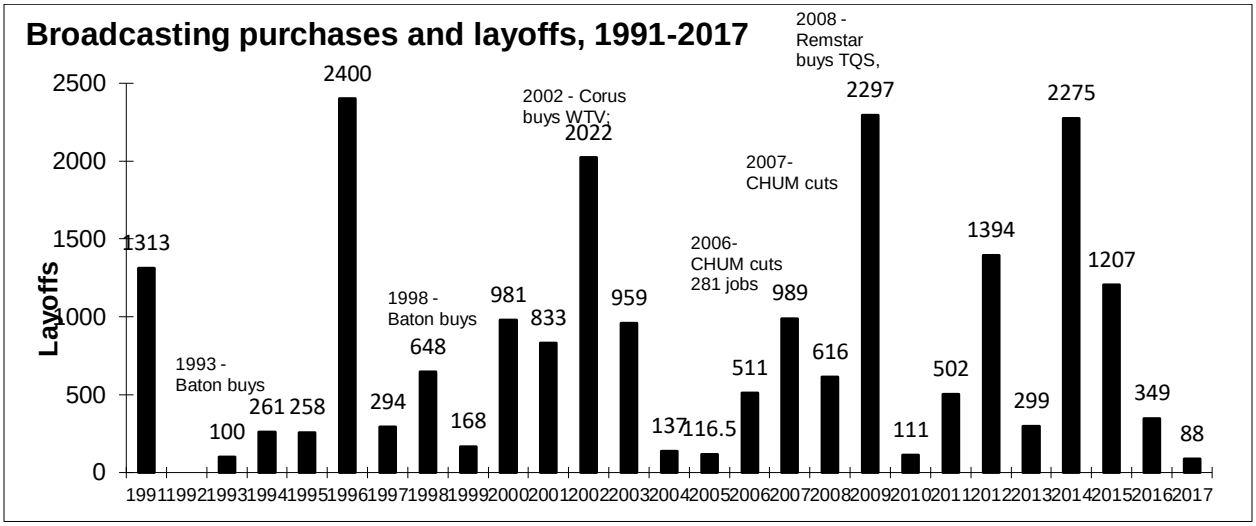
245 Genuinely effective remedies for reduced broadcasting employment are within the purview of the parent corporations of the largest ISP members of the application's coalition, and as noted previously the large telecommunications companies that also control broadcasting services have reduced their level of employment by 2.4% since 2012 (Appendix 3).

246 Broadcast employment also falls under the CRTC's jurisdiction, under the *Broadcasting Act*. Yet the Commission has permitted many layoffs to take place, often in the context of ownership transactions (see Figure 2), without expressing concerns about the layoffs to broadcasters.

205 *Broadcasting Act*, s. 3(1)(d)(iv):

> the Canadian broadcasting system should … through … the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children….

Figure 2 Broadcast layoffs, 1991-2017



247 Large telecommunications companies' decisions to reduce employment levels in broadcasting for the past twenty years do not now justify their blocking Canadian users' access to allegedly infringing websites.

248 Even if website blocking had any positive effect on broadcast employment—and there is no evidence whatsoever on this point, such effects would very likely be outweighed by job losses elsewhere. A recent study by the Internet Association in the United States found that weakening the principle of intermediary liability — precisely what approval of the applicant's proposal would do — would eliminate over 425,000 jobs and $44 billion USD in GDP annually, while increasing costs for startups, raising barriers to innovation, making Internet access and other digital services more expensive or consumers, and impairing subscribers' overall online experience, making the Internet less usable as a whole. A simplistic proportional calculation suggests the equivalent loss would be approximately $4.4 billion in losses to Canada's annual GDP.

249 Finally, it is worth noting, when considering the credibility of the application and its proposal, that both Bell Canada and Videotron have outsourced much of their Canadian employees' work to jurisdictions abroad.[206] TELUS has a call centre in Manila, Philippines which employs 3,000

206 Daryl-Lynn Carlson, "Videotron Fine-Tunes Egypt Staff" (28 May 2008), online: National Post <https://www.pressreader.com/canada/national-post-latest-edition/20080528/283373352736213>; News Release, "Bell Canada is cutting Canadian jobs in favour of contractors overseas," online: <https://www.newswire.ca/news-releases/bell-canada-is-cutting-canadian-jobs-in-favour-of-contractors-overseas-533724601.html>; Ben Shingler, "Bell Mobility layoffs in Dorval could total 230 workers" (6 May 2016), online: CBC News <www.cbc.ca/news/canada/montreal/bell-mobility-lays-off-dorval-workers-total-1.3569955>; Kristin Rushowy, "Bell Mobility axes 'hundreds' of jobs at Mississauga call centre" (11 January 2012), online: Toronto Star <https://www.thestar.com/news/gta/2012/01/11/bell_mobility_axes_hundreds_of_jobs_at_mississauga_call_centre.html>.

people; Rogers has outsourced IT services to IBM; Bell has outsourced jobs to India.[207]Without commenting on the merits of these operating decisions, it seems at best self-serving, and at worst hypocritical, for large telecommunications service providers such as Bell and Rogers to support the blocking of Canadian users' access to the internet, to restore (in part) jobs that they themselves shipped abroad.

1. The CRTC must distinguish between copyright owners and actual creators, artists, and performers who often sign away their copyright

250 A critical fact that the application glosses over is that *creators and copyright owners are often not the same party*. Particularly when it comes to industries such as film and television, as well as music and book publishing, it is common knowledge that the vast majority of rewards reaped from successful hits accrue to the associated legacy offline intermediaries—record labels, film studios, or publishers—rather than the individual writers, actors, performers, musicians, or composers who directly created the work.

251 Legal scholarship in Canadian copyright law points out the importance of distinguishing, when determining law and policy, actual creators from other copyright owners who claim to represent their interests (but seemingly only when it comes to joining forces against new digital interlopers):

> The fact that copyrights are often commercially exploited by owners who are not creators is also significant in considering a balance between "creators" and society more generally. While in many cases there will be a concrete link between the ability of an owner to exploit a copyright and the reward for the creator, this is not always the case, or it does not always trickle down in the manner one might expect. […]
>
> In such a context, strong copyright protection may bolster the bottom line of certain industries, but may not serve the purpose of encouraging a broad and diverse musical culture. […]
>
> Thus the interests of owners (in many cases, corporate or industry owners) are focused on a bottom line that is dependent both on strong copyright protection and on creators of content. However, the bottom line may depend more upon the ability to fully exploit a limited range of works than on the proliferation of a diverse body of works by a multiplicity of creators. While the interests of corporate owners are substantial, they are not necessarily aligned with the interests of a broader cross-section of creators.[208]

252 Giuseppina D'Agostino, founder and director of the Intellectual Property Law and Technology Program at Osgoode Hall Law School, addressed this point in an analysis of the Supreme Court of Canada's decisions in the 2012 Copyright Pentalogy:

> [C]reators are still the castaways in the copyright balance. Since *Théberge*, courts have come to see promoting the public interest as against rewarding the creators. So while the Court is correct to state that there has been a shift in its preoccupation toward users, as

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207 Gary Ng, "Ottawa Condemns Rogers, TELUS and Bell for "Dishonest" Lobbying" (2014), online: iPhone in Canada <www.iphoneincanada.ca/carriers/ottawa-condemns-rogers-telus-and-bell-for-dishonest-lobbying/>. (For clarity, TELUS is not a member of the applicant coalition.)

208 Scassa, at pages 53-56 (footnotes omitted).

> confirmed in *CCH*, I would hesitate to endorse its view that Canada had an author-centric view to begin with. In fact, *authors have been the rhetorical stand-ins for owners since the onset of copyright law*. In reality, with little adequate copyright protection, *contract law governs authors' rights, and they typically transfer their rights to new owners (i.e. publishers and others) who give little in return*.
>
> As a result, what we continue to see in the jurisprudence is a welcome pronouncement of users' rights and a lack of consideration of authors (and the unsatisfactory realities they also face), who are also integral to the balancing formula for copyright and an essential part in furthering the public interest. What may be more accurate to reflect in the literature and case law is *a need to limit less the author's and more the owner's rights*.[209]

253 Given the above, it seems disingenuous, if not hypocritical, for some of the applicants to depict concern for artist compensation as a driving factor for their extraordinary request,[210] given that they themselves throughout the entire history of their own industries have been in a primary position to compensate artists more fairly. Advocates for Canada's cultural sector have indeed told Canadian Heritage that "There is a need to ensure that Canadian creators share in the financial rewards resulting from increased dissemination of cultural content via digital channels":[211] but the solution lies in producing consistently growing levels of high-quality, accessible, and affordable Canadian programming, and not in blocking users' access to websites.

254 Formal reports and academic literature widely acknowledge that creators, performers, and artists are disserved by the cultural sector. The landmark *Report to Access Copyright on Distribution of Royalties* stated the following, among much else:

> It is difficult to determine the overall distribution between publishers and creators. We do not know for certain how much is passed on by publishers to creators who are not affiliates of Access Copyright. Creators who are affiliates are paid directly by the collective and this amount is therefore known. *For the past several years the breakdown has been about 75/25 in favour of publishers.* In 2005, the creators who were affiliates received $3,789,278 (25.3%) and the publishers received $11,182,589 (74.7%) out of the total to the two groups of $14,971,867. […]
>
> With the permission of a number of creators, I examined how their works were treated by publishers. […] *I found that publishers were claiming full rights to works in a large number of cases where, in my view, their right to do so was uncertain*. When I examined the individual contracts I found that the publisher had been interpreting the contracts to give them full reprography rights in cases where it was not at all clear that they had these rights. […]
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> …

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209 Giuseppina D'Agostino , "The Arithmetic of Fair Dealing at the Supreme Court of Canada" in *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, ed. Michael Geist (Ottawa: University of Ottawa Press, 2013), at pages 202-03.

210 Application 8663-A182-201800467, at para 35.

211 Application 8663-A182-201800467, at para 37.

> As the distribution models have been reworked over the years—in large part based on usage data—the changes have tended to benefit the publishers more than the creators.[212]

255 Another report, Study Concerning Fair Compensation for Music Creators in the Digital Age, made similar findings:

> The revenue split within the music industry is grossly inequitable and lacks transparency. Our study finds that monies distributed to rights holders by streaming services should be split 50/50 between the two main rights holder groups: record labels/performing artists vs. publishers/songwriters. *The current split is closer to 94/6, in favor of labels. Currently, major record labels receive up to 97% of revenues that flow to all music rights holders, leaving as little as 3% to be shared among songwriters, music publishers, and other rights holders and administrators*. A combination of regulatory constraints, market imbalances and major record labels negotiating with services for all types of rights holders has led to this disparity. […]
>
> One reason for this is that streaming services often only negotiate with the major record labels, which are supposed to represent all rights holders. In some cases, record labels are also shareholders in the streaming services, which clearly places their interests in conflict with the artists, songwriters and other rights holders they claim to represent. […]
>
> No discussion of how revenue is shared in the music industry can ignore the music industry's major problems with transparency. To illustrate, the Phéline Commission in France reported that major record labels have received large non-recoupable advances from music streaming services. *There is no evidence that these advances have been shared with artists, songwriters or other rights holders* in Europe, the United States, or elsewhere. … Likewise, consumers have *no way of knowing what portion of their subscription fees make it into the pockets of their favorite musicians and songwriters*.[213]

256 The *Fair Compensation* report sets out recommendations for "fair trade music", and it is notable that these are not based on blocking users' Internet access, chilling freedom of expression, or distorting telecommunications and copyright law, but rather holding labels, publishers, and other industrial copyright owners to account when it comes to their own treatment of artists.

2. Applicants themselves are primarily responsible for lack of content reflecting "diverse cultural identity" of Canadians

257 The application states that due to the existence of online copyright infringement, "Uniquely Canadian stories may never be told and content that reflects the diverse cultural identity of Canadians will be lost."[214] To be blunt, such statements are self-serving: decades of reports, studies, anecdotes, media articles, submissions to and appearances before the CRTC in broadcasting proceedings have pleaded for the CRTC to increase diversity in programming, particularly by underrepresented Canadians, for underrepresented Canadians. Members of the

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212 Martin L Friedland, CC, QC, MFL, "Report to Access Copyright on Distribution of Royalties" (15 February 2007), available online: <http://www.accesscopyright.ca/media/8359/access_copyright_report_--_february_15_2007.pdf>, at pages 12, 13, and 15 (emphasis added).

213 Pierre-E Lalonde, "Study Concerning Fair Compensation for Music Creators in the Digital Age"(22 October 2014), available online: <http://www.cisac.org/Media/Studies-and-Reports/Publications/CIAM14-1172_Study_fair_compensation_2014-05-01_EN>, at pages 3, 27, 28 (emphasis added).

214 Application 8663-A182-201800467, at para 52.

applicant coalition such as Bell and Rogers have forcefully and successfully opposed these requests. Responsibility for the absence of sufficiently reflective Canadian programming, and for the lack of diversity in the schedules of Canada's public and private broadcasters, rests squarely with broadcasters[215] —not with uninvolved ISPs or users of the telecommunications system.

258 For instance, Canadian film and television has been long criticized for misrepresenting, discriminating against, and ignoring the stories and perspectives of:

- Indigenous peoples in Canada;[216]
- differently-abled Canadian creators, actors and performers;[217]

215 "Michael Coutanche, Charles H. Davis, and Emilia Zboralska, "Telling Our Stories: Screenwriters and the Production of Screen-Based Culture in English-Speaking Canada" Canadian Journal of Communications, Vol 40 (2015), 261-280, available online: <www.cjc-online.ca/index.php/journal/article/view/2995/2548>: "The research literature on exclusionary networks in the screen industry emphasizes that work opportunities are differentially allocated to white males, while females, ethnic/cultural minorities, less-educated writers, and older writers are pigeonholed or deflected. … In English-speaking Canada, these generic and institutional tendencies in the screenwriting occupation are exacerbated by the idiosyncratic characteristic of weak demand among domestic broadcasters and film distributors for diversity programming (Coutanche & Davis, 2013)."

216 Michael Coutanche, Charles H. Davis, and Emilia Zboralska, "Telling Our Stories: Screenwriters and the Production of Screen-Based Culture in English-Speaking Canada" Canadian Journal of Communications, Vol 40 (2015), 261-280, available online: <www.cjc-online.ca/index.php/journal/article/view/2995/2548>: "The research literature on exclusionary networks in the screen industry emphasizes that work opportunities are differentially allocated to white males, while females, ethnic/cultural minorities, less-educated writers, and older writers are pigeonholed or deflected. … In English-speaking Canada, these generic and institutional tendencies in the screenwriting occupation are exacerbated by the idiosyncratic characteristic of weak demand among domestic broadcasters and film distributors for diversity programming (Coutanche & Davis, 2013)."

