

# Website Blocking, Clogging the Pipes, and Crippling Citizens' Fundamental Communication Rights



by

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1. This document constitutes the intervention of the Canadian Media Concentration Research Project (CMCRP) in response to Part 1 application “Application to disable on-line access to piracy sites”, submitted by the Asian Television Network International Limited, on behalf of a Coalition (FairPlay Canada). The CMCRP wishes to be considered an intervener in this proceeding.

### **Executive Summary**

2. The CMCRP opposes the Fairplay coalition’s bid to have the Commission create and oversee a website blocking scheme that would require all ISPs to block subscribers’ access to a blacklist of “websites and services that are *blatantly, overwhelmingly, or structurally engaged in piracy*” (Fairplay, 2018, para 1). While we agree that mass scale piracy should be strongly discouraged we also argue that the Fairplay application is the wrong tool for the job.
3. If Parliament had intended website blocking methods to be used as part of the copyright regime it would have explicitly included them in the *Copyright Act* (2012) or the *Telecommunications Act* (1993) (or both). In fact, while many of the same interests behind the Fairplay application advocated for website blocking to be included in the Copyright Act, Parliament explicitly rejected their proposals. Fairplay’s attempt to have the Commission embrace measures that Parliament recently rejected is inappropriate, and especially so with a review of the Copyright Act just around the corner.
4. Moreover, Fairplay’s interpretation of sections 24, 24.1, 36 and 70 of the *Telecommunications Act* as giving the Commission the authority to use its “broad powers” to create and oversee an extrajudicial website blocking scheme to pursue copyright and broadcasting policy goals without an explicit legislative mandate to do so is strained. As we show, section 70 does not empower the Commission to investigate compliance with copyright. Section 24 has conventionally been harnessed to a far narrower range of explicit telecommunications policy objectives than the application implies, and where it has been used in the furtherance of blocking telecommunications, it has only be done so in connection with explicit clauses in the *Act* that empower it to do so, i.e. the Do Not Call List (DNCL) and Canada’s Anti-Spam Law (CASL). The Commission also lacks the in-house expertise needed to pursue the copyright aims the application asks for.
5. Crucially, Fairplay’s efforts to engage the *Telecommunications Act* for the purposes it claims are at odds with the rare occasions where the Commission has relied on section 36 to *advance* the values of common carriage, *not* to carve out exceptions to them. It would be a perverse irony indeed if the ‘crown jewel’ in the common carrier regime (aka, ‘net neutrality, in popular parlance)—section 36 of the *Telecommunications Act*—was used not sparingly to fortify and refine such principles but to gut them instead.

6. The Fairplay application also relies extensively on research that has been hired by industry and trade associations to push a policy agenda. Such studies lack scholarly rigour and independence, and their aim is generally not to further our knowledge of the complex issues at stake, but to give a one-sided and exaggerated portrait of the scale of piracy.
7. Industry Canada, the Office of the Privacy Commissioner, the 2012 Hargreaves report for the UK Government, the Clift Advisory Committee report for the World Intellectual Property Organization, and other independent reviews raise serious misgivings about much of the work by consultancies and think tanks in this area. This includes work by consultants that the Fairplay application calls on directly to build its case, as elaborated on further below.<sup>1</sup>
8. The studies relied upon by the Fairplay application provide many examples in which big numbers are tossed around with no proper sense of scale. We challenge these studies by drawing on data from Statistics Canada, the CRTC, PriceWaterhouseCooper, and other sources to show that the media industries which Fairplay claims are being badly harmed are, with a few exceptions, doing well. Wrenching transformation for many, yes; dire straits on account of “blatant, overwhelming and structural piracy”, no.
9. We also conduct a review of forty countries from the OECD and European Union, finding that 21 countries have either relied upon a transposition of the European Union’s 2001 Copyright Directive into national legislation or—in the case of countries outside the EU—have adopted equivalent laws, and that these laws have been regularly used to authorize website blocking. We found that 18 of these countries block websites by court order: Australia, Austria, Belgium, Chile, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, the Netherlands<sup>2</sup>, Norway, Spain, Sweden and the UK.<sup>3</sup> Crucially, these countries only allow website blocking after a court order is obtained. This contrasts with the coalition’s proposal, which contains no such provisions— a substantial deficiency, in our

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<sup>1</sup> See Industry Canada ([Canada, 2012](#), sec 1.3.1), the Office of the Privacy Commissioner ([Canada, 2012](#), Sec 3.2.3), Hargreaves (2012) and [Clift, C. and the WIPO Advisory Committee on Enforcement](#), 2011).

<sup>2</sup> For further insights, see: Australia: [active](#); Austria: [active](#); Belgium: IITF report; Chile: [inactive](#); Denmark: IITF report; Finland: [active](#); France: IITF report; Germany: [active](#); Greece: [active](#); Iceland: [active](#); Ireland: [active](#); Israel: [active](#); Netherlands: [active](#); Norway: IITF report; Spain: IITF report; Sweden: [active](#); United Kingdom: IITF report; In the Netherlands, website blocking was permitted between 2012 and 2014 before being dropped on the basis of a Court of Appeal decision that found such measures ineffective. However, the situation is now once again in flux with a decision by the Supreme Court expected soon ([Woitier, 2014](#); [Cooke, 2018](#)).