217 http://www.cbc.ca/radio/thecurrent/s%C3%A9an-mccann-opens-up-students-assaulting-teachers-and-disability-rights-1.2921752/disability-rights-advocates-push-back-on-inaccessible-casting-1.2921753 // https://disabilitycreditcanada.com/media-representations-disability // https://www.theglobeandmail.com/arts/film/how-a-new-canadian-film-fest-spotlights-people-with-disabilities/article29995703 / // http://www.cacl.ca/publications-resources/The%20R%20Word%20-%20Documentary%20Film%20Project // https://www.thestar.com/news/canada/2017/07/16/not-enough-diversity-on-canadian-television-report-says.html; http://www.omdc.on.ca/Assets/Research/Research+Reports/Framework+II/Framework+II+Canada$!e2$!80$!99s+Screen-based+Workforce_en.PDF "Some interviewees indicated that discrimination based on persistent but hidden perceptions such as (i) social stereotypes, (ii) negative attitudes, and (iii) general misperceptions still occurs and can affect hiring and promotion decisions regarding members of designated groups. ƒ 16% of Aboriginal people who responded to the worker-level survey identified "overt discrimination" as having a "severe" or "significant" impact on their workplace. ƒ A major challenge for members of employment equity groups in the screen-based industries is coping with workplace environments that are unwelcoming or unaccommodating to their unique needs and/or sensibilities. Persons with disabilities, for example, face intense attitudinal and architectural barriers (such as building access) across the screen-based industries." page 13

- racialized individuals and groups in Canada;[218] and
- women in Canada.[219]

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218 http://www.cbc.ca/news/canada/british-columbia/everyday-racism-canadian-artists-discuss-minority-representation-in-film-and-media-1.4144038 // https://www.ryerson.ca/~c5davis/publications/REPORT-ON-CANADIAN-SCREENWRITERS_2012.pdf ("Racialized minority writers are under-represented in the most influential screenwriting occupations … Screenwriters of colour experience racial and gender discrimination more frequently than white screenwriters. When asked if they had experienced various forms of discrimination, minority writers reported Race/Ethnicity and Gender most often. 36% of writers of colour indicated Race/Ethnicity discrimination compared to 5% of white writers, and 36% of writers of colour experienced gender discrimination compared to 20% of white writers." SCR) // "Even Australian success Cleverman, a supernatural show about a kid who experiences superhuman possessions, features an 80% Indigenous cast and is rooted in Aboriginal mythology. Why is it, then, that the Canadian film and television industry cannot simply create speculative fiction content with roles for people of colour as three-dimensional characters?" www.cbc.ca/arts/why-diversity-in-canadian-sci-fi-film-and-television-still-has-a-long-way-to-go-1.4088642

219 See: Who is sitting in the director's chair? http://www.ubcp.com/wp-content/uploads/DGC16_WWWTP_report_singles.pdf; Women In View: On Screen 2014: http://womeninview.ca/wp-content/uploads/2016/01/WIV-2014-report.pdf; Focus on Women 2013: http://www.womeninfilm.ca/_Library/images/Focus_on_Women_2013_CUES.pdf // "Female writers have on average fewer screen credits than male writers. ... Women earn less for screenwriting work than men. Our data show that women are over-represented in the very lowest income ranges for screenwriting and men consistently earn more from screenwriting than their female counterparts. At the top end of the industry, men win the most lucrative contracts over women at a ratio of 3 to 1. ... As noted earlier, our survey results show that it is most often men who make the decisions about who is hired to write TV series episodes, what the creative direction of the series will be and even which stories and characters will be approved. The talent and expertise of female screenwriters is utilized, but under the supervision of their male counterparts." SCR // "I think it's being heard and trusted that is the most difficult," says Maslany, describing her experience as a woman on the set. The Two Lovers And A Bear star has had the opportunity to work with female directors like Helen Shaver ("my mentor and icon"), Kate Melville and Anita Doiron, but recognizes that the system is hard-wired for women directors to fail, and why we rarely see them climb that financial cliff. "There are extra hoops to jump through," says Maslany. "A woman being on set, leading a group of mostly men—there can be weird power struggles. I've witnessed that first-hand." […] "These are instances where the industry's dismissal of a woman's opinion is obvious. But how do women and minorities fight unconscious bias that is far more subtle and pervasive? As Follows reports, most people don't think of themselves as sexist but are unconsciously guided by biases against women and minorities. "It plays into everything from funding decisions to situations at cocktail parties, where the expectation is that you're a girlfriend instead of a fellow professional," says Porch Stories director Sarah Goodman. "These things are ingrained in our society, where the people who are assumed to be important or successes are white guys. You see that play out at a micro-level along gender and race lines." https://nowtoronto.com/movies/because-it-s-2016-the-gender-gap-in-canadian-film/ // "Directors and gender inequality in the Canadian screen-based production industry seeks to explain the root causes of the systemic discrimination and exclusion women face from key creative and leadership roles in the Canadian screenbased storytelling landscape. It advances a sophisticated understanding of the resilience of gender inequality. The report builds on the growing body of statistical evidence that is available through an analysis of qualitative data based on interviews with 18 Canadian directors in providing a comprehensive evidence-based body of research. WWP 1" … i. Women in View on Screen 2015 reveals that to a large degree the Canadian stories seen on screens are overwhelmingly told by men. The

259 Canada's public broadcaster, the Canadian Broadcasting Corporation (CBC), also party to this application, is not exempt from these concerns.[220]

260 Ironically, it is precisely the new, digital-based, Internet-reliant services such as Netflix and Buzzfeed that have, comparatively speaking, embraced what it means to tell stories that reflect "diverse cultural identity", and accordingly done more to improve Canada's social and economic fabric.[221] In its annual diversity report, Buzzfeed stated:

> We are different than legacy media companies focused on a subscriber base that skews older and less diverse. Our content is freely available to the public for maximum impact and scale. We reach hundreds of millions of people around the world every month across dozens of platforms. The global scale of "social" and "mobile" is vast and extends beyond the traditional demographics of newspapers, magazines and broadcast TV. Our work is especially popular among young people who are part of the most diverse and globally connected generation in history. It isn't possible to connect with this audience or reach our full potential as a company without a diverse team around the world that is deeply connected to diverse cultures and communities.[222]

261 Not only are traditional broadcasters failing to address their own purported concern with diverse Canadian stories, but they also provide little transparency with which to assess their efforts:

> Private broadcasting is supposed to be diverse under Canadian law, but the government doesn't require that companies publish their employment equity numbers. Because of weak and inconsistent reporting guidelines, it is impossible to know the racial makeup of private Canadian broadcasting—or whether their diversity expectations are being met.[223]

262 The Commission has also seen several instances of BDUs such as Shaw and Videotron failing to provide adequate access to community creators, with unique, lesser told stories, on their community channels. See, for example, testimonies at the hearing leading to BRP (Local and

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robust statistical report clearly establishes that, "…women are not only an unacceptably small minority of those employed in [key creative positions], but they are least present where the financial power is the greatest."4 WWP 6 http://www.actra.ca/actra/interactra/FAll2016/files/assets/common/downloads/Coles%20WWWTP%20Sept%202%20final.pdf //

220 http://www.canadalandshow.com/just-white-cbc "In 2006, less than 6% of CBC employees were People of Colour. Almost a decade later, this number has gone up by less than 3 percentage points. Aboriginal representation has fared even worse: in 2009, 1.4% of CBC employees were Aboriginal, and five years later the number changed to 1.5%. In both cases, that's about half of the industry availability for Aboriginal journalists." […] "The priorities of the executive … don't necessarily change the day-to-day culture," he said, adding that the only tangible difference in the CBC Toronto newsroom has been an increase in racially diverse interns, not managers. "The higher up the chain you go, the worse it gets."

221 See, e.g., http://www.huffingtonpost.ca/entry/streaming-sites-diversity_us_56c61240e4b0b40245c96783; http://variety.com/2017/film/news/ava-duvernay-netflix-diversity-1202527100/; https://www.vice.com/en_ca/article/z4gmw5/why-netflix-has-decided-to-make-diversity-a-top-priority

222 https://www.buzzfeed.com/jonah/2017-update-on-diversity-at-buzzfeed?utm_term=.nlmPegpmk#.neeob0dmE

223 http://www.canadalandshow.com/private-broadcasters-diversity/

Community TV), of Sid Chow Tan, Wawatay, and NewWest.TV.[224] The Commission also found in recent years that Videotron's MaTV was in non-compliance of its access programming requirements, resulting in the inability of ICTV to tell its stories.[225]

263 Suffice it to say that among all of the reasons that the traditional Canadian entertainment media industry fails to produce stories reflective of Canadians' "diverse cultural identity," the absence of a website blocking tribunal at the CRTC seems the least in importance among them.

3. Other matters—alleged income tax losses

264 The application also cites loss of taxes (ie, government revenues)[226] as a reason for the Commission to establish a website blocking regime. Even if taxation and government revenues were within the CRTC's ambit (and they are not), setting up a website-blocking regime that will result in collateral damage across Canada's telecommunications system and distort several carefully calibrated legal regimes, is at best a slow and tortuous way to address this concern.

265 Would it not be more direct and effective for Parliament to close tax loopholes, such as those which allowed Bell Canada to pay an effective tax rate of 4.53% from 2004-2014, instead of the statutory tax rate of 26.5%? Such a move would have increased government tax revenues by not millions but billions, from one company alone.[227]

IV. Application would breach Canadians' rights and raises high likelihood of error and censorship

A. Canada must address website blocking on the basis of its own values and history

1. Jurisdictions Implementing Website Blocking Set No Appropriate Examples for Canada

266 The fact that other jurisdictions have adopted website blocking is insufficient justification for the CRTC to follow their lead. Other states' approach to online copyright infringement has developed in the context of their respective legal systems, policy considerations, and cultural values.

267 Some of these differences are evidence in the area of copyright. The Canadian government engaged in over two years of consultation with thousands of Canadians representing a wide range of perspectives, leading up to the reformed *Copyright Act* in 2012.

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224 Local and Community TV hearing transcripts

225 https://crtc.gc.ca/eng/archive/2015/2015-31.htm

226 Application 8663-A182-201800467, at para 46.

227 https://www.taxfairness.ca/sites/taxfairness.ca/files/pdf/canadian_for_tax_fairness_-_tax_havens_2017_nov_15_for_release.pdf, at page 22.

268 Canada's copyright approach differs from that of other jurisdictions. The European Union's Copyright Directive pays less mind to users' rights and fair dealing, or fair use, than Canadian copyright law does. While the Canadian *Copyright Act* integrates clear protection for users' rights in the form of fair dealing, and Supreme Court of Canada decisions have affirmed users' rights on several occasions, Article 5 of the Directive provides a list of limitations on and exceptions to what copyright owners may enforce in the way of copyright infringement, and makes them almost entirely *optional* for member states to enact in their own laws.[228]

269 Second, while EU lawmakers seem reluctant to encode proportionality into their copyright law, Canadian legislators and courts have grappled directly with proportionality, drawing a line with respect to the extent of ISPs' involvement in copyright enforcement (notice-and-notice).[229]

270 Third, any proportionality assessment in EU law must weigh three "fundamental rights" equally, based on the *Charter of Fundamental Rights of the European Union.* The European *Charter* considers intellectual property to be a "fundamental right" (for copyright owners), alongside freedom of speech and freedom of information (for users), and the freedom to conduct a business (for Internet service providers, seemingly with a presumption they are not vertically integrated). EU copyright law operates in contrast to Canadian law when it comes to what an appropriate balance of the three "rights" above. Only freedom of expression is protected as a right in the Canadian *Charter*, giving it more weight in Canada than in the European Union, especially as weighed against intellectual property, which is not a constitutionally right in Canada.[230] Moreover, "the CJEU has for the past 10 years sporadically included fundamental rights as a factor in the copyright context. Yet save for a few exceptions, the exercise has seemingly been a charade."[231]

271 France and South Korea have both implemented "graduated response" laws to enforce copyright (which France withdrew after massive outcry[232]), which results in a subscriber *losing Internet access entirely* simply for engaging in an act of copyright infringement, and that is assuming it was not someone else in their household.[233] This likely runs counter to the Commission's decision in TRP CRTC 2016-496, which recognized Internet access as a basic service. It also suggests that what these jurisdictions consider an appropriate balance between users' rights, or indeed human rights, and enforcing laws on behalf of copyright owners, is not appropriate for Canada.

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228 Erik Ahlgren, Does EU copyright law threaten digital freedom? (Master Programme (LL.M.) in Intellectual Property Law, Department of Law, Uppsala Universitet, 2017), available online: <http://www.diva-portal.org/smash/get/diva2:1110139/FULLTEXT02>, at page 29.

229 Ibid., at 39

230 Arno R. Lodder & Puck Polter, "ISP blocking and filtering: on the shallow justification in case law regarding effectiveness of measures" (2017) European Journal of Law and Technology 8:2, online: <http://ejlt.org/article/view/517/758>, at page 4.

231 Ahlgren, at page 53.

232 https://www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy

233 http://www.wipo.int/wipolex/en/text.jsp?file_id=190144;

272 In addition, Canada may admire South Korea for its high standards in telecommunications and broadband connectivity, but its online content regulation policies leave something to be desired, particularly where freedom of expression is concerned. According to Freedom House's Freedom of the Net 2017 report, South Korea scored 35 / 100, with 0 being the most free, and 100 being the least free. For comparison, Canada scored 15 out of 100.[234] South Korea regularly blocks social and political content, and its press is considered "partly free". In this context, the fact it has decided to also block websites engaged in copyright does not seem particularly meaningful as an example to follow.

273 Website blocking in Australia requires a federal court order. This key safeguard is what the application proposes to eschew in Canadian law.[235] With respect to obtaining such orders, David Lindsay writes, "A persistent danger with a legal system characterised by weak judicial oversight, such as Australian law, is that acknowledgement of rights as part of the legislative process is commonly little more than a tokenistic or pro forma gesture."[236] Furthermore, "Australian courts are not bound by the proportionality principle."[237] Australia's copyright enforcement regime is thus also not an appropriate example for Canada to follow.

274 In fact, when the Australia Productivity Commission completed a thorough review of Australia's copyright laws, it found that "the case for further policy change or Government action on copyright infringement is weak. Rights holders, their publishers and other content providers are best placed to bring content to Australian consumers in a timely and competitively priced way. This approach is the most efficient and effective way to reduce online copyright infringement."[238]

275 More closely examining the copyright laws and legal regimes of the website blocking jurisdictions cited in the application reveals greater context important to assessing the merits of implementing such a regime in Canada. In these cases, website blocking emerged against a background of lesser emphasis on human rights, additional balancing provisions allowing users to circumvent DRM, a repressive regime with very little freedom of expression, and within a policy landscape that considered cutting off Internet access a proportionate response to instances of copyright infringement. The fact that these jurisdictions engage in website blocking for copyright infringement thus have no bearing on whether or not Canada should, and in fact rather suggest that Canada should not.

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234 https://freedomhouse.org/report/freedom-net/2017/south-korea

235 https://www.legislation.gov.au/Details/C2015A00080

236 David F Lindsay, "Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness" (2017) UNSW Law Journal 40:4, at page 1531.

237 Ibid., at 1337

238 Australian Government Productivity Commission, "Intellectual Property Arrangements: Productivity Commission Inquiry Report" (23 September 2016) No. 78, online: <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>, at page 569.

2. United States had Direct Influence on Implementing Aggressive Copyright Enforcement Regimes in Jurisdictions around the World; Canada Must Avoid Similarly Succumbing

276 Strong evidence has emerged over recent years that the United States has engaged in a shocking amount of interference with other countries' intellectual property regimes, including that of many of the jurisdictions above. This suggests that even apart from their own respective legal contexts, many of the countries that have implemented website blocking for copyright infringement did not necessarily arrive at that decision after independent, careful consideration of the proposal on its merits.

277 For example, the United States—through state actors, corporate copyright owners represented by industry associations such as the MPAA, or both—has:

- funded a "a private intellectual property enforcement unit run by major rightsholders" in New Zealand and offered to consult on reforming New Zealand's copyright law;[239]
- bankrolled a landmark online copyright infringement lawsuit in Australia—one that resulted in website blocking, *Roadshow Films Pty Ltd v iiNet Ltd*;[240]
- applied continuous, sustained pressure to Spain to strengthen its intellectual property enforcement regime and include more extreme measures such as website blocking, including giving Spain an ultimatum and threatening to put Spain on its copyright watch list (one whose validity the Canadian government rejects);[241]
- and exported copyright enforcement regimes more aggressive and imbalanced than the United States' own regime, through free trade agreements such as those with Singapore, South Korea, Peru, and Colombia.[242]

278 And of course, leaked diplomatic cables from WikiLeaks revealed the extent of U.S. influence on Canada's own copyright reform efforts, as detailed by Michael Geist:

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239 https://arstechnica.com/tech-policy/2011/05/wikileaks-us-offered-to-bankroll-new-zealand-piracy-crackdown/

240 https://arstechnica.com/tech-policy/2011/09/wikileaks-mpaa-behind-aussie-isp-lawsuit-but-dont-tell-anybody/

241 https://arstechnica.com/tech-policy/2010/12/how-wikileaks-killed-spains-anti-p2p-law/; https://www.eff.org/deeplinks/2010/12/not-so-gentle-persuasion-us-bullies-spain-proposed; https://arstechnica.com/tech-policy/2012/01/how-the-us-convinced-spain-to-adopt-internet-censorship/; https://arstechnica.com/tech-policy/2012/01/how-the-us-convinced-spain-to-adopt-internet-censorship/

242 "It's worth noting, of course, that the reason South Korea put in place such a draconian copyright law was due to serious diplomatic pressure from the US as a part of a supposed "free trade" agreement between the two countries." https://www.techdirt.com/articles/20101025/18093711583/a-look-at-how-many-people-have-been-kicked-offline-in-korea-on-accusations-not-convictions-of-infringement.shtml; South Korea will now have to adopt the U.S. and E.U. definition of copyright—extending it to seventy years after the death of the author. … Recent free-trade agreements with Peru and Colombia insisted on much the same terms. And CAFTA—a free-trade agreement with countries in Central America and the Caribbean—included not just longer copyright and trademark protection but also a dramatic revision in those countries' patent policies." https://www.newyorker.com/magazine/2007/05/14/exporting-i-p

> Several WikiLeaks cables released earlier this year chronicle the sustained U.S. lobbying effort on copyright. In a June 2005 cable, the U.S. talks about the "need to engage the legislative branch as well as relevant departments", proposes creating a bi-lateral working group, and offers to conduct training sessions for Canadian officials. A June 2006 cable discusses meetings with Bernier and then-Canadian Heritage Minister Bev Oda. A March 2007 cable reports on repeated meetings and attempts to elevate the issue as a top priority. […]

279 The cable states that Bernier "promised to keep the Ambassador informed on the copyright bill's progress, and indicated that US government officials might see the legislation after it is approved by Cabinet, but before it is introduced in Parliament." […]

> The 2009 cable also raises questions about the copyright consultation that year and Canadian encouragement of the U.S. pressure. The cable reports that Zoe Addington, Clement's former director of policy, said the consultations would be used "as an opportunity to educate consumers and â€˜sell' the Government view." Moreover, Addington encouraged the U.S. intensify its lobbying efforts, stating "if Canada is elevated to the Special 301 Priority Watch List (PWL), it would not hamper—and might even help—the Government of Canada's ability to enact copyright legislation." Days later, Canada was elevated on the Watch list.[243]

280 As one journalist put it, "How many Commonwealth member nation anti-piracy initiatives are essentially a creation of US content rightsholders, or the US State Department, or a combination of both parties?"[244]

B. Breach of fundamental human rights

281 It is well known that Canadians have a right to express themselves freely, under Canada's *Charter of Rights and Freedoms.* Section 2(b) of the *Charter* states that

> Everyone has the following fundamental freedoms: […]
>
> Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ….

282 The corollary—that Canadians have the right to receive information—may be somewhat less well known. As provided by Article 19 of the 1948 *Universal Declaration of Human Rights*, however, the fundamental right of freedom of expression includes the freedom to "to seek, receive and impart information and ideas through any media and regardless of frontiers".[245] The result is that Canadians' rights to receive information are as important as their right to

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243 http://www.michaelgeist.ca/2011/09/wikileaks-on-can-copyright/; see also https://www.thestar.com/news/canada/2011/09/03/leaks_show_us_swayed_canada_on_copyright_bill.html and https://www.cigionline.org/publications/what-canadas-international-copyright-policy

244 https://arstechnica.com/tech-policy/2011/09/wikileaks-mpaa-behind-aussie-isp-lawsuit-but-dont-tell-anybody/ The Commission may want issue requests for information to the applicant, inquiring if they have received any support in the form of funding, support in kind, or any consultation or advice from U.S.-based actors such as the MPAA or RIAA, in light of the above evidence of U.S. interference with other countries' sovereignty over their own copyright laws.

245 Canada voted for the Declaration on 10 December 1948: https://www.ideas-idees.ca/blog/canada-and-universal-declaration-human-rights

express themselves. In 2004 the Supreme Court agreed that the freedom to speak, and the freedom to 'hear', are flip sides of the same coin.[246]

283 Cultural content is itself protected through 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,[247] of which Canada was a founding signatory. Article 2.1 of the *Convention* establishes that the right for individuals to choose expressions of culture, is guaranteed.[248]

284 The Forum acknowledges that the rights to freedom of expression and to receive communications, are not unlimited. But limits to those freedoms must comply with Canadian law. Section 1 of the *Charter of Rights and Freedoms* establishes that these rights are subject to "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

285 In light not only of Canada's support for these interntional declarations and treaties, and Canadians' constitutionally protected right to receive communications, very strong and very clear evidence would be needed for the CRTC to override Canadians' fundamental human rights by establishing a website-blocking process. The application simply does not have that strong and clear evidence, and as we have shown above, ample evidence contradicts the findings and conclusions made by the application.

286 In the absence of clear evidence that supports the application, and the presence of evidence demonstrating that the harms claimed by the application are at best, *de minimus*, the Forum submits that the CRTC would be contravening Canadians' fundamental rights if it were to authorize the proposed regime. If the CRTC has not been prepared to block websites promoting hatred and gambling, it cannot block sites to protect the copyright held by Canada's largest communications companies and others, to increase the revenues of those parties by an unknown but not significant amount. Website blocking would be an unreasonble limit that cannot be demonstrably justified in Canada.

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246 *Harper v. Canada (Attorney General)*, 2004 SCC 33, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2146/index.do.

247 Paris, 20 October 2005, https://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf#page=15.

248 *Ibid.*:
Article 2—Guiding principles 1. Principle of respect for human rights and fundamental freedoms Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

C. Website blocking is too close to censorship

287 As noted above (Part IIA), Parliament has not chosen to give the CRTC the authority to block Canadians' access to websites. This is likely due in part to our collective, lingering fears of past centuries' censorship initiatives:

- In 1467 Pope Innocent VIII decreed that all books related to Christian doctrine were to be submitted to local Church authorities for approval before publication; the licence to publish was to be printed at the beginning of each book[249]
- In 1520 Pope Leo X excommunicated Martin Luther, ordered the burning of his printed works and prohibited their print, sale, distribution or possession[250]
- In 1629 the British Secretary of State warned the Stationers' Company that "'any matters of newes relations histories or other things in prose or in verse that have reference to matters and affairs of State" could only be printed after the review, approval and licence of Britain's official news licenser[251]
- In 1743 it became a criminal offence in Britain to sell newspapers without an official stamp [252]
- In 1839 the British Parliament passed *An act for the more efficient Suppression of Societies established for seditious and treasonable Purposes, and for the better preventing treasonable and seditious Practices*, c. 12 to "restrain the printing or publishing of any Papers or Books whatsoever which should be meant or intended to be published without the Name and Place of abode of the Printer thereof being printed thereon in the Manner in the said Act specified ….", and
- In 1914 the US President orders the Navy Department to censor all internaitonal telegraph messages sent and received by radio firms[253], while the Canadian government terminated all non-official use of telegraphy from August 1914 to May 1919.[254]

288 Blocking users' access to websites is the 21st century equivalent of the 16th century system in which readers' access to books and ideas was limited by, among others, the Stationers' Guild, the Cathollic Church[255] or the Crown.[256] It is the 21st equivalent, for the 20th century's telephone

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249 http://www.lumenverum.com/apologetics/forbidden.htm

250 *Ibid*. at 81.

251 Cyndia Susan Clegg, *Press Censorship in Caroline England*, (Cambridge University Press) at 192-193.

252 Caroline Davis, http://apm.brookes.ac.uk/publishing/contexts/18thcent/freedom.htm

253 http://www.ipass.net/~whitetho/part2.htm

254 http://earlyradiohistory.us/sec012.htm

255 Through the *Indes Expurgatorious*, or Index of Forbidden Books ("History and Definitions of Censorship", http://www.wam.umed.edu/~gjbush/history.html).

256 Elizabeth 1 established a Royal Licensing system in 1559 requiring all books to be submitted to her, the Queen's Council or ecclesiastical commrs of London, before the books could be published. and extended this in 1566 through the Star Chamber, which decreed that prohibited books could not be printed imported or sold; "Mechanisms of Censorship", http://apm.brookes.ac.uk/publishing/contexts/elizabet/mechanis.htm#1.
Similarly France' Charles IX prohibited the printing of any material without his special permission in 1563: Mette Newth, "The Long History of Censorship" (Norway, 2010), http://www.beaconforfreedom.org/liste.html?tid=415&art_id=475.

system, of regularly receiving a false message that "the number you have dialed is out of service" message.

289 Overt and mandatory censorship gradually faded, however. The World Wars of the 20th century changed world leaders' views on the importance of ensuring access to information, on the theory that democracy could only survive if citizens could inform themselves, and the universal human rights and freedoms briefly addressed above were among the outcomes of this view. (Even so, the Catholic Church only issued the last Index of Forbidden Books in 1948—the year that the *Universal Declaration of Human Rights* was proposed. [257]

290 Today, very few grounds remain to block Canadians' desire to communicate. The *Canada Post* Corporation *Act*, R.S.C., 1985, c. C-10 prohibits the seizure or detention of mail,[258] and it is an offence under the *Criminal Code* to sop mail conveyances with intent to rob or search them, with a penalty if guilty of imprisonment for life.[259] (That said, the Canada Post Corporation may open mail—other than letters—to determine whether a mailed item is mailable (s. 41(1)—not to evaluate possible copyright infringement.)

291 The *Criminal Code* also permits courts to prohibit discussion of other matters: the identification of victims of sexual offences,[260] the identification of jurors in jury trials[261] and the publication of evidence about an accused. At times the *Code* requires courts to issue orders prohibiting the publication of information.[262]

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257 "History and Definitions of Censorship", http://www.wam.umed.edu/~gjbush/history.html

258 *Canada Post Corporations Act*, s. 40 (3) "Notwithstanding any other Act or law, but subject to this Act and the regulations and to the Canadian Security Intelligence Service Act, the Customs Act and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, nothing in the course of post is liable to demand, seizure, detention or retention."

259 *Criminal Code*, R.S.C., 1985, c. C-46 (Section 345)
Marginal note: Stopping mail with intent
345 Every one who stops a mail conveyance with intent to rob or search it is guilty of an indictable offence and liable to imprisonment for life

260 *Criminal Code*, s. 486.4 (1): "Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of" more than two dozen offences under the *Code.*

261 *Criminal Code*, s. 631(6):
(6) On application by the prosecutor or on its own motion, the court or judge before which a jury trial is to be held may, if the court or judge is satisfied that such an order is necessary for the proper administration of justice, make an order
(a) directing that the identity of a juror or any information that could disclose their identity shall not be published in any document or broadcast or transmitted in any way; or
(b) limiting access to or the use of that information.

262 *Criminal Code*, s. 486.4(3):
In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

292 Yet Canadians arguably retain a distant memory of previous censorship regimes—in March 2018 63.8% of Canadians thought there is a risk that, over time, the federal government will block Canadians' access to online sites for reasons other than copyright infringement, with 73.4% of those 18 to 24 years of age sharing this view.

293 The Forum noted previously that the CRTC has denied two requests to block websites that allegedly communicated hate, or facilitated gambling. The foundation of such prohibitions is that gambling and the dissemination of hatred, recognized by Parliament as being a serious threat to Canadian society, are both prohibited by the *Criminal Code*.

294 One need not stretch one's imagination to consider that the proposed agency could be used to block Canadian users' access to content defined as touching on national security concerns. The British government, for example, has "funded the creation of a machine learning algorithm that can be used to etect ISIS propaganda videos online", which "will be offered to smaller video platforms and cloud storage sites like Vimeo and pCloud in order to vet their content."[263] According to the algorithm's creator it "… can detect 94 percent of ISIS propaganda with 99.99 percent accuracy. It incorrectly identifies around 0.005 percent of videos it scans. This means, on a site with 5 million videos uploaded each day, it would incorrectly flag 250 for review by human moderators."[264]

295 Insofar as the application urges the CRTC to approve its proposal because other nations are blocking websites, the Forum notes that governments are also blocking websites for reasons that have nothing to do with online copyright infringement. Norwegian ISPs have included terms in user agreements permitting them to remove not just unlawful content, but any "controversial" content even if the content is legal, to avoid controversy—raising serious freedom of expression concerns.[267]

296 In fact, techology is now being used to ensure 'online respect'. Netsweeper, based in southern Ontario, for example, sells Internet content filtering products and services.[268] Its filtering services have been identified in Qatar, United Arab Emirates, Yemen, Kuwait, Pakistan and Somalia.[269] The company explains that it provides "… the technology that tracks and categorizes

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Ibid., s. 517(1):
If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as [set out below] ….