<sup>3</sup> See, for example, Fairplay at para 62. <sup>3</sup> For further insights, see: Australia: [active](#); Austria: [active](#); Belgium: IITF report; Chile: [inactive](#); Denmark: IITF report; Finland: [active](#); France: IITF report; Germany: [active](#); Greece: [active](#); Iceland: [active](#); Ireland: [active](#); Israel: [active](#); Netherlands: [active](#); Norway: IITF report; Spain: IITF report; Sweden: [active](#); United Kingdom: IITF report; In the Netherlands, website blocking was permitted between 2012 and 2014 before being dropped on the basis of a Court of Appeal decision that found such measures ineffective. However, the situation is now once again in flux with a decision by the Supreme Court expected soon ([Woitier, 2014](#); [Cooke, 2018](#)).

view. We also identify four countries that block websites by way of administrative procedures,: Italy<sup>4</sup>, Portugal, South Korea, and Turkey.

10. Simultaneously, however, we identify eighteen countries of these countries that rarely engage in website blocking and which have not revised or adopted new copyright laws that explicitly lay out a framework for such an approach or, in the case of the European Union, relied on a transposition of the Copyright Directive: Canada, Croatia, Cyprus, the Czech Republic, Estonia, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, New Zealand, Poland, Romania, Slovenia, the Slovak Republic, Switzerland, and the United States. At least six of them have explicitly *rejected* or withdrawn website blocking or other severe anti-piracy measures as an option: Canada (the *Copyright Act*), Mexico (Supreme Court ruling), the Netherlands,<sup>5</sup> Poland<sup>6</sup>, Switzerland<sup>7</sup>, and the United States (i.e. SOPA and PIPA, in 2011).
11. In sum, while website blocking to combat blatant piracy has become more common, it is still seen as an extreme measure and typically used only as a last resort. In addition, where such measures are being actively used, they are done so only with a court order except in the minority outlying cases where administrative measures are used. The wave of legislation transposing the EU's Information Society Directive into national copyright laws exemplifies the point.<sup>8</sup> Even under these conditions, website blocking continues to be opposed by ISPs, human rights agencies, and citizens' groups across the OECD and EU countries.
12. We also argue that website blocking is a bad idea because it reinforces incentives to embed surveillance and control capabilities more deeply into internet and mobile access networks. Indeed, this was a key concern for the UK regulator Ofcom, ultimately leading UK government to drop an expanded website blocking scheme from the *Digital Economy Act* (2010).
13. Website blocking embodies a logic whereby greater levels of internet traffic monitoring, control and blocking are welded into the infrastructure of the internet, an outcome that is anathema to the principles of a democratic society like Canada.

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<sup>4</sup> Italy allows website blocking through both court orders and by the telecoms and broadcasting regulator, AGCOM.

<sup>5</sup> In the Netherlands, website blocking was permitted between 2012 and 2014 before being dropped on the basis of a Court of Appeal decision that found such measures ineffective. However, the situation is now once again in limbo with a decision by the Supreme Court expected soon ([Woitier, 2014](#); [Cooke, 2018](#)).

<sup>6</sup> <http://www.thenews.pl/1/12/Artykul/91997,Government-stopped-from-preparing-'illegal-antiinternet-piracy-legislation>

<sup>7</sup> <https://smetille.ch/2017/11/29/revision-du-droit-dauteur-et-obligations-des-hebergeurs/>

<sup>8</sup> EU (2001). European Union (EU). Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN>

### The Wrong Time for a Do-over (or, We've Seen This Movie Before)

14. Parliament rejected similar proposals to include website blocking schemes from many of the same parties that are now part of the coalition when the current copyright framework became law (2012). Those same interests have continued to advocate for much the same agenda ever since. Having failed to achieve change through legislative channels, these same companies are now trying to get what they want through the telecommunications regulator.
15. Nonetheless, a critical change has occurred in the interim, namely that the interests of Canada's biggest ISPs and mobile network operators fundamentally changed as a result of the increasing extent of vertical integration within the industry. Indeed, Bell, Rogers and Shaw—the big three vertically-integrated ISPs now leading the charge for the Commission to create and oversee a new website blocking scheme—were staunch critics of such measures at the hearings on the various copyright bills considered between 2006 and 2011.<sup>9</sup>
16. At the time, these companies were at the head of the [Business Coalition for Balanced Copyright](#) (BCBC), a lobby group formed around the issues. The BCBC represented not just the big ISPs but independent ones too, as well as Google, eBay, Tucows, the Canadian Association of Broadcasters, the Computer and Communications Industry Association, and the Canadian Wireless Telecommunications Association, amongst others. In response to the chorus of calls by rights holder advocates like [Barry Sookman](#), [the Entertainment Software Association](#), [the Canadian Recording Industry Association](#) (CRIA), [Canadian Media Production Association](#) (CMPA) and [Association québécoise de l'industrie du disque, du spectacle et de la vidéo](#) (ADISQ) for a more punitive approach to piracy, the ISP-led Business Coalition for Balanced Copyright was blunt: “Another fundamental policy choice embedded in this Bill, and which the BCBC strongly supports, is the rejection of ‘notice-and-takedown’ and ‘graduated response’ policies, which would turn intermediaries into ‘copyright police’” (*emphasis added*, para 20).
17. It is useful to revisit these arguments because similar claims have been raised anew by the coalition's application. [ADISQ](#), the trade association for the Quebec-based recorded music industry, asked why those who are “controlling and monetizing the bandwidth” should not also use that control to “protect the rights of the people who produce the content that circulates on it?” (March 1, 2012 @ 1050 mark). The Canadian Motion Picture Distributors Association also wanted those who control the pipes to crack down on those who were pirating content.<sup>10</sup> “We can no longer ignore the estimated one-quarter of Internet traffic that now involves the unauthorized distribution of copyrighted material,” the group's representative told the hearing.<sup>11</sup> The [Canadian Independent Music Association](#),

<sup>9</sup> Then and now, Videotron has been a staunch advocate of the copyright maximalist position.

<sup>10</sup> Noss, W. <https://apps.ourcommons.ca/ParlDataWidgets/en/intervention/3756424>

<sup>11</sup> Ibid.

[Entertainment Software Association](#), [the CRIA](#), [Business Software Alliance \(BSA\)](#) as well as the [CMPA](#) called for a notice-and-takedown regime and either hinted at or said explicitly that they agreed with a “graduated response,” three-strikes approach. The [Canadian Music Publishers Association](#) argued that ISPs had an “obligation . . . to block access to services that are . . . or ordinarily used for enabling acts of copyright infringement.” The [BSA](#) also argued that ISPs should work together with rights holders “to curtail infringing conduct when it is . . . blatant and obvious.” One last example: [Quinlan Road Productions](#) wanted ISPs to “play a significant role in the management of the content that passes through their hands . . . . This must be true not only for copyright purposes but. . . pornography, piracy, and fraud.” The extent to which content rights holders were willing to use ISPs as chokepoints for all manner of problems was astonishingly open-ended.

18. The [Canadian Recording Industry Association](#) painted a dire portrait of a *recorded music* industry devastated by piracy as part of its pitch for a notice-and-takedown regime. The losses to piracy were staggering, it said, with revenue having fell from \$1,200 million in 1999 to ~\$420-430 million in 2010. The [Canadian Motion Picture Distributors Association](#) painted a similar view of the devastating impact that piracy was having on the movie industry, and the Canadian economy as a whole: “Movie piracy resulted in a loss equivalent to \$965 million in GDP across the Canadian economy last year” alone, it claimed, “while in terms of jobs, if it weren't for movie theft, we would have had the equivalent of another 12,600 jobs last year alone.” Job losses went far beyond just the movie industry to affect the whole economy, claimed the group (February 17, 2011 @ 1100 mark).<sup>12</sup>
19. As we will see, however, many of these claims turned out to be factually incorrect and to be generally wide of their mark. Statistics Canada data, for example, subsequently showed that losses to the “recorded music” industry were half the amount the CRIA was alleging. To say nothing of the fact that the CRIA neglected to talk about those critically important areas of the music industry that were growing fast, and which have since gone on to drive the *recovery* of the music industry: performance royalties, live concerts and internet, mobile and digital sales ([IFPI, 2017](#); [SOCAN, 2017](#)). The music industry in Canada, in fact, has grown at a relatively brisk pace year-after-year for the past five years, with revenue rising from \$1.6 billion in 2012 to \$2 billion in 2016, as cited in the associated figures below.
20. Rights holders wanted all intermediaries from ISPs through to search engines (e.g. Google), social networking sites (e.g. Facebook, Twitter) and data/web hosting sites to block access to websites and services that enabled copyright infringement. They also wanted to substitute a notice-and-takedown and/or a graduated response regime for the less intrusive “notice-and-notice” regime already included in the bill and practiced as a matter of course by all of Canada’s major ISPs. Third, they wanted to claw back the novel user-generated content (UGC) clause of the act that allows people to make mashups and remixes from snippets of copyrighted content for non-commercial uses. They sought a copyright term extension from

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<sup>12</sup> Ibid.

lifetime of the creator plus 50 years to life plus 70 years. Finally, they wanted tough measures to protect “digital locks.”<sup>13</sup>

21. ISPs rejected this view of the world (with one exception, Videotron). Tanya Woods, Bell’s Legal Counsel at the time, for instance, responded that “we’re a common carrier, and as a common carrier we’re neutral. That’s decided by the *Telecommunications Act*” (March 1, 2012 @ 0940).<sup>14</sup> The Business Coalition for Balanced Copyright (2011) sang from the same hymn sheet:

. . . . The BCBC supports the Bill’s limitation of ISPs’ roles to notice delivery and data retention which is to be done under judicial supervision. This approach is in line with the view, accepted around the world, that intermediaries should not unduly interfere with their customer’s online activities.<sup>15</sup>

22. At the end of the day, the copyright holders groups’ wish-list was largely rejected except in relation to hard digital locks rules that some argued took away with one hand user rights that had just been granted with the other. This was a disappointment to those who argued for what we can call “a right to repair” and to “space shift” media content that they have legitimately acquired freely from one digital device to another.