263 James Vincent, "UK creates machine learning algorithm for small video sites to detect ISIS propaganda", *The Verge* (13 February 2018, 9:45 am EST), https://www.theverge.com/2018/2/13/17007136/uk-government-machine-learning-algorithm-isis-propaganda.

264 *Ibid*.

267 https://hannemyr.com/censorship-in-norway

268 Jakub Dalek, et al, "Tender Confirmed, Rights At Risk: Verifying Netsweeper in Bahrain", (16 September 2016), https://citizenlab.ca/2016/09/tender-confirmed-rights-risk-verifying-netsweeper-bahrain/.

269 *Ibid*.

content that is harmful, inappropriate or a threat to any end user, young or old."[270] It markets its technology by pointing out that it can encourage promote 'respectful' online behaviour:

> Trained in 30+ languages, and with over 90 available categories, The Netsweeper is the first web content filtering to develop and use a form of hybrid "AI" (Artificial Intelligence) technology to scan content, assign content to categories, and update its filter system without human intervention in real-time. With millions of web pages being posted each day, this artificial intelligence engine has the capacity to keep pace with the massive growth of online content. Our technology encourages responsible, respectful, critical and creative e-learning and online activities.[271]

297 It is therefore not at all difficult to imagine that if the CRTC grants the application, Parliament or the federal government may in time require the agency to change, to encompass other allegedly serious problems. In March 2018 63.8% of Canadians believed there was a slight-to-virtually-certain chance that Parliament would expand the agency's role to issues other than copyright (Table 3):[272]

Table 3 Canadians' view of the risk that the federal government will expand website blocking

Q7 Do you think there is any risk that, over time, the federal government will block Canadians' access to Internet sites or services for reasons other than concerns over copyright?	**No risk**	**Slight risk**	**50-50 chance**	**More likely than not**	**Virtually certain**	**Not sure**
TOTAL (N=829)	29.9%	29.8%	11.7%	10.4%	11.9%	6.3%
	29.9%	63.8%				6.3%
Language (p=.014)						
English	28.2%	28.5%	12.0%	11.6%	13.4%	6.3%
French	36.1%	34.4%	10.6%	6.1%	6.7%	6.1%
Age (p=.000)						
18—24 years of age (born 1994 or after)	24.5%	30.6%	16.3%	10.2%	16.3%	2.0%
25—44 (born 1974 to 1993)	26.8%	29.1%	10.0%	12.7%	19.1%	2.3%
45—64 (born 1954 to 1973)	31.6%	25.0%	11.4%	11.7%	11.7%	8.5%
65 years of age or older (born before 1953)	31.6%	37.3%	13.3%	6.2%	4.4%	7.1%

298 Even if the CRTC had the authority to grant the application (it does not), and even if the application had clearly proven the necessity for a website blocking regime (it has not), the CRTC should deny the application on the well-founded concern that very little prevents temporary traffic-control roadblocks from being turned into concrete bollards and, eventually, permanent deadends. Canada should not return to the 'walled-garden' approach of the 20th century Internet, all to enable a few large companies to extract a little more money from users.

D. Will the proposed regime actually work?

299 The Application provided very little information about the process and procedures that the proposed agency would use, or the tests that the CRTC might adopt in lieu of rubberstamping the agency's recommendations. The fact that the agency's part-time staff, rather than its

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270 Netsweeper Marketing, "Today is Safer Internet Day 2018", https://www.netsweeper.com/updates/safer-internet-day-2018/.

271 *Ibid*.

272 See Appendix 6 for the full survey.

Directors, would develop recommendations to the CRTC, possibly without the participation of the wbsites alleged to be infringing copyright, heightens concerns about the risks of mistakes.

300 Consider the sheer volume of of infringement that is alleged to be happening. In just one month in early 2016, for instance, Google Search received 88 million copyright takedown notices.[273] The risk of websites being blocked when they have not done anything 'wrong' at all, is high.

1. Survey results: A majority of Canadians' believes that sites will be blocked even if they have done nothing wrong

301 With the mountain of evidence adduced above that demonstrates the serious flaws in evidence purporting to justify website blocking, it is little wonder that in March 2018 a majority (57.7%) of Canadians believed there is a risk that the CRTC will be unable to maintain a perfect record when it comes to blocking sites (Table 4). The belief that there was absolutely no chance whatsoever that the CRTC would block a website that was not infringing copyright was, incidentally, highest (44.3%) among those who said they had not visited a single website by accident in the past year.

Table 4 Canadians' views on the risk that the CRTC will block websites that have not done anything wrong

Q6 The CRTC, the federal board that regulates telecommunications in Canada, is being asked to block Canadians' access to sites and online services that make music, movies or TV shows available without the copyright owners' permission. Do you think there is any risk that, if the CRTC begins to block access to sites and online services because of copyright issues, it will block some Internet sites or online services that have done nothing wrong?	**No risk**	**Slight risk**	**50-50 chance**	**More likely than not**	**Virtually certain**	**Not sure**
TOTAL (N=829)	32.8%	26.8%	12.9%	8.6%	9.4%	9.5%
	32.8%	57.7%				9.5%
Gender (p=.000)						
Male	31.8%	24.6%	11.5%	11.7%	13.3%	7.0%
Female	35.6%	29.6%	14.9%	4.3%	3.4%	12.1%
Other	8.3%	33.3%	8.3%	8.3%	33.3%	8.3%
Age (p=.000)						
18—24 years of age (born 1994 or after)	28.6%	18.4%	26.5%	12.2%	12.2%	2.0%
25—44 (born 1974 to 1993)	35.5%	26.4%	10.0%	8.2%	15.5%	4.5%
45—64 (born 1954 to 1973)	34.8%	23.4%	12.7%	8.9%	8.5%	11.7%
65 years of age or older (born before 1953)	28.9%	34.7%	12.4%	8.0%	4.4%	11.6%
Belief that it is possible to visit Internet sites by accident (p=.000)						
Yes (ie, accidental visits are possible)	31.2%	29.7%	10.8%	10.6%	13.4%	4.3%

273 Alex Hern, "Revealed: How copyright lw is being misued to remove material from the internet : when Annabelle Narey posted a negative review of a building firm on Mumsnet, the last thing on her mind was copyright infringement", *The Guardian* (23 May 2016 11.02 BST), https://www.theguardian.com/technology/2016/may/23/copyright-law-internet-mumsnet.

Q6 The CRTC, the federal board that regulates telecommunications in Canada, is being asked to block Canadians' access to sites and online services that make music, movies or TV shows available without the copyright owners' permission. Do you think there is any risk that, if the CRTC begins to block access to sites and online services because of copyright issues, it will block some Internet sites or online services that have done nothing wrong?	**No risk**	**Slight risk**	**50-50 chance**	**More likely than not**	**Virtually certain**	**Not sure**
No (ie, accidental visits are not possible)	33.8%	35.2%	8.3%	6.9%	10.3%	5.5%
Not sure	16.8%	22.8%	21.8%	13.9%	5.9%	18.8%
Experience with visiting Internet sites by accident in past year (p=.000)						
Yes (ie, has visited sites accidentally)	33.0%	26.7%	10.9%	10.7%	11.4%	7.3%
No (ie, has not visited sites accidentally)	44.3%	24.3%	4.3%	5.0%	10.0%	12.1%
Not sure	22.6%	12.9%	35.5%	9.7%	9.7%	9.7%
Household accessed audio-visual content online in past year (p=.000)						
Yes	34.4%	25.7%	12.1%	9.3%	10.7%	7.8%
No	30.4%	33.1%	11.0%	5.5%	5.0%	14.9%
Not sure	4.8%	4.8%	52.4%	14.3%	9.5%	14.3%

2. Website blocking causes significant collateral damage and false positives

302 Canadians' fear that the CRTC will make mistakes when it orders websites to be blocked is based in reality. Contrary to the application's claim that there is "no evidence of overblocking",[274]website blocking has instead resulted in in countless examples of false positives, unintended consequences, abuse of process, and collateral damage around the world.

303 The Lumen data base in the United States has documented cases of court orders issued for content removal based on fraudulent or falsified DMCA takedown requests;[275] businesses setting up false websites and backdating articles specifically to issue DMCA takedown requests to remove critical reviews grounded in claiming copyright infringement;[276] and a major real estate company, Zillow, attempting to take down a popular satirical website, McMansionHell.com, claiming copyright infringement.[277] The Electronic Frontier Foundation also maintained for several years the DMCA Unintended Consequences Archive,[278] recording takedowns targeting diverse and publicly beneficial content such as videogame tinkering

274 Application 8663-A182-201800467, at para 69.
275 https://lumendatabase.org/blog_entries/802; see also https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/30/libel-takedown-injunctions-and-fake-notarizations/?utm_term=.3b0e2367aa47
276 https://lumendatabase.org/blog_entries/800
277 https://lumendatabase.org/blog_entries/787
278 https://www.eff.org/wp/unintended-consequences-under-dmca/archive

research, calculator operating system commentary, a reverse engineering wiki, and cybersecurity researchers.[279]

304 This research establishes that, very much like people, computers and their programming are fallible. In 2012, for example, a company's "large web crawler coupled with sophisticated algorithms and detection models to identify counterfeit products offered for sale across the Internet" collected "thousands of various data points from websites", identifying "which of the websites are likely counterfeiters, using a combination of information supplied by the clients and inspecting the websites for characteristics consistent with counterfeiting."[280] A temporary restraining order transferring control of the websites of 3,343 defendants to the plaintiffs was granted (the plaintiffs later dismissed more than 300 defendants from their case). The US court noted the software company's admission that its programs only identified "likely counterfeiters",[281] and that of the *3,000* parties alleged to have infringed the plaintiffs' trademarks, "only *one* specific example of alleged counterfeiting" was identified.[282] The US court eventually denied continuation of the temporary restraining order—but too late for the non-infringing businesses that lost control of their websites during this process, and suffered business disruptions.[283]

305 In 2014 ISP filters in the UK blocked one in five websites incorrectly. Users lost access to a feminist and women's rights blog, a politics blog, sex education websites, post-partum care websites, suicide and self-harm information, and anonymizing services.[284]

306 In 2018 YouTube's automated 'Content ID' system enabled infringing copyright claims to be filed in 2018 against a video of white noise that had been posted in 2015. YouTube explained that the system "… allows rights holders a way to claim content at scale by finding matches to content they submit to us and giving them an automated way to identify, block, and even make money from uploads of their content." If rights holders permit the content to remain posted, they become entitled to its monetization.[285] In this case, YouTube's automation permitted copyright

279 https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf

280 American Bridal & Prom Industry Association, Inc., et al. v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 16 C 0023, US Dist Ct N. Dist. Illinois East. Div., https://cases.justia.com/federal/district-courts/illinois/ilndce/1:2016cv00023/320145/90/0.pdf?ts=1467289312, per Blakey J., at 9.

281 *Ibid*., at 9.

282 *Ibid*., at 10.

283 See *e.g.* Daniel Nazer, "Abusive Site-Blocking Tactics By American Bridal and Prom Industry Association Collapse Under Scrutiny", Electronic Frontier Foundation (28 March 2016), https://www.eff.org/deeplinks/2016/03/american-bridal-and-prom-industry-association-slinks-away-after-being-called-out.

284 https://motherboard.vice.com/en_us/article/3dka5n/the-uks-internet-filters-block-1-in-5-websites

285 Rhett Jones, "Man's YouTube Video of White Noise Hit With Five Copyright Claims" Gizmodo (), https://gizmodo.com/man-s-youtube-video-of-white-noise-hit-with-five-copyri-1821804093; Electronic Frontier Foundation, "Ten Hours of Static Gets Five Copyright Notices" Deeplinks Blog (7 March 2018—1:30 pm), https://www.eff.org/takedowns/ten-hours-static-gets-five-copyright-notices.

infringement claims to be posted with respect to "a bunch of frequencies with equal intensity playing simultaneously"—audio-visual content certainly, that happened to be (literally) noise.

307 In March 2018, a German court blocked all Germany-based users from accessing Project Gutenberg, which "hosts more than 56,000 free ebooks in various formats…offered in English, Spanish, German and other languages, and are considered free to use in the United States as they are not protected under U.S. copyright law according to the service."[286] This occurred due to a lawsuit demanding that Project Gutenberg "block access to 18 ebooks by the three German authors Heinrich Mann, Thomas Mann, and Alfred Döblin or remove the books entirely from the catalog."[287] Fear of further lawsuits caused Project Gutenberg to block access to their *entire* library from all of Germany, resulting in a significant loss of access to knowledge and information—the vast majority of which is public domain material in the United States. Overly broad copyright enforcement therefore resulted in a significant net loss to society in the way of access to knowledge, even where no infringement was involved.

308 In France, yet another case of mistaken blacklisting led to users being unable to access websites such as Google.fr, Wikipedia, and a cloud provider, among other popular and legal services. Not only that, but these sites were blocked due to appearing on a terrorism blacklist, and when users tried to access them, the ISP redirected visitors to a government webpage that stated the sites were blocked due to "providing instructions for carrying out terror attacks or celebrating acts of terrorism".[288]

309 In Australia, the Australian Securities and Investment Commission (ASIC) accidentally blocked access to 250,000 uninvolved, unrelated websites—including Melbourne Free University—that happened to share an IP address with the intended targets of blocking, three sites engaged in financial fraud.[289]

310 Overzealous copyright enforcement and imbalanced copyright law also acts as a deterrent to Australian creators—defeating the purpose of having copyright in the first place.[290] A recent study found significant levels of ongoing anxiety regarding copyright among Australian creators:

> The anxiety was most acute around content owned by large corporations—for some creators, there were big-name copyright owners that were simply no-go zones. One visual artist remarked, "They totally scare us, or scare me, you know?" Many creators were critical of the significant fees or damages demanded by copyright owners in disputes. Again, creators raised issues of fairness in terms of proportional responses in copyright

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286 Application 8663-A182-201800467, at para 69.
://www.ghacks.net/2018/03/04/project-gutenberg-blocks-access-from-germany/"
https://www.ghacks.net/2018/03/04/project-gutenberg-blocks-access-from-germany/

287 *Ibid*.

288 https://www.theregister.co.uk/2016/10/18/orange_blows_up_french_gov_website/

289 https://theconversation.com/blocking-piracy-websites-is-bad-for-australias-digital-future-34418; https://www.computerworld.com.au/article/553342/asic_reveals_depth_ignorance_over_website_blocking_debacle/

290 https://eprints.qut.edu.au/115940/2/QUT-print.pdf ; See also: https://theconversation.com/how-copyright-law-is-holding-back-australian-creators-91390

> enforcement. One creator said, "I think the punishment far outweighs the crime. It's just seen in a really black-and-white perspective. That you've broken a law, s therefore I get to put you in court and you give us lots and lots of money. In terms of culture, there's nothing to be gained from that."[291]

311 In Turkey, the government attempted DNS-based blocking in 2012, upon which users moved to other, public DNS servers run by Google. The result?: "Turkish authorities responded by hijacking all traffic to the Google DNS service, which caused significant collateral damage."[292]

312 Russia and China have each encountered problems with virtual private networks, thanks to the difficulty of distinguishing between public and commercial VPS—one solution may be licensing:

> …there is also a third element to Russia's VPN dilemma—how to differentiate between VPNs used by the public and those used in a commercial environment. China is trying to solve this problem by forcing VPN providers to register and align themselves with the state. Russia hasn't tried that, yet.[293]

313 These facts clearly establish that website blocking is, to put it mildly, imperfect. Many people and their rights will suffer harm under its introduction in Canada.