23. As the hearings on Bill C-32 were wrapped up, the Minister of Industry at the time, Tony Clement observed:

The act . . . is both consumer and creator friendly. . . . There were face-to-face meetings in nearly every major city in Canada, and we took into account the views of artists, performers, shoppers, surfers, business people, and students. Today I can confidently say to you that this bill represents what we feel is the best compromise for the betterment of both creators and consumers that we could possibly reach. Frankly, for a bill of this scope, balance is our only option (at the 0850 mark).<sup>16</sup>

24. The big difference between the ISPs then and the same ones who are spearheading the coalition’s initiative now (e.g. Bell, Rogers, Videotron, Shaw [by way of Corus]) is that all of them, except Videotron, have changed their stripes. Having become vertically integrated entities with big stakes in broadcasting and pay TV services, they have turned into staunch advocates of the same positions they had advised the government to reject not so long ago. However, while their interests and alignments have changed 180 degrees, the principles of common carriage as well as the values that animate the role of the internet and media in a democratic society have not.

<sup>13</sup> Library of Parliament. (2011), <https://lop.parl.ca/Content/LOP/LegislativeSummaries/41/1/c11-e.pdf>.

<sup>14</sup> Woods, T. (2012). <http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/meeting-6/evidence>.

<sup>15</sup> Business Coalition for Balanced Copyright. (2011), para 19.

<https://dwmw.files.wordpress.com/2012/03/businesscoalitionforbalancedcopyrighte.pdf>

<sup>16</sup> <https://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-3/evidence>.

### **The Coalition’s present application rests on tenuous Legal Foundations**

25. The coalition now proposes a three-step process for establishing a regime to block impugned web sites and services engaged in copyright infringement.
26. **First**, it requests the Commission establish an “independent piracy review agency” (IPRA) under subsection 70(1)(a) of the *Telecommunications Act*. Section 70 in whole reads:

#### **“Appointment by Commission**

**70 (1)** The Commission may 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
- (b) on which the Commission is required to report under section 14.”

27. The Commission would, in effect, engage this power in order to delegate to the IPRA the task of identifying online sites or services that are “blatantly, overwhelmingly, or structurally engaged in piracy” (Fairplay, 2018, p. 2). Once established, the IPRA would field applications from concerned rightsholders seeking to have infringing sites and/or services blocked, and, upon successful identification of an infringing site, forward a request to the Commission to block the impugned site and/or service.
28. **Second**, upon receipt of a recommendation from the IPRA, the Commission would issue an order to all Canadian Internet Service Providers (ISPs) to block end-user access to the impugned site.<sup>17</sup> Such an order would be issued, according to the coalition, pursuant to the Commission’s broad powers under sections 24 and 24.1 of the *Telecommunications Act*. These sections read:

#### **“Conditions of service**

**24** The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

#### **Conditions of service – person other than Canadian Carrier**

**24.1** The offering and provision of any telecommunications service by any person other than a Canadian carrier are subject to any conditions imposed by the Commission, including those relating to

- service terms and conditions in contracts with users of telecommunications services;

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<sup>17</sup> This may take the form of a list, expanded from time to time, the population of which would require blocking. Or, potentially, individual orders.

protection of the privacy of those users;  
 access to emergency services; and  
 access to telecommunications services by persons with disabilities.”

29. In the coalition’s view, these powers, which apply to Canadian carriers and to resellers respectively, are sufficiently broad to empower the Commission to order ISPs to block access to websites on the basis of enabling or engaging in copyright infringement.
30. **Third**, and finally, the Commission would engage section 36 of the *Telecommunications Act* to grant permission to ISPs operationalize site blocking orders promulgated under section 24. Section 36 reads:

**“Content of messages**

**36** Except 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.”

31. As CRTC Executive Director of Telecommunications Chris Seidl recently told the Parliamentary committee on Access to Information, section 36 of the *Telecommunications Act* forms one of two pillars of Canada’s approach to network neutrality or common carriage.<sup>18</sup> This provision is at the heart of maintaining an open and democratic communication system, in which users, rather than intermediaries, make determinations as to how they will communicate, with whom, and about what. Since website blocking amounts to a form of content control, ISPs seeking to operationalize an order under section 24 to block impugned sites and/or services would also have to obtain approval from the Commission to do so under section 36. The coalition presents this requirement as a matter of “housekeeping,” since under its proposal, the CRTC itself would issue the order to block websites, and therefore section 36 approval would in the coalition’s view be a mere formality.
32. In sum, the coalition’s application asks the CRTC to convene the IPRA pursuant to section 70 of the *Telecommunications Act*, which will make recommendations to the Commission about which sites to block. The Commission will then operationalize these recommendations by ordering Canadian ISPs, using its powers under sections 24 and 24.1, to block end-user access to the impugned list of sites. Finally, the Commission will approve this blocking as it is required to do under section 36 before permitting content control by ISPs.

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<sup>18</sup> The other pillar being subsection 27(2), the prohibition on unjust discrimination and undue preference, which is not invoked in the present application. For Mr. Seidl’s full remarks, see: [https://www.canada.ca/en/radio-television-telecommunications/news/2018/02/chris\\_seidl\\_to\\_thestandingcommitteeonaccesstoinformationprivacya.html](https://www.canada.ca/en/radio-television-telecommunications/news/2018/02/chris_seidl_to_thestandingcommitteeonaccesstoinformationprivacya.html)

33. Together, sections 70, 24, 24.1, and 36 form the legal footing on which the coalition's requested relief rests. The coalition, supported by an appended legal opinion from McCarthy Tetrault, presents its request as a straightforward matter of assessing the harm of online copyright infringement and implementing a solution using the tools ready-at-hand to the Commission. In the CMCRP's view, however, this proposal is problematic for a number of significant reasons. In the what follows, we explain why the legal rationale presented by the coalition is tenuous at best.

### **Establishing an agency to investigate copyright compliance is outside the Commission's jurisdiction**

34. The threshold issue in this proceeding is the establishment of the IPRA. The language of section 70 of the *Act* appears to give the Commission broad powers to inquire into relevant matters; it can appoint "any person" to inquire into "any matter," subject to several terms. However, our reading of these terms suggests that this power is circumscribed and may not be sufficient to allow the Commission to create the IPRA in the first place.

35. The fundamental role and purpose of the proposed IPRA would be to investigate whether certain sites or services are infringing copyright, yet the power to convene an inquiry under section 70 is restricted to matters "pending before the Commission or within the Commission's jurisdiction under this Act."

36. Although the *Copyright Act* has been recognized by the courts as part of an interrelated statutory scheme together with the *Telecommunications, Broadcasting, and Radiocommunication Acts*, copyright matters fall outside of the purview of the CRTC's home statutes. We believe the fact that the IPRA's primary role and purpose would be to investigate compliance with the *Copyright Act* places it outside the Commission's jurisdiction to establish. Nor does the first clause of section 70 (1)(a) of the *Act*, regarding the ability to designate an inquiry into "any matter pending before the Commission" permit the Commission to establish an inquiry into something outside of its realm of statutory authority, since, as we understand it, matters pending before the Commission would always be brought under either the *Broadcasting* or the *Telecommunications Acts*.

37. Additionally, at various points in its application, the coalition draws comparisons between the IPRA and the existing Commissioner for Complaints for Telecom-Television Services (CCTS) (e.g. paras. 78, 82, 99). In the CMCRP's view, there is no analogy to be drawn between the proposed IPRA and the CCTS, for two reasons. First, the CCTS was created by the Commission pursuant to an order by the Governor in Council (GiC) which stated that all telecommunications service providers should participate in what would eventually become the CCTS.<sup>19</sup> This process unfolded under the auspice of section 70(1)(b) of the *Act*, which provides for the Commission to report back to the GiC under such an order. In other words, the CCTS was created by the Commission under explicit order by government. By contrast,

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<sup>19</sup> Order in Council P.C. 2007-533, 4 April 2007.

no such order has been issued by the GiC in respect of investigating copyright infringement in the present case, rather the request has been brought solely on the private volition of the coalition. Second, the role and purpose of the CCTS falls squarely within the Commission's statutory jurisdiction under the *Telecommunications Act*, as it deals with the relationship between consumers and providers of telecommunications services, and administers specific regulations promulgated by the CRTC with administrative powers delegated to the CCTS (i.e. the *Wireless Code*). The same cannot be said of the proposed IPRA. As already discussed, the primary role and function of the IPRA would be to investigate compliance with copyright by online sites and services, which falls outside the purview of the Commission's home statutes. As such, its comparisons between the organizational structure and mandate of the CCTS and the proposed IPRA are inapt.

38. Finally, the fact that the *Copyright Act* lies beyond the Commission's statutory jurisdiction raises questions as to whether it has the competence or jurisdiction to evaluate recommendations proposed by the IPRA. It is therefore unclear what the basis would be for the Commission to render judgment upon the IPRA's recommendations, despite the coalition's assurances that, in so doing, the Commission would "provide reasons to the [impugned] site operator" and "quickly or automatically extend the site blocking requirement" (Fairplay, 2018, para. 87).
39. Since the Commission does not itself have the power to investigate compliance with copyright, and does not have the power to establish an agency to investigate same, it must reject the coalition's application.

### **Protecting copyright is not a telecommunications policy objective**

40. Leaving aside the issue of whether the Commission would be acting within its jurisdiction by establishing the IPRA, the next phase of the coalition's proposal asks that the CRTC engage its broad power under sections 24 and 24.1 of the *Telecommunications Act* to require ISPs to block access to impugned sites and services as a condition of offering service. In the CMCRP's view, there are significant problems with this request. These problems stem from the fact that the coalition is pursuing what are essentially copyright concerns, which it has strained to frame in terms of broadcasting and telecommunications policy objectives. To be clear, the CMCRP recognizes and supports intellectual property owners' right to appropriate remuneration for their works, and other associated rights (ability to control dissemination and distribution of works, etc.). Our opposition to the application stems from what is, in our view, an inappropriate use of telecommunications policy to pursue copyright aims, one which eschews the typical approach to balance competing objectives that sits at the centre of copyright law and policymaking, is likely to create collateral damage to users and providers of telecommunications, and which is generally incompatible with the legitimate principles of a democratic society.
41. The *Telecommunications Act* requires that the Commission exercise its powers (including those under sections 24 and 24.1) "with a view to implementing the Canadian

telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27” (section 47(a)). The coalition cites several of the *Act*’s objectives in support of its request that the Commission exercise these powers to order website blocking. Specifically, the coalition’s application invokes subsections 7(a), 7(h), and 7(i) of the *Telecommunications Act* for this purpose. These sections read as follows, respectively:

**“Objectives**

**7** It is hereby affirmed that telecommunications policy performs an essential role in the maintenance of Canada’s identity and sovereignty and that the Canadian telecommunications policy has as its objectives

**(a)** to 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;

[...]