V. Conclusion

314 For the reasons set out above, the Forum opposes application 8663-A182-201800467. The application has failed to make its case, due to seriously flawed evidence.

315 Even if the applicant had made its case and its evidence were credible – and neither is true – the application has failed to explain why "monetizing content" owned by a few large and wealthy companies constitutes a public policy priority in a free and democratic society. If this problem were as compelling as claimed, why has it been absent from the many discussions oon the broadcast policy side of the CRTC – where the blame for declining revenues is invariably laid at the feet of over-the-top streaming services such as Netflix?

316 Even if the application's evidence were credible (and it is not), the CRTC should not, and in our view is not, empowered to use the *Telecommunications Act* to achieve objects of the *Broadcasting Act* and the *Copyright Act*.

317 Even if the CRTC were somehow empowered (and it is not) to order telecommunications service providers to breach the *Telecommunications Act* by blocking Canadians' access to websites, what will prevent such blocking orders from expanding even further, to address concerns from,

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291 https://eprints.qut.edu.au/115940/2/QUT-print.pdf, at page 24.

292 PCB 19

293 Andy, "Russia VPN Blocking Law Failing? No Provider Told To Block Any Site" *Torrent Freak* (24 February 2018), https://torrentfreak.com/russia-vpn-blocking-law-failing-no-provider-told-to-block-any-site-180224/.

hypothetically, Politicians seeking to whitewash their history[294] or businesses seeking to block or reduce criticism of their work or their profession[295]?

318 In the Forum's view, this application is marked by pure self-interest, with concerns about declining investment in Canadian program production and declining employment opportunities cynically deployed as window-dressing.

319 The application ignores the public interest in the right to have access to information and cultural content, and it ignores the interest of the nation by self-centredly threatening to reduce telecommunications investment.

320 Quite simply, application 8663-A182-201800467 is not desirable. It is reasonable to fear that once approved, it will be impossible to correct.

321 The Forum asks the CRTC to deny application 8663-A182-201800467.

294 It is reported that in September 2017 a candidate for the US senate issued takedown requests to YouTube to remove video interviews granted before he announced his candidacy, in which he mocked those who had asked him to remove their images from a 'revenge porn' website he had been operating: https://www.techdirt.com/articles/20170929/17100738318/former-revenge-porn-site-operator-readies-senate-run-issuing-bogus-takedown-requests-to-youtube.shtml

295 In 2017 an online real estate database company sent a cease-and-desist request that a blogger remove photos used by the blogger for architectural criticism, and that the company did not own but for which it was claiming copyright infringement: Nilay Patel@reckless, "Zillow doesn't even own the photos it threatened to sue a popular blogger over: Maybe talk to people before sending the lawyers" *The Verge* (27 June 2017, 3:07 pm EDT), https://www.theverge.com/2017/6/27/15880934/zillow-mcmansion-hell-copyright-kate-wagner.

Appendices

Appendix 1 Questions that the Forum would have asked, had an interrogatory phase been permitted

FRPC interrogatory 1 The 'Terms of Service' of ISPs such as Bell and Rogers include prohibitions on copyright infringement by their subscribers. Please state the number of ISP subscribers suspended by Bell Canada, Bell ExpressVu, Cogeco, and Rogers due to copyright-infringing activities in each of the past five years.

FRPC interrogatory 2 Your application points out that copyright infringement is prohibited by both the *Copyright Act* and the *Radiocommunication Act*. (a) Please state the number of times in each of the past five years that the members of your coalition have relied on provisions of these statutes to prosecute copyright infringement. (b) Please state the outcome of such prosecutions.

FRPC interrogatory 3 What is your estimate of the likelihood that more than one website uses the same IP address?

FRPC interrogatory 4 How does the agency proposed by application 8663-A182-201800467 affect notice & takedown? Suppose an ISP expeditiously removed infringing content – would the agency still recommend that it be blocked? (The UK's *Electronic Commerce Directive Regulations 2007* permit take-down within "two days".)

FRPC interrogatory 5 What if a website hosts user-generated content (UGC) and is unaware that some of this content is infringing? Is the website equally liable? See *Louis Vuitton Moet Hennessy (LVMH) v eBay.*

FRPC interrogatory 6 Will the recommendations of IPRA's staff, and all the evidence on which the recommendations be based, be made public?

FRPC interrogatory 7 Will IPRA staff or the CRTC be able to issue *ex parte* decisions?

FRPC interrogatory 8 Would decisions issued by the CRTC permit those that made applications to IPRA, to deduct losses claimed in those applications from their taxable income?

FRPC interrogatory 9 How do websites become unblocked?

FRPC interrogatory 10 If websites are mistakenly blocked, could the sites' owners seek damages, and if so, from whom?

FRPC interrogatory 11 Paragraph 10 of your application defines 'piracy' as a range of activities involving websites, applications an, services. Many computer users store data 'on the cloud'. Would approval of your application permit the blocking of cloud servers?

FRPC interrogatory 12 Paragraph 10 of your application states that "piracy sites could include … a location on the Internet dedicated to the delivery of [a] … subscription service accessed

directly from a server through an illicit streaming device." Please provide examples of the 'illicit streaming devices' to which you refer.

FRPC interrogatory 13 Paragraph 10 of your application refers to "services" and "apps". Please provide examples of these services and apps. of 'piracy', 'pirate operators' and 'piracy sites'. Definitions of 'services' and 'apps':

FRPC interrogatory 14 Would IPRA accept requests from other governments or non-Canadian actors?

FRPC interrogatory 15 Assume that IPRA is completely effective in preventing Canadian's access to websites that infringe copyright, and that as a result, Canadians resume the acquisition of copyright-infringing material through Canada Post or courier delivery services. In light of the importance ascribed by the Coalition to copyright infringement, would it support the blocking of Canadians' mailed or couriered requests to parties that make copyright-infringing material available upon request?

FRPC interrogatory 16 At paragraph 76 you argue that Canada's net neutrality policy "does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online". What would prevent IPRA from being asked to ban sites that carry unlawful content that is not infringing?

Appendix 2 Telecommunications companies' share of broadcasting revenues, 2008-2017

$ millions	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Cable										
BCE	$43	$50	$ 60	$ 91	$188	$372	$629	$843	$ 1,013	$ 1,244
Cogeco	$829	$969	$ 1,042	$ 1,128	$ 1,189	$ 1,224	$ 1,254	$ 1,262	$ 1,268	$ 1,296
Quebecor	$840	$ 1,879	$ 2,110	$ 2,319	$ 2,529	$ 2,668	$ 2,773	$ 2,931	$ 3,067	$ 3,166
Rogers	$ 2,609	$ 2,896	$ 3,098	$ 3,258	$ 3,346	$ 3,421	$ 3,460	$ 3,462	$ 3,453	$ 3,435
Cable total	$ 4,321	$ 5,794	$ 6,311	$ 6,796	$ 7,252	$ 7,685	$ 8,117	$ 8,498	$ 8,802	$ 9,141
										DTH
BCE	$ 1,382	$ 1,539	$ 1,676	$ 1,802	$ 1,765	$ 1,747	$ 1,673	$ 1,562	$ 1,427	$ 1,249
DTH total	$ 1,382	$ 1,539	$ 1,676	$ 1,802	$ 1,765	$ 1,747	$ 1,673	$ 1,562	$ 1,427	$ 1,249
Discretionary										
BCE	No data				$ 1,059	$ 1,480	$ 1,532	$ 1,492	$ 1,566	$ 1,556
Quebecor					$ 78	$ 92	$ 96	$160	$160	$184
Rogers					$356	$434	$479	$543	$726	$771
Discretionary total					$ 1,493	$ 2,006	$ 2,107	$ 2,195	$ 2,452	$ 2,512
										Radio
BCE	No data			$160	$157	$423	$414	$411	$397	$373
Cogeco	$33	$36	$ 42	$114	$ 95	$ 95	$ 97	$ 95	$103	$105
Rogers	$241	$212	$ 204	$221	$225	$225	$228	$233	$221	$220
Radio total	$274	$249	$ 246	$495	$478	$742	$740	$739	$721	$697
										TV
BCE	No data			$837	$811	$776	$736	$724	$717	$675
Quebecor	$248	$251	$ 252	$260	$257	$249	$229	$214	$209	$219
Rogers	$207	$202	$ 247	$298	$291	$273	$228	$222	$198	$206
TV Total	$455	$453	$ 499	$ 1,395	$ 1,358	$ 1,299	$ 1,194	$ 1,160	$ 1,125	$ 1,100
Total, all companies	$ 6,433	$ 8,035	$ 8,732	$ 10,487	$ 12,346	$ 13,478	$ 13,830	$ 14,154	$ 14,526	$ 14,699
Annual change		*24.9%*	*8.7%*	*20.1%*	*17.7%*	*9.2%*	*2.6%*	*2.3%*	*2.6%*	*1.2%*
% of system revenues	43.2%	50.8%	57.6%	65.7%	76.3%	81.9%	83.3%	85.4%	88.7%	
Broadcasting system revenues										
BDUs	$8,244.4	$9,224.7	$7,995.4	$8,459.1	$8,560.8	$8,793.9	$8,930.0	$8,918.7	$8,734.2	No data
Discretionary	$2,931.1	$3,121.2	$3,474.6	$3,748.1	$3,967.5	$4,091.0	$4,248.8	$4,289.7	$4,415.6	
Private radio	$1,593.7	$1,507.7	$1,551.8	$1,613.8	$1,618.4	$1,622.7	$1,614.2	$1,602.5	$1,551.1	
Private TV	$2,138.3	$1,970.5	$2,147.3	$2,153.1	$2,038.1	$1,944.3	$1,803.7	$1,757.1	$1,677.8	
Total	$14,907.6	$ 15,824.1	$15,169.1	$15,974.0	$16,184.9	$16,451.9	$16,596.6	$16,568.1	$16,378.7	

Appendix 3 Telecommunications companies' share of full-time or equivalent broadcast employees, 2008-2017

Owner (FTEs)	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Cable										
BCE			144	255	501	798	778	561	143	253
Cogeco	1,253	1,889	2,101	2,119	2,184	2,215	2,146	2,144	2,042	2,387
Quebecor	4,001	-	4,828	5,621	6,113	6,270	6,584	5,954	7,327	6,329
Rogers	5,258	5,632	5,314	4,811	4,504	4,761	4,720	4,433	4,364	4,082
Cable Total	10,512	7,521	12,387	12,806	13,301	14,044	14,228	13,092	13,876	13,051
DTH										
BCE	1,398	1,715	1,507	1,281	881	736	673	549	412	398
DTH Total	1,398	1,715	1,507	1,281	881	736	673	549	412	398
Discretionary TV										
BCE	No data				1,202	1,484	1,153	1,036	828	752
Quebecor					320	307	312	303	184	175
Rogers					493	689	623	637	634	616
P&Sp Total					2,015	2,480	2,088	1,976	1,646	1,543
Radio										
BCE				677	568	1,948	1,611	1,649	1,469	1,408
Cogeco	143	152	153	747	498	477	470	460	468	466
Rogers	1,031	922	920	997	983	992	887	796	664	725
Radio Total	1,174	1,074	1,073	2,420	2,049	3,418	2,968	2,905	2,601	2,599
TV										
BCE				2,126	2,146	2,060	2,094	2,136	1,962	1,871
Quebecor	1,220	1,245	1,244	1,197	1,174	1,105	1,002	940	873	841
Rogers	937	978	951	863	887	828	771	681	551	516
TV Total	2,157	2,223	2,195	4,186	4,207	3,993	3,867	3,757	3,386	3,228
Companies' total	15,241	12,533	17,162	20,694	22,453	24,670	23,823	22,280	21,921	20,819
Annual change		*-17.8%*	*36.9%*	*20.6%*	*8.5%*	*9.9%*	*-3.4%*	*-6.5%*	*-1.6%*	
Top 4 as % of Canada	**33.0%**	**26.0%**	**35.1%**	**41.2%**	**43.6%**	**48.1%**	**46.6%**	**46.0%**	**47.5%**	
Canada										
BDUs	22,823	25,698	26,887	27,940	28,793	28,825	29,028	27,244	26,513	
Discretionary	5,542	5,526	5,542	5,526	6,176	6,116	6,198	5,899	5,437	
Private radio	10,470	10,196	10,100	10,517	10,185	10,257	9,932	9,546	8,886	
Private TV	7,406	6,701	6,363	6,263	6,343	6,083	5,961	5,790	5,314	
Total	46,241	48,121	48,892	50,245	51,497	51,281	51,119	48,479	46,149	

Appendix 4 Subscribers to basic and non-basic BDU service, 2008-2017

Subscribers to basic & non-basic broadcast distribution systems (millions of subscribers)

Medium	Owner	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	% change, 2008-17
Cable	BCE	0.064998	0.106426	0.085286	0.096556	0.328148	0.582753	0.868858	1.123826	1.326117	1.499434	2206.9%
	Cogeco	0.854976	0.862941	0.839665	0.877985	0.863115	0.834771	0.797165	0.765358	0.739324	0.718894	-15.9%
	Quebecor	1.565115	1.620837	1.654962	1.677997	1.705525	1.691168	1.689235	1.633659	1.6959	1.652402	5.6%
	Rogers	2.290293	1.620837	2.30287	2.292883	2.241137	2.162951	2.049576	1.927363	1.833301	1.75901	-23.2%
Cable Total		4.775382	4.211041	4.882783	4.945421	5.137925	5.271643	5.404834	5.450206	5.594642	5.62974	17.9%
DTH	BCE	1.864	1.887704	1.978222	1.96854	1.915259	1.787259	1.678335	1.531785	1.38436	1.241901	-33.4%
Grand Total		6.639382	6.098745	6.861005	6.913961	7.053184	7.058902	7.083169	6.981991	6.979002	6.871641	3.5%

Appendix 5 Average revenue per user for basic and non-basic broadcast distribution service

Average revenue per user (ARPU) for basic and non-basic distribution service												
Medium	Owner ($ millions)	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	% change, 2008-17
Cable	BCE	$ 419.40	$ 330.74	$ 526.01	$ 776.37	$ 524.08	$ 610.62	$ 682.67	$ 713.99	$ 764.20	$ 829.48	97.8%
	Cogeco	$ 598.98	$ 652.68	$ 730.68	$ 728.65	$ 756.23	$ 756.49	$ 753.30	$ 738.38	$ 716.73	$ 689.69	15.1%
	Quebecor	$ 534.38	$ 553.39	$ 593.37	$ 620.30	$ 636.94	$ 651.11	$ 642.69	$ 650.97	$ 610.59	$ 611.98	14.5%
	Rogers	$ 698.69	$ 1,054.69	$ 766.76	$ 798.39	$ 820.36	$ 819.05	$ 811.22	$ 848.79	$ 830.22	$ 829.05	18.7%
Cable Total		$2,251.45	$ 2,591.50	$2,616.81	$2,923.72	$2,737.60	$2,837.27	$2,889.88	$2,952.13	$2,921.74	$2,960.20	31.5%
DTH	BCE	$ 740.39	$ 806.24	$ 846.23	$ 914.00	$ 921.78	$ 976.14	$ 994.99	$1,017.95	$1,028.87	$1,003.81	35.6%

Appendix 6 March 2018 survey results

Blocking access to Internet sites

Results from a survey commissioned by the Forum for Research and Policy in Communications (FRPC)

29 March 2018

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Highlights

A national interactive voice response survey of 829 adults (18 years or over) across Canada was conducted by Access Research on behalf of the Forum for Research and Policy in Communications (FRPC) on the 6th, 7th, 8th, 9th and 11th of March 2018. The results have a margin of error of plus or minus 3.5%, 19 times out of 20.