**(h)** to respond to the economic and social requirements of users of telecommunications services; and

**(i)** to contribute to the protection of the privacy of persons.”

42. The coalition’s application goes to great length to make the case that failure to institute its recommended regime for blocking copyright infringing web sites and/or services would have serious harmful consequences – going so far as to suggest that, in the absence of such measures, “if the Canadian creative sector is left to rely solely on conventional domestic legal remedies, it will be doomed to fail” (Fairplay, 2018, paras. 13 & 58). Relying on data from a MUSO report, as well as from network equipment manufacturer Sandvine, the coalition paints a portrait of rampant online piracy in Canada, which it characterizes as an existential threat to both rightsholders, creative sector workers, and distributors. In the coalition’s view, this situation is tearing apart the social and economic fabric of Canada. According to this argument, since section 7(a) of the *Act* is concerned with ensuring that telecommunications contribute to enriching and strengthening those fabrics, and since copyright infringement places them in jeopardy, then the Commission is within its powers to order infringing sites blocked using its powers under sections 24 and 24.1.
43. Copyright infringement may be harmful to intellectual property holders, including broadcasters and broadcasting distribution undertakings (BDUs). However, it is difficult to discern how this situation has direct relevance to the telecommunications policy objectives. The scale of the harm, and the extent to which it can be directly attributed to the impugned sites and services, however, is dubious, as we discuss at greater length below in an analysis of the content industries’ economic performance. Furthermore, we question the connection between the broadly worded policy objective relied upon by the coalition – strengthening the economic and social fabric of the country – and the specific mechanism that the coalition proposes to address the problems it has identified.

44. In this regard, the Supreme Court of Canada’s judgment in the *Value for Signal* case is instructive.<sup>20</sup> In that case, which involved the creation of a retransmission right to be charged by local television stations to broadcasting distribution undertakings (BDUs), the Supreme Court held that:

**“No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime, and it was not sufficient for the CRTC to find jurisdiction by referring in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives.** Establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act cannot be a sufficient test for conferring jurisdiction on the CRTC. **Policy statements are not jurisdiction-conferring provisions and cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament. Similarly, a broadly drafted basket clause in respect of regulation making authority (s. 10(1)(k)), or an open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” when issuing licences (s. 9(1)(h)) cannot be read in isolation, but rather must be taken in context with the rest of the section in which it is found”** (emphasis added).<sup>21</sup>

45. Similarly, in the instant case the coalition’s application relies upon an appeal to the broadly-construed policy objectives of the *Telecommunications Act* in combination with the open-ended powers found in sections 24 and 24.1 of the *Act*. To our knowledge, nowhere in the *Act* is there explicit reference to a power to investigate matters related to compliance with copyright, let alone to operationalize an order to block end-user access to online sites/and or services on the basis of being engaged in copyright infringement.

46. The coalition, together with the appended legal opinion from McCarthy Tétrault, point to a number of ways in which the section 24 and 24.1 powers have been used or could be used in an effort to draw an analogy to their proposal to engage it for the purpose of site blocking.<sup>22</sup> There are, in our view, several reasons why this comparison is inapt.

47. The coalition’s argument that sections 24 and 24.1 are sufficiently broad to enable the Commission to order site blocking rest on a comparison between its proposed use of those powers and the existing, non-exhaustive illustration of potential uses as it exists in subsections 24.1(a)-(d) of the *Act*:

#### **Conditions of service – person other than Canadian Carrier**

<sup>20</sup> Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489.

<sup>21</sup> Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489.

<sup>22</sup> McCarthy Opinion, pp. 16-20.

**24.1** The offering and provision of any telecommunications service by any person other than a Canadian carrier are subject to any conditions imposed by the Commission, including those relating to

- service terms and conditions in contracts with users of telecommunications services;
- (a) protection of the privacy of those users;
- (b) access to emergency services; and
- (c) access to telecommunications services by persons with disabilities.

48. The coalition characterizes these conditions as enabling the CRTC to require “ISPs to take measures to assist innocent parties with problems the TSP did not itself create but which they are well-positioned to address” (McCarthy Opinion, 2018, p. 17). In support of this proposition, the coalition lists 10 examples of how this power has been used, including: consumer safeguards such as access to 9-1-1, payphone terms and conditions, accessibility for persons with disabilities; security deposits, telephone directories, and suspension or disconnection of service; relay services for persons with disabilities; requiring carriers to provide alternative information formats for people with disabilities; requiring carriers allow access to competitors in multi-dwelling units; wholesale resale obligations; requiring that carriers offer reliable 9-1-1 service; requiring membership by carriers in the CCTS; disclosure requirements for wholesale mobile wireless roaming arrangements; and prohibiting 30-day cancellation policies.<sup>23</sup>
49. The coalition lists these examples in an effort to show that there is context for interpreting the open-ended power of sections 24 and 24.1, together with the broadly worded policy objective contained in s 7(a), in a manner that would permit blocking websites and/or services on the basis of enabling copyright infringement. There are, however, important differences between using sections 24 and 24.1 to engage in the examples given and the proposed blocking scheme. These differences render the comparison inapt, and suggest that the coalition’s characterization of sections 24 and 24.1 as enabling the Commission to order website blocking is misguided and incorrect.
50. With one exception (the national Do Not Call List, which we discuss momentarily), each of these examples deals with the relationship between consumers of telecommunication services and telecommunication service providers, or inter-carrier relationships, viz. the nature and characteristics of the telecommunications services themselves. This includes things like establishing classes of service to serve disadvantaged groups or members of the population, setting the terms upon which those services must be offered, and ensuring that adequate information is available to the public regarding those services. What none of the examples given by the coalition do (again, with the exception of the DNCL) is engage with telecommunications services *on the basis of the content of those services*. Yet this is exactly what the coalition’s proposal does – it proposes to block access to websites on the basis of the content of those websites. This, we submit, is not what sections 24 or 24.1 are meant to

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<sup>23</sup> McCarthy Opinion, pp. 17-20.

do – and the examples that the coalition do not support a reading that suggests they would allow such blocking in any case, since they are not similar to the proposed use of the powers.

51. While it might be said that there are similarities between the proposed course of action and the use of sections 24 and 24.1 in the case of subscriber disconnections, there is an important difference that separates existing cases with the proposed one. To our knowledge, where the Commission has engaged with the terms upon which subscribers can be disconnected or have their service suspended, it has done so in ways that constrain the scope of action available to service providers. In the case of the *Wireless Code*, for instance, the Commission restricted the type of fees that could be charged to subscribers upon disconnection, and imposed limits upon when disconnections may occur and requires substantial notice before suspension or disconnection may be imposed. With respect to the 30-day cancellation policy, the Commission placed more power in the hands of consumers regarding their ability to terminate service by preventing carriers from requiring prior notice. These measures contrast with the coalition’s proposal, which would expand TSPs’ ability to suspend aspects of a customer’s service. For this reason, we do not believe that existing measures related to disconnection or suspension support the coalition’s request.
52. Finally, the only powers within the *Act* that we have been able to identify dealing explicitly with blocking telecommunications on the basis of content relate to unsolicited telecommunications – nuisance phone calls (i.e. the “do not call list” and unwanted commercial message (i.e. spam via CASL and related amendments to the *Telecommunications Act*) – but these powers have significant differences with those contemplated by the coalition’s proposed regime.<sup>24</sup> The most important difference rendering the coalition’s comparison in the present application inapt – it mentions the DNCL in passing but does not refer to CASL – is that both the DNCL and CASL have been folded into the Commission’s jurisdictional purview by explicit inclusion in the *Telecommunications Act*. Both of these powers fall under section 41 of the *Act*, and both have required explicit legislative amendments to operationalize. This contrasts with the proposed use of section 24 and 24.1 (together with section 36 approval) as stand-alone measures invoked to justify website blocking on the basis of involvement with copyright infringement. On this latter issue, the *Telecommunications Act* is silent. Simply put, if Parliament had intended to empower the Commission to block copyright-infringing websites, it would have included this power in the *Act* explicitly, as it has done for the DNCL and CASL.
53. In sum, we are of the view that the terms of the policy objective “to 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” are too broad, and the proposed use of the open-ended powers of sections 24 and 24.1 (and, additionally, the powers set out in sections 32 and 67) too tenuously connected to both the objectives and context of the *Act* to allow the Commission to grant the coalition’s proposal.

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<sup>24</sup> See: Unsolicited Telecommunications, beginning at s. 41 of the *Telecommunications Act*.

This situation is analogous to the Supreme Court's finding in the *Value for Signal* judgment. In that case, the Court found that "Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too far removed from the core purposes intended by Parliament and from the powers granted to the CRTC under that Act."<sup>25</sup> The same can be said of the present case with respect to the *Telecommunications Act* and the proposed website blocking regime. No specific provision or regulation-making clause can be found in the *Telecommunications Act* that would enable the Commission to institute website blocking – as argued above, sections 24 and 24.1 do not qualify as such. The Commission therefore must, in our view, reject the coalition's request for relief.

### **The proposed regime does not respond to the requirements of users of telecommunications services**

54. The coalition argues that its proposed regime will have the effect of responding to the social and economic requirements of users of telecommunications services, since copyright infringement may contribute directly or indirectly to higher costs for consumers of legitimate cultural goods and services. This argument is misguided, however, since it conflates the use of telecommunications services – carriage services such as fixed or mobile Internet access – with the use of cultural content delivered by means of telecommunications. While the coalition may be correct in the assertion that copyright infringement results in users of legitimate cultural goods and services subsidizing users of infringing services, this has no bearing on their activities and role *qua* users of *telecommunications* services, and therefore it is difficult to see how the coalition's observations regarding the economic effects of copyright infringement could contribute to fulfilling the objectives embodied by section 7(h) of the *Act*.
55. To put it plainly, a user of telecommunications services pays the same freight regardless of the content being delivered – whether that content is legitimate or not; whether it is a website, a streaming television show, advertising, etc. This is not to condone the illegitimate use of copyright-infringing online services by certain users of telecommunications services. To repeat, the CMCRP supports intellectual property holders' various rights to control of and remuneration from their works. The point, however, is to highlight the fact that the coalition's argument regarding cross-subsidization and increased cost for cultural goods resulting from copyright infringement relates not to users of telecommunications services, but to users of cultural services. The use of cultural services, the economics of content production and distribution, and the impact of copyright infringement are all important, but they do not affect people in their role as users of telecommunications services. In our view, therefore, these issues lie outside the scope of the *Telecommunications Act*.