The purpose of the survey was to learn about Canadians' experience with visiting Internet sites by accident, their views on the potential for websites to be blocked incorrectly, and their views on the possibility that either the CRTC or the federal government might, at some point, expand Internet blocking beyond copyright infringement. These issues have arisen in the context of the CRTC's consideration of application 8663-A182-201800467, submitted to the CRTC at the end of January 2018.

The survey found that in the ten provinces,

- 91.2% of Canadians subscribed to or paid for the Internet
- 94.7% of Canadians have used the Internet in the past year
- 70.3% of Canadians believe it is possible to visit Internet sites by accident, although this figure declines with age, with 77.6% of those between 18 and 24 years of age, and 59.6% of those over 65 years of age, believing in the possibility of accidental visits to websites
- 70.4% of those who thought it was possible to visit websites by accident or who were unsure whether this was possible, said they had visited a website by accident in the previous year; 84.2% of those between 18 and 24 years of age, and 56% of those over 65 years of age, said they had visited websites by accident in the previous year
- 75.6% of Canadians, including 90% of those between 25 and 44 years of age, and 55.1% of those over 65 years of age, said they or someone in their household had accessed audio-visual content online in the past year
- 57.7% of Canadians thought there is a risk that the CRTC will block websites that are not infringing copyright, with 69.3% of those 18 to 24 years of age sharing this view, and
- 63.8% of Canadians thought there is a risk that, over time, the federal government will block Canadians' access to online sites for reasons other than copyright infringement, with 73.4% of those 18 to 24 years of age sharing this view.

I Purpose of the research

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.

This report summarizes results from a survey undertaken on behalf of the Forum in March 2018 about adult Canadians' experiences with Internet sites, their views on the chances that Internet sites could be blocked in error, and their views about the likelihood that the CRTC or the federal government might at some point expand Internet blocking to address matters other than copyright infringement. The survey was undertaken as part of the Forum's research with respect to application 8663-A182-201800467, submitted to the CRTC on 29 January 2018, and posted by the CRTC on its website on 30 January 2018.

Relatively little survey research has been published with respect to Canadians' views on website blocking. In 2007 a survey by Leger Marketing on behalf of eBay Canada, studying Canadians' views on network neutrality, found that sixty percent of Canadians (three in five) agreed "that Internet providers should be required to treat all content, sites and platforms equally."[296]

The survey results described in this report focus on three issues raised by application 8663-A182-201800467: the incidence of accidental visits to websites, the risk that an 'anti-piracy' initiative will block online sites in error, and the risk that over time the reasons for blocking online sites may expand beyond copyright infringement concerns.

Part II, which follows, briefly describes the survey results.

a. Subscription to the Internet
b. Use of the Internet in the past y ear
c. Beliefs about and experience with accidental visits to Internet sites
d. Household access to online audio-visual content
e. Perceived risk that if the CRTC blocks access to Internet sites and services because of copyright concerns, it will block some sites or services that have done nothing wrong, and
f. Perceived risk that the federal government may, over time, block access to Internet sites and services because of reasons other than copyright concerns.

We analyze the results in Part III, while the survey method and questionnaires are set out in Part IV.

296 "76% of Canadians believe government should pass a law to protect consumers' right to access online content of their choice" Canada News Wire (1 October 2007),

II Analysis of survey results

Access Research conducted an interactive-voice-response survey of 829 people over 18 years of age in Canada, in the first two weeks of March 2018, using an English-language and French-language questionnaire designed by the Forum. Access Research weighted the survey responses by age, gender, and region, using data from Statistics Canada.[297] The survey's results have a margin of error of plus or minus 3.49%, 19 times out of 20.

The survey asked respondents about their

- Use of the Internet
- Use of the Internet to access music, movies or TV shows
- Expectations about accidental visits to Internet sites
- Personal experience with accidental visits to Internet sites
- Perception of the risk that if the CRTC blocks access to Internet sites and services because of copyright concerns, it will block some sites or services that have done nothing wrong, and
- Perception of the risk that over time, the federal government might block access to Internet sites and services because of reasons other than copyright infringement.

We analyzed these concepts in terms of demographics: language, gender, age, region (in which respondents live), education and income. Responses suggesting uncertainty ("Not sure") were generally included in the analysis.

Tests of statistical significance measure were used to measure the probability that a specific association between variables was or was not likely to have occurred by chance.[298] Results were considered statistically significant when their probability of occurring by chance – using the Pearson's chi-square test[299]– was equal to or lower than five times out of a hundred (*i.e.*, the 5%, or .05 level that is generally used in the social sciences). Statistically significant results can be generalized to the population being described,[300] whom we describe in the remainder of this report as 'Canadians'.[301]

Associations between concepts that were not statistically significant may have occurred by chance, and for that reason are not reported. Results that are not statistically significant also convey meaning, however: results showing no statistically significant differences by gender establish that men, women and others (who chose not to identify as male or female) held the same general views.

A Subscription to the Internet

297 The Forum notes, however, that only one (1) response was received from the territories.

298 In other words, a statistically significant result from these tests does not imply that the results are important (a significant finding), but that the results were unlikely to have occurred by chance.

299 Two-sided asymptotic significance levels.

300 Results that are not statistically significant may have occurred by chance.

301 As the survey did not ask respondents about their citizenship or nationality, non-Canadians resident in Canada with Canadian telephone numbers may also be included in the results.

The survey found that 91.2% of Canadians or their households subscribe to or paid for the Internet. Rates of subscription were lower for those between 18 and 24 years of age (79.6%), for those with an annual income below $20,000 (69.9%), for those who did not complete university (80.1%) and for those over 65 year of age. Subscription levels rose markedly with household income, with nearly all (99.2%) of those earning $80,000 or more per year subscribing to the Internet.

No statistically significant differences in Internet subscription were found based on gender (p=0.155 – ie, the results could have occurred by chance 15.5 times out of a hundred), language (p=0.999) and region (0.942).

Survey result 1 Subscription to the Internet

Q2. Do you or anyone in your household subscribe to or pay for the Internet?	**Yes**	**No**	**Not sure**
TOTAL (N=829)	91.2%	7.7%	6.1%
Age (p=.000)			
18 – 24 years of age (born 1994 or after)	79.6%	**14.3%**	6.1%
25 – 44 (born 1974 to 1993)	95.5%	4.5%	0.0%
45 – 64 (born 1954 to 1973)	93.7%	5.4%	0.9%
65 years of age or older (born before 1953)	86.2%	**12.4%**	1.3%
Income (p=.000)			
Less than $20,000	69.9%	25.8%	4.3%
$20,000 to $39,000	87.1%	12.1%	0.7%
$40,000 to $59,000	91.5%	7.7%	0.7%
$60,000 to $79,000	97.5%	2.5%	0.0%
$80,000 or more	99.2%	0.8%	0.0%
Education (p=.0000)			
Secondary school or less	80.1%	18.4%	1.5%
College or university	94.6%	4.6%	0.8%
Post graduate studies	95.7%	3.5%	0.9%

B Use of Internet in past year

Based on the survey 94.7% of Canadians had used the Internet in the past year, with the lowest use reported by those over 64 years of age (86.7%), those with an income of less than $20,000 (81.7%), and those with secondary education or less (87.8%).

No statistically significant differences in Internet use in the pasy ear were found based on gender (p=.141), language (p=.195) and region (p=.241).

Survey result 2 Use of the Internet in the past year

Q2. Do you use the Internet or have you used it in the past year?	**Yes**	**No**	**Not sure**
TOTAL (N=785)	94.7%	5.3%	6.1%

Q2. Do you use the Internet or have you used it in the past year?	Yes	No	Not sure
Age (p=.000)			
18 – 24 years of age (born 1994 or after)	95.9%	4.1%	Excludes missing data
25 – 44 (born 1974 to 1993)	98.6%	1.4%	
45 – 64 (born 1954 to 1973)	97.5%	2.5%	
65 years of age or older (born before 1953)	86.7%	13.3%	
Income (p=.000)			
Less than $20,000	81.7%	18.3%	
$20,000 to $39,000	90.7%	9.3%	
$40,000 to $59,000	94.4%	5.6%	
$60,000 to $79,000	98.8%	1.2%	
$80,000 or more	100.0%	0.0%	
Education (p=.000)			
Secondary school or less	87.8%	12.2%	
College or university	96.6%	3.4%	
Post graduate studies	98.3%	1.7%	

C Visiting websites accidentally – belief and experience

More than two-thirds (70.3%) of Canadians believed it is possible to visit Internet sites by accident, with slightly more men than women (74.5% vs 65.5%) sharing this belief. Disbelief in the possibility of accidental website visits grows with age: one in ten (10.2%) of those between the ages of 18 and 24 years of age does not believe that websites can be visited accidentally, compared to one in five (23.1%) of those aged 65 years or more. Disbelief in the possibility of accidental Internet site visits decreases with income: nearly a third (30.1%) of those with an annual household income of $20,000 or less do not believe that Internet websites can be visited accidentally, while only 13.4% of those with an annual household income of $80,000 or more share this view.

Differences based on language and region were not statistically significant (p=.788 and p=.940, respectively).

Survey result 3 Belief in the possibility of accidental website visits

Q3. Do you believe it is possible to visit Internet websites by accident?	Yes	No	Not sure
TOTAL (N=785)	70.3%	17.5%	12.2%
Gender (p=.014)			
Male	74.5%	15.3%	10.2%
Female	65.5%	19.8%	14.7%
Other	50.0%	41.7%	8.3%
Age (p=.000)			
18 – 24 years of age (born 1994 or after)	77.6%	10.2%	12.2%

Q3. Do you believe it is possible to visit Internet websites by accident?	Yes	No	Not sure
25 – 44 (born 1974 to 1993)	80.0%	14.5%	5.5%
45 – 64 (born 1954 to 1973)	71.5%	16.1%	12.3%
65 years of age or older (born before 1953)	59.6%	23.1%	17.3%
Gender (p=.007)			
Male	74.5%	15.3%	10.2%
Female	65.5%	19.8%	14.7%
Other (n=12)	50.0%	41.7%	8.3%
Income (p=.000)			
Less than $20,000	54.8%	30.1%	15.1%
$20,000 to $39,000	56.4%	23.6%	20.0%
$40,000 to $59,000	72.5%	14.8%	12.7%
$60,000 to $79,000	79.0%	16.0%	4.9%
$80,000 or more	80.8%	13.4%	5.7%
Education (p=.000)			
Secondary school or less	59.7%	28.1%	12.2%
College or university	73.5%	14.7%	11.8%
Post graduate studies	80.0%	10.4%	9.6%

As noted above, more than two thirds (70.3%) of Canadians considered it possible to visit websites by accident; 12.2% were unsure whether this is possible, and 17.5% considered it impossible to visit websites by accident.

More than two thirds (70.4% of Canadians who thought it possible to visit websites by accident, or who were unsure whether this is possible, said they had visited a website accidentally in the past year. Four-fifths (84.2%) of those aged 18 to 24 years of age had visited sites accidentally, while just over half (56.4%) of those aged 65 years or older said they had done so. Proportionately higher levels of accidental visits (73.8%) were also reported by those with college or higher levels of education.

No statistically significant differences were found between Canadians based on their language (p=.610), region (p=.714) and income (p=.244).

Survey result 4 Personal experience in the past year with accidental website visits

Q4 Have you visited a website by accident in the past year?	Yes	No	Not sure
TOTAL (N=583)	70.4%	24.3%	5.3%
Gender (p=.014)			
Male	71.8%	24.5%	3.6%
Female	68.9%	24.1%	7.0%
Other	50.0%	16.7%	33.3%
Age (p=.000)			
18 – 24 years of age (born 1994 or after)	84.2%	13.2%	2.6%
25 – 44 (born 1974 to 1993)	79.5%	17.6%	2.8%

Q4 Have you visited a website by accident in the past year?	Yes	No	Not sure
45 – 64 (born 1954 to 1973)	70.4%	25.2%	4.4%
65 years of age or older (born before 1953)	56.0%	33.6%	10.4%
Education (p=.000)			
Secondary school or less	56.4%	36.8%	6.8%
College or university	73.8%	22.1%	4.1%
Post graduate studies	78.3%	16.3%	5.4%

D Accessing audio-visual content online

Three-quarters (75.6%) of Canadians reported that they, or someone in their household, had accessed music, movies or television programming online in the past year, with such access decreasing by those with lower levels of completed education (56.6%), those with incomes under $39,000 per year (69.3% or less), and those over 65 years of age (55.1%).

No statistically significant differences were found based on language (p=.699) or region (p=.298).

Survey result 5 Household access in past year to audio-visual content online

Q5 Have you or has anyone in your household accessed music, movies or TV shows using the Internet in the last year?	Yes	No	Not sure
TOTAL (N=829)	75.6%	21.8%	2.5%
Gender (p=.006)			
Male	79.7%	17.6%	2.7%
Female	70.4%	27.9%	1.7%
Other	66.7%	25.0%	8.3%
Age (p=.000)			
18 – 24 years of age (born 1994 or after)	87.8%	12.2%	0.0%
25 – 44 (born 1974 to 1993)	90.0%	8.6%	1.4%
45 – 64 (born 1954 to 1973)	78.8%	17.4%	3.8%
65 years of age or older (born before 1953)	55.1%	42.2%	2.7%
Education (p=.000)			
Secondary school or less	56.6%	39.3%	4.1%
College or university	81.3%	16.3%	2.4%
Post graduate studies	81.7%	17.4%	0.9%
Income (p=.000)			
Less than $20,000	64.5%	33.3%	2.2%
$20,000 to $39,000	69.3%	29.3%	1.4%
$40,000 to $59,000	75.4%	23.2%	1.4%
$60,000 to $79,000	82.7%	14.8%	2.5%
$80,000 or more	84.3%	12.6%	3.1%

E Risk that CRTC may block Internet sites by mistake

The survey asked about the risk that the CRTC might, if it begins to block access to websites that make audio-visual content available without copyright owners' permission, block sites that have not done

anything wrong. The question distinguished between no risk, a slight risk, a 50-50 risk, a risk that is more likely than not, and virtual certainty.

More than half (57.7%) of Canadians, and 69.3% of those from 18 to 24 years of age thought there is a slight or higher risk that the CRTC will block websites by accident.

No statistically significant differences occurred on the basis of region (p=.179), education (p=.304) and income (p=.061).

Survey result 6 Risk that CRTC may block websites that have done nothing wrong

Q6 The CRTC, the federal board that regulates telecommunications in Canada, is being asked to block Canadians' access to sites and online services that make music, movies or TV shows available without the copyright owners' permission. Do you think there is any risk that, if the CRTC begins to block access to sites and online services because of copyright issues, it will block some Internet sites or online services that have done nothing wrong?	**No risk**	**Slight risk**	**50-50 chance**	**More likely than not**	**Virtually certain**	**Not sure**
TOTAL (N=829)	32.8%	26.8%	12.9%	8.6%	9.4%	9.5%
	32.8%	57.7%				9.5%
Gender (p=.000)						
Male	31.8%	24.6%	11.5%	11.7%	13.3%	7.0%
Female	35.6%	29.6%	14.9%	4.3%	3.4%	12.1%
Other	8.3%	33.3%	8.3%	8.3%	33.3%	8.3%
Age (p=.000)						
18 – 24 years of age (born 1994 or after)	28.6%	18.4%	26.5%	12.2%	12.2%	2.0%
		69.3%				
25 – 44 (born 1974 to 1993)	35.5%	26.4%	10.0%	8.2%	15.5%	4.5%
		60.1%				
45 – 64 (born 1954 to 1973)	34.8%	23.4%	12.7%	8.9%	8.5%	11.7%
		53.5%				
65 years of age or older (born before 1953)	28.9%	34.7%	12.4%	8.0%	4.4%	11.6%
		59.5%				
Belief that it is possible to visit Internet sites by accident (p=.000)						
Yes (ie, accidental visits are possible)	31.2%	29.7%	10.8%	10.6%	13.4%	4.3%
No (ie, accidental visits are not possible)	33.8%	35.2%	8.3%	6.9%	10.3%	5.5%
Not sure	16.8%	22.8%	21.8%	13.9%	5.9%	18.8%
Experience with visiting Internet sites by accident in past year (p=.000)						
Yes (ie, has visited sites accidentally)	33.0%	26.7%	10.9%	10.7%	11.4%	7.3%
No (ie, has not visited sites accidentally)	44.3%	24.3%	4.3%	5.0%	10.0%	12.1%
Not sure	22.6%	12.9%	35.5%	9.7%	9.7%	9.7%
Household accessed audio-visual content online in past year (p=.000)						
Yes	34.4%	25.7%	12.1%	9.3%	10.7%	7.8%
No	30.4%	33.1%	11.0%	5.5%	5.0%	14.9%
Not sure	4.8%	4.8%	52.4%	14.3%	9.5%	14.3%

F Risk that federal government may block internet sites for reasons other than copyright infringement

The survey then asked about the risk that, over time, the federal government might block Internet sites for reasons other than copyright infringement.

More than half (63.8%) of Canadians, and nearly three-quarters (73.4%) of those aged 18 to 24 years thought there is a risk that website blocking will expand to address issues other than alleged copyright infringement.

No differences were observed by region (p=.402) or by income (p=.110).

Survey result 7 Risk that government may block sites for reasons other than copyright

Q7 Do you think there is any risk that, over time, the federal government will block Canadians' access to Internet sites or services for reasons other than concerns over copyright?	**No risk**	**Slight risk**	**50-50 chance**	**More likely than not**	**Virtually certain**	**Not sure**
TOTAL (N=829)	29.9%	29.8%	11.7%	10.4%	11.9%	6.3%
	29.9%	63.8%				6.3%
Language (p=.014)						
English	28.2%	28.5%	12.0%	11.6%	13.4%	6.3%
French	36.1%	34.4%	10.6%	6.1%	6.7%	6.1%
Gender (p=.000)						
Male	30.7%	25.1%	10.8%	13.8%	15.3%	4.3%
Female	31.3%	36.2%	12.6%	5.2%	6.0%	8.6%
Other	8.3%	25.0%	16.7%	16.7%	33.3%	0.0%
Age (p=.000)						
18 – 24 years of age (born 1994 or after)	24.5%	30.6%	16.3%	10.2%	16.3%	2.0%
	24.5%	73.4%				
25 – 44 (born 1974 to 1993)	26.8%	29.1%	10.0%	12.7%	19.1%	2.3%
	26.8%	70.95				
45 – 64 (born 1954 to 1973)	31.6%	25.0%	11.4%	11.7%	11.7%	8.5%
	31.6%	59.8%				
65 years of age or older (born before 1953)	31.6%	37.3%	13.3%	6.2%	4.4%	7.1%
	31.6%	61.2%				
Education (p=.001)						
Secondary school or less	35.7%	25.0%	15.3%	6.6%	6.6%	10.7%
College or university	27.5%	31.1%	10.8%	12.0%	13.1%	5.4%
Post graduate studies	32.2%	32.2%	10.4%	7.8%	15.7%	1.7%
Belief that it is possible to visit Internet sites by accident (p=.005)						
Yes (ie, accidental visits are possible)	31.3%	26.7%	11.2%	12.1%	14.6%	4.1%
No (ie, accidental visits are not possible)	34.3%	37.9%	5.7%	7.1%	10.7%	4.3%
Not sure	16.1%	32.3%	29.0%	6.5%	9.7%	6.5%
Accessed audio-visual content online in past year (p=.000)						

Q7 Do you think there is any risk that, over time, the federal government will block Canadians' access to Internet sites or services for reasons other than concerns over copyright?	No risk	Slight risk	50-50 chance	More likely than not	Virtually certain	Not sure
Yes	30.6%	26.6%	12.6%	12.4%	13.4%	4.3%
No	28.2%	41.4%	8.8%	2.2%	7.2%	12.2%
Not sure	23.8%	23.8%	9.5%	19.0%	95%	14.3%

III Research method

A Survey

A survey of 829 adults (18 years or over) across Canada (yielding results with a margin of error of plus or minus 3.5%, 19 times out of 20) who use the Internet or have used it in the past year, was conducted in English and in French by Access Research using interactive voice response technology on behalf of the Forum for Research and Policy in Communications (FRPC) on the 6th, 7th, 8th, 9th and 11th of March 2018. Pers

Copies of the English-language and French-language surveys are attached. The survey was discontinued (see question 2) if respondents were not sure if they use the Internet, or have used it in the past year. Respondents who do not believe it is possible to visit websites by accident were not asked if they had visited websites by accident in the previous year (see question 4).

The purpose of the survey was to learn about Canadians' experience with visiting Internet sites by accident, their views on the potential for websites to be blocked incorrectly, and their views on the possibility that either the CRTC or the federal government might, at some point, expand Internet blocking beyond copyright infringement. These issues arose in the context of the CRTC's consideration of application 8663-A182-201800467.

Analysis of the results found one (1) response from the territories, and 67 responses from the Atlantic provinces. Rather than analyze the data using the original values for the residence variable, we collapsed these into four larger categories: West (and the single northern response); Ontario; Quebec and the Atlantic provinces.

Q10 In which province or territory do you live?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	British Columbia	104	12.5	12.5	12.5
	Alberta, Saskatchewan or Manitoba	147	17.7	17.7	30.3
	Ontario	308	37.2	37.2	67.4
	Quebec	202	24.4	24.4	91.8
	Newfoundland or New Brunswick	38	4.6	4.6	96.4
	Nova Scotia or Prince Edward Island	29	3.5	3.5	99.9

	Yukon	1	.1	.1	100.0
	Total	829	100.0	100.0	

Next, we asked respondents about their completed levels of education. Although nearly all (97.6%) answered the questions, low response levels were received with respect to grade school (25 cases), high school (40 cases) and the doctorate level (24 cases). We therefore collapsed the original education values into three categories: up to and including high school; college or bachelor's degree, and MA or doctorate.

11 What is the highest level of education that you have completed?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Grade 8 or less	25	3.0	3.1	3.1
	Some high school	40	4.8	4.9	8.0
	High school diploma or equivalent	131	15.8	16.2	24.2
	College or CEGEP	275	33.2	34.0	58.2
	Bachelor's degree	223	26.9	27.6	85.8
	Master's degree	91	11.0	11.2	97.0
	Doctorate	24	2.9	3.0	100.0
	Total	809	97.6	100.0	
Missing	Prefer not to answer	20	2.4		
Total		829	100.0		

We also asked respondents about their household income and 86.5% of respondents provided answers. We decided to analyze the results in terms of income quintiles, and regrouped the responses into five categories: under $20,000; $20,000 to $39,000, $40,000 to $59,000, $60,000 to $79,000 and $80,000 or higher.

12 Which of the following categories best describes your total household income, before taxes?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Under $20,000	93	11.2	13.0	13.0
	$20,000 to just under $40,000	140	16.9	19.5	32.5
	$40,000 to just under $60,000	142	17.1	19.8	52.3
	$60,000 to just under $80,000	81	9.8	11.3	63.6
	$80,000 to just under $100,000	95	11.5	13.2	76.8
	$100,000 to just under $150,000	97	11.7	13.5	90.4
	$150,000 and above	69	8.3	9.6	100.0
	Total	717	86.5	100.0	
Missing	Prefer not to answer	112	13.5		
Total		829	100.0		

Finally, we asked respondents about their age, using 10-year categories to the age of 75. We decided to regroup these categories to reflect generational experience with technology, and used the following

categories: 18-24 years of age (born from 1994 or after, and having lived almost all their lives with the Internet); 25 to 44 years of age (born between 1974 to 1993, and having lived most of their lives with personal computers); 45 to 64 years of age (born between 1954 to 1973, and having lived most of their lives with mainframe or personal computers), and 65 years of age or over (born before 1953, and having experienced introduction of mainframe computers, personal computers and the Internet).

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	18-24 yrs (born 1994 or after)	49	5.9	6.0	6.0
	25--44 yrs (born 1974 to 1993)	220	26.5	27.2	33.2
	45-64 yrs (born 1954 to 1973)	316	38.1	39.0	72.2
	65 yrs + (born before 1953)	225	27.1	27.8	100.0
	Total	810	97.7	100.0	
Missing	No answer	19	2.3		
Total		829	100.0		

B Survey questionnaires

Forum for Research and Policy in Communications
Internet / Blocking Usage Survey

Forum Research Inc. 27 February 2018

Part A – Introduction

Hello. This is Forum Research calling on behalf of the Forum for Research and Policy in Communications. We would like to ask you some questions about the Internet. The survey will take about 4 minutes of your time. Just use the touchpad on your phone to select the correct answer when prompted. If you have any questions about this call, you can reach our firm, Access Research, at 1-855-561-3603 or at inquiry@access-research.com.

A. First of all, are you at least 18 years of age or older?
   a. Press 1 if Yes → CONTINUE
   b. Press 2 if No → TERMINATE

Part B – Main Survey

1. Do you or anyone in your household subscribe to or pay for the Internet?

   1. Press 1 if Yes
   2. Press 2 if No
   3. Press 3 if you are not sure

2. Do you use the Internet or have you used it in the past year?

   1. Press 1 if Yes
   2. Press 2 if No
   3. Press 3 if you are not sure → TERMINATE

3. Do you believe it is possible to visit Internet websites by accident?

   1. Press 1 if Yes → CONTINUE
   2. Press 2 if No → SKIP TO Q5
   3. Press 3 if you are not sure → SKIP TO Q5

4. Have you visited a website by accident in the past year?

   1. Press 1 if Yes
   2. Press 2 if No
   3. Press 3 if you are not sure

5. Have you or has anyone in your household accessed music, movies or TV shows using the Internet in the last year?

1. Press 1 if Yes
2. Press 2 if No
3. Press 3 if you are not sure

6. The CRTC, the federal board that regulates telecommunications in Canada, is being asked to block Canadians' access to sites and online services that make music, movies or TV shows available without the copyright owners' permission.

   Do you think there is any risk that, if the CRTC begins to block access to sites and online services because of copyright issues, it will block some Internet sites or online services that have done nothing wrong?

   1. Press 1 if there is no risk that the CRTC will block the wrong Internet websites or services
   2. Press 2 if there is a slight risk that the CRTC will block the wrong Internet websites or services
   3. Press 3 if there is a 50-50 chance that the CRTC will block the wrong Internet websites or services
   4. Press 4 if it is more likely than not that the CRTC will block the wrong Internet websites or services
   5. Press 5 if it is virtually certain that the CRTC will block the wrong Internet websites or services
   6. Press 6 if you are not sure

7. Do you think there is any risk that, over time, the federal government will block Canadians' access to Internet sites or services for reasons other than concerns over copyright?

   1. Press 1 if there is no risk
   2. Press 2 if there is a slight to moderate risk
   3. Press 3 if there is a 50-50 chance that, over time, the federal government will block Internet websites or services for reasons other than concerns over copyright
   4. Press 4 if it is more likely than not that, over time, the federal government will block Internet websites or services for reasons other than concerns over copyright
   5. Press 5 if it is virtually certain that, over time, the federal government will block Internet websites or services for reasons other than concerns over copyright
   6. Press 6 if you are not sure

Part C – Demographics

8 The next few questions are about yourself. Your answers will be kept confidential and anonymous. Please indicate your gender.

   1. Press 1 for Male
   2. Press 2 for Female
   3. Press 3 for Other
   4. Press 4 if you prefer not to say

9 How old are you?

1. Press 1 if between 18 and 24 years of age
2. Press 2 if between 25 and 34
3. Press 3 if between 35 and 44
4. Press 4 if between 45 and 54
5. Press 5 if between 55 and 64
6. Press 6 if between 65 and 74
7. Press 7 if 75 years of age or older
8. Press 8 if you prefer not to answer

10 In which province or territory do you live?

1. Press 1 if British Columbia
2. Press 2 if Alberta, Saskatchewan or Manitoba
3. Press 3 if Ontario
4. Press 4 if Quebec
5. Press 5 if Newfoundland or New Brunswick
6. Press 6 if Nova Scotia or Prince Edward Island
7. Press 7 if Northwest Territories
8. Press 8 if Nunavut
9. Press 9 if Yukon

11 What is the highest level of education that you have completed?

1. Press 1 if Grade 8 or less
2. Press 2 if Some high school
3. Press 3 if High school diploma or equivalent
4. Press 4 if College or CEGEP
5. Press 5 if Bachelor's degree
6. Press 6 if Master's degree
7. Press 7 if Doctorate
8. Press 8 if you prefer not to answer

12 Which of the following categories best describes your total household income, before taxes?

1. Press 1 if under $20,000
2. Press 2 if $20,000 to just under $40,000
3. Press 3 if $40,000 to just under $60,000
4. Press 4 if $60,000 to just under $80,000
5. Press 5 if $80,000 to just under $100,000
6. Press 6 if $100,000 to just under $150,000
7. Press 7 if $150,000 and above
8. Press 8 if you prefer not to answer

Thank you, that's all the questions I have. If you have any questions about this call, you can reach our firm, Access Research, at 1-855-561-3603 or at inquiry@access-research.com.
Have a great day.

Forum for Research and Policy in Communications
Sondage sur l'utilisation d'Internet/le blocage

Forum Research Inc. 27 février 2018

Partie A – Introduction

Bonjour. Bonjour, j'appelle de la part de Forum Research au nom du Forum for Research and Policy in Communications. Nous aimerions vous poser quelques questions au sujet d'Internet. Le sondage devrait prendre environ 4 minutes. Il suffit d'utiliser le clavier de votre téléphone pour sélectionner votre réponse lorsqu'on vous demandera de le faire. Si vous avez des questions au sujet de cet appel, vous pouvez appeler notre entreprise, Access Research, au 1 855 561-3603, ou écrire à inquiry@access-research.com.

B. D'abord, êtes-vous âgé de 18 ans ou plus?
   1. Appuyez sur le 1 si votre réponse est affirmative →CONTINUER
   2. Appuyez sur 2 si votre réponse est affirmative →ARRÊTER

Partie B – Sondage principal

1. Est-ce que vous ou quelqu'un de votre foyer êtes abonnés à Internet ou payez pour Internet?

   1. Appuyez sur le 1 si votre réponse est affirmative
   2. Appuyez sur le 2 si votre réponse est négative
   3. Appuyez sur le 3 si vous êtes indécis

2. Utilisez-vous ou avez-vous utilisé Internet au cours de la dernière année?

   1. Appuyez sur le 1 si votre réponse est affirmative
   2. Appuyez sur le 2 si votre réponse est négative
   3. Appuyez sur le 3 si vous êtes indécis → ARRÊTER

3. Croyez-vous qu'il est possible de visiter des sites Web par erreur?

   1. Appuyez sur le 1 si votre réponse est affirmative →CONTINUER
   2. Appuyez sur le 2 si votre réponse est affirmative →PASSER À Q5
   3. Appuyez sur le 3 si vous êtes indécis → PASSER À Q5

4. Avez-vous visité un site Web par erreur au cours de la dernière année?

   1. Appuyez sur le 1 si votre réponse est affirmative
   2. Appuyez sur le 2 si votre réponse est négative
   3. Appuyez sur le 3 si vous êtes indécis

5. Avez-vous ou quelqu'un dans votre foyer a-t-il eu accès à de la musique, des films ou des émissions de télévision sur Internet au cours de la dernière année?

   1. Appuyez sur le 1 si votre réponse est affirmative
   2. Appuyez sur le 2 si votre réponse est négative
   3. Appuyez sur le 3 si vous êtes indécis

6. On demande au CRTC, l'office fédéral qui réglemente les télécommunications au Canada, de bloquer l'accès des Canadiens aux sites et aux services en ligne qui rendent la musique, les films ou les émissions de télévision accessibles sans la permission des titulaires de droits d'auteur.

   Pensez-vous qu'il y a un risque que, si le CRTC commence à bloquer l'accès aux sites et aux services en ligne à cause des questions de droit d'auteur, il bloque certains sites Internet ou services en ligne qui n'ont rien à se reprocher?

   1. Appuyez sur le 1 s'il n' y a aucun risque que le CRTC bloque les mauvais sites Web ou services Internet.
   2. Appuyez sur le 2 s'il y a un léger risque que le CRTC bloque les mauvais sites Web ou services Internet.
   3. Appuyez sur le 3 s'il y a une chance sur deux que le CRTC bloque les mauvais sites Web ou services Internet.
   4. Appuyez sur le 4 s'il est plus probable qu'improbable que le CRTC bloquera les mauvais sites Web ou services Internet.
   5. Appuyez sur le 5 s'il est pratiquement certain que le CRTC bloquera les mauvais sites Web ou services Internet.
   6. Appuyez sur le 6 si vous êtes indécis

7. Pensez-vous qu'il y a un risque que, avec le temps, le gouvernement fédéral bloque l'accès des Canadiens aux sites ou aux services Internet pour des raisons autres que les préoccupations relatives au droit d'auteur?

   1. Appuyez sur le 1 s'il n' y a aucun de risque.
   2. Appuyez sur le 2 s'il y a un risque faible à modéré.
   3. Appuyez sur le 3 s'il y a une chance sur deux que, au fil du temps, le gouvernement fédéral bloque des sites Web ou des services Internet pour des raisons autres que les préoccupations relatives au droit d'auteur.
   4. Appuyez sur le 4 s'il est plus probable qu'improbable qu'au fil du temps, le gouvernement fédéral bloquera des sites Web ou des services Internet pour des raisons autres que les préoccupations relatives au droit d'auteur.
   5. Appuyez sur le 5 s'il est pratiquement certain qu'au fil du temps, le gouvernement fédéral bloquera des sites Web ou des services Internet pour des raisons autres que les préoccupations relatives au droit d'auteur.
   6. Appuyez sur le 6 si vous êtes indécis

Partie C – Questions démographiques

8 Les quelques prochaines questions portent sur vous. Vos réponses demeureront confidentielles et anonymes. Veuillez indiquer votre sexe.

   1. Si vous êtes un homme, appuyez sur le 1
   2. Si vous êtes une femme, appuyez sur le 2
   3. Appuyez sur le 3 pour Autre
   4. Appuyez sur le 4 si vous préférez ne pas l'indiquer

9 Quel âge avez-vous?

1. Appuyez sur le 1 si vous êtes âgé de 18 à 24 ans
2. Appuyez sur le 2 si vous êtes âgé de 25 à 34 ans
3. Appuyez sur le 3 si vous êtes âgé de 35 à 44 ans
4. Appuyez sur le 4 si vous êtes âgé de 45 à 54 ans
5. Appuyez sur le 5 si vous êtes âgé de 55 à 64 ans
6. Appuyez sur le 6 si vous êtes âgé de 65 à 74 ans
7. Appuyez sur le 7 si vous êtes âgé de 75 ans ou plus.
8. Appuyez sur 8 si vous préférez ne pas répondre

10 Dans quel territoire ou quelle province résidez-vous?

1. Appuyez sur le 1 pour la Colombie-Britannique
2. Appuyez sur le 2 pour l'Alberta, la Saskatchewan ou le Manitoba
3. Appuyez sur le 3 pour l'Ontario
4. Appuyez sur le 4 pour le Québec
5. Appuyez sur le 5 pour Terre-Neuve ou le Nouveau-Brunswick
6. Appuyez sur le 6 pour la Nouvelle-Écosse ou l'Île-du-Prince-Édouard
7. Appuyez sur le 7 pour les Territoires du Nord-Ouest
8. Appuyez sur le 8 pour le Nunavut
9. Appuyez sur le 9 pour le Yukon

11 Quel est le niveau de scolarité le plus élevé que vous avez atteint?

1. Appuyez sur le 1 si vous avez atteint la 8^{e} année ou moins
2. Appuyez sur le 2 si vous avez fréquenté l'école secondaire un certain temps.
3. Appuyez sur le 3 si vous avez obtenu un diplôme d'études secondaires
4. Appuyez sur le 4 si vous avez étudié au collégial ou au CÉGEP
5. Appuyez sur le 5 si vous avez un diplôme de baccalauréat
6. Appuyez sur le 6 si vous avez un diplôme de maîtrise
7. Appuyez sur le 7 si vous avez un diplôme de doctorat
8. Appuyez sur 8 si vous préférez ne pas répondre

12 Laquelle des catégories suivantes décrit le mieux le revenu total de votre ménage, avant impôts?

1. Appuyez sur le 1 s'il est inférieur à 20 000 $
2. Appuyez sur le 2 s'il est supérieur à 20 000 $, mais tout juste sous 40 000 $
3. Appuyez sur le 3 s'il est supérieur à 40 000 $, mais tout juste sous 60 000 $
4. Appuyez sur le 4 s'il est supérieur à 60 000 $, mais tout juste sous 80 000 $
5. Appuyez sur le 5 s'il est supérieur à 80 000 $, mais tout juste sous 100 000 $
6. Appuyez sur le 6 s'il est supérieur à 100 000 $, mais tout juste sous 150 000 $
7. Appuyez sur le 7 s'il est de 150 000 $ et plus.
8. Appuyez sur 8 si vous préférez ne pas répondre

Merci, je n'ai pas d'autres questions. Si vous avez des questions au sujet de cet appel, vous pouvez appeler notre entreprise, Access Research, au 1 855 561-3603, ou écrire à inquiry@access-research.com. Passez une bonne journée!

Appendix 7 Excerpts from Hansard Debates leading up to Passing of Bill C-11 (2012)

[Hon. James Moore (Minister of Canadian Heritage and Official Languages, CPC)]:
This is a balancing act. Certainly there are those who wish they had amendments a little different from the way our government has designed the bill, but we think we have an effective and responsible balance that will serve Canadians well into the future.[302]

[Hon. Christian Paradis (Minister of Industry and Minister of State (Agriculture), CPC)]:
I think all members would agree that this House has debated and consulted for some time now on how to strike an appropriate balance while establishing a modern, responsive copyright regime in Canada. These amendments are the latest demonstration of our government's commitment to strike the right balance between rights holders and users. We recognize that copyright in the digital age will always evolve and that efforts to maintain balance are ongoing, whether a bill is before us or not. Such is the complexity of copyright and the many views on what is an ideal regime.[303]

[Marie-Claude Morin (Saint-Hyacinthe—Bagot), NDP]:
The NDP has fought every step of the way for a balanced approach to copyright. We participated in the committee, even without support from some of the opposition members, that studied this bill. We listened to the concerns of a number of groups with regard to the scope of this bill. At committee stage, we proposed 17 amendments that could have made this bill more balanced and fair for the artists and consumers. […] Indeed, what is really important to remember about this bill is that the NDP is proposing a balanced approach that does not discriminate against consumers and allows artists and creators to be properly paid for the work they do for our society.[304]

[Elizabeth May (Saanich—Gulf Islands), Green]:
I think that it needs to be understood that this copyright modernization act has moved in the right direction in most ways. Unfortunately, the balance is not right in relation to consumer rights and those of device manufacturers and copyright holders.[305]

[Rodger Cuzner (Cape Breton—Canso), Liberal]:
Madam Speaker, my colleague cites the essence of the problem. It is in the balance. I am certainly no expert on this, but I have had an opportunity to speak to artists as well. […] Certainly from the testimony I read, I do not believe the balance has been struck. I am comfortable where our party stands now, that we will not be supporting this legislation because there is an absence of balance in the legislation.[306]

302 Hon. James Moore (Port Moody—Westwood—Port Coquitlam) 2012-05-15 10:40, Hansard no. 124
303 Hansard no. 141, 2012-06-15.
304 Marie-Claude Morin (Saint-Hyacinthe—Bagot) 2012-05-15 11:50 and 12:00, Hansard no. 124.
305 2012-05-15 11:45 (Hansard no. 124).
306 2012-06-15 12:46 [p.9631], Hansard no. 141.

Annex 1 Questions that the Forum would have asked, had an interrogatory phase been permitted

FRPC interrogatory 17	The validity of estimates that XX million people in Canada have visited infringing sites
FRPC interrogatory 18	The 'Terms of Service' of ISPs such as Bell and Rogers include prohibitions on copyright infringement by their subscribers. Please state the number of ISP subscribers suspended by Bell Canada, Bell ExpressVu, Cogeco, and Rogers due to copyright-infringing activities in each of the past five years.
FRPC interrogatory 19	Your application points out that copyright infringement is prohibited by both the *Copyright Act* and the *Radiocommunication Act*. (a) Please state the number of times in each of the past five years that the members of your coalition have relied on provisions of these statutes to prosecute copyright infringement. (b) Please state the outcome of such prosecutions.
FRPC interrogatory 20	The likelihood that more than one website uses the same IP address
FRPC interrogatory 21	How does this affect notice & takedown? What if an ISP expeditiously removes infringing content? UK's *Electronic Commerce Directive Regulations 2007* permit take-down within "two days"
FRPC interrogatory 22	What if a website hosts user-generated content (UGC) and is unaware that some of this content is infringing? Is the website equally liable? See *Louis Vuitton Moet Hennessy (LVMH) v eBay*
FRPC interrogatory 23	Suppose the idea is to create whitelists or blacklists—does this matter to us?
FRPC interrogatory 24	Will the recommendations of the proposed agency's staff, and all the evidence on which the recommendations be based, be made public?
FRPC interrogatory 25	Will the agency's staff or the CRTC be able to issue *ex parte* decisions?
FRPC interrogatory 26	Would decisions issued by the CRTC permit those that made applications to the proposed agency, to deduct losses claimed in those applications from their taxable income?
FRPC interrogatory 27	How do websites become unblocked?
FRPC interrogatory 28	If websites are mistakenly blocked, could the sites' owners seek damages, and if so, from whom?
FRPC interrogatory 29	Paragraph 10 of your application defines 'piracy' as a range of activities involving websites, applications an, services. Many computer users store data 'on the cloud'. Would approval of your application permit the blocking of cloud servers?

FRPC interrogatory 30 Paragraph 10 of your application states that "piracy sites could include … a location on the Internet dedicated to the delivery of [a] … subscription service accessed directly from a server through an illicit streaming device." Please provide examples of the 'illicit streaming devices' to which you refer.

FRPC interrogatory 31 Paragraph 10 of your application refers to "services" and "apps". Please provide examples of these services and apps. of 'piracy', 'pirate operators' and 'piracy sites'. Definitions of 'services' and 'apps':

FRPC interrogatory 32 Would the proposed agency accept requests from other governments or non-Canadian actors?

FRPC interrogatory 33 Assume that the proposed agency is completely effective in preventing Canadian's access to websites that infringe copyright, and that as a result, Canadians resume the acquisition of copyright-infringing material through Canada Post or courier delivery services. In light of the importance ascribed by the Coalition to copyright infringement, would it support the blocking of Canadians' mailed or couriered requests to parties that make copyright-infringing material available upon request?

FRPC interrogatory 34 At paragraph 76 you argue that Canada's net neutrality policy "does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online". What would prevent the agency from being asked to ban sites that carry unlawful content that is not infringing?