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<sup>25</sup> Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489.

56. While the cost of online content is not relevant to the economic requirements of users of telecommunications services, the cost of telecommunications services themselves most certainly is. Although the coalition's application does not provide technical or economic details on how its proposal would be implemented, there would surely be costs associated with implementing a website blocking scheme, particularly as it would require *all* ISPs in Canada to equip themselves to implement the proposed plan of action. In fact, the ITIF report cited by the coalition in support of its proposal addresses this issue directly:

“The costs of website blocking vary according to the type of blocks used and the country implementing them. More intensive processes, such as deep packet inspections, cost more. All website-blocking processes involve technical support costs for administering the blocking process within an ISP's network and in fielding calls from users about why they cannot access certain sites. There are hosting costs for the landing page that users trying to access blocked sites are redirected toward, as required in many countries. [...] In the United Kingdom, legal documents filed by lawyers representing rights holders estimated that the cost can be as high as \$18,900 per new website blocked for each ISP [...] an Australian government estimate gave the cost per ISP to enact website blocking as \$95,000 annually.”<sup>26</sup>

57. More information would be required to put a dollar figure on the cost of implementing the coalition's proposal. However, what can be said is that there will be costs, and that those costs will be ultimately borne by users of telecommunications services. As the above citation demonstrates, these costs can be substantial. It may be the case that some of Canada's larger, more sophisticated carriers are already equipped to implement such a proposal, but it is equally probable that there are many smaller carriers that are not similarly prepared and would be required to incur substantial fixed and operating costs in order to bring themselves into compliance should the coalition's request be granted, many of which serve rural, remote, and/or Northern areas ignored by the larger national or provincial carriers. Imposing such costs would thus appear likely to disproportionately affect users of telecommunications services in underserved areas. This outcome would run counter to the statutory policy objective “to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada” (section 7(b) of the *Act*). Additionally, such an outcome would detract from longstanding government efforts to improve affordability of and access to telecommunications services in rural, remote, and Northern areas of the country. This, we submit, would not be responsive to the economic and social requirements of users of telecommunications services, and in fact would contribute to the opposite.

58. Furthermore, the coalition characterizes its proposal as responding to the needs of users of telecommunications services by virtue of its aspiration to “encourage compliance with Canada's laws, including laws with respect to the intellectual property communicated by

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<sup>26</sup> ITIF, *How Website Blocking Is Curbing Digital Piracy Without “Breaking the Internet”* (August 2016). Page 11.

telecommunications” (Fairplay, 2018, p. 27). The coalition provides little elaboration on this point, and as such it is unclear to us how substituting the Commission’s judgment, or that of the proposed IPRA, for that of users or the appropriate authorities already responsible for disposing of matters related to copyright infringement, would be responsive to the requirements of users of telecommunications services.

### **Privacy of persons? A slippery slope**

59. In addition to arguing that a website blocking regime would contribute to enriching the social and economic fabric of Canada, and to responding to the economic and social requirements of users, the coalition argues that their proposal would contribute to the protection of the privacy of persons. The application argues that piracy sites “are among the leading sources of the dissemination of malware and the hacking and theft of the personal and private information of Canadian consumers” and that “Disabling access to some of the most prominent ones will significantly contribute toward the protection of the privacy of Canadian Internet users” (Fairplay, 2018, p. 27). The coalition points to several reports, by McAfee, Dr. Paul Watters, and Digital Citizens Alliance / Risk IQ to support its allegations.
  
60. Protecting personal privacy is an important aim, and one that is explicitly identified in the *Act’s* policy objectives. It is also enumerated as one of the four illustrations given regarding the aim of section 24.1 in that section of the *Act*. That being said, recognizing that the Commission has powers to impose terms and conditions on the offer of telecommunications services that are intended to protect privacy is one thing, but the idea that those powers extend to blocking access to web sites and services on the basis of privacy violations is another thing altogether. In our view, a similar analysis to the one above applies here: where the Commission does have the power to block or prohibit telecommunications on the basis of content or in furtherance of privacy protection (i.e. in the case of nuisance telecommunications), there are explicit provisions in the *Telecommunications Act* enabling the Commission to institute blocking or similar measures (i.e. the DNCL or CASL), whereas, as discussed above, there are no such explicit references to blocking in sections 24 or 24.1. Measures such as the DNCL also require opt-in from users of telecommunications services before engaging the blocking power, whereas the proposed regime would involve across-the-board blocking of impugned sites or services.
  
61. Additionally, the inclusion of privacy violation as a potentially legitimate motivation for blocking introduces significant uncertainty as to the scope of the action that could result should the Commission grant the coalition’s request for relief. Is the coalition asking the Commission to block end-user access to websites because they infringe copyright, or because they violate privacy, or both? Should websites that violate privacy in the same way that copyright-infringing websites do, but do not themselves violate copyright, also be blocked? Indeed, it is telling that the coalition itself, by putting forward the idea that privacy concerns could justify blocking, could not make it through its application without beginning to slide down the slippery slope.

62. The coalition cannot escape the implication of its decision to go beyond issues of copyright to include privacy as a legitimate reason to block access to online sites and services. If blocking privacy violations is justified because it contributes to achieving the policy objectives, what else might similarly qualify? Following the pending legalization of recreational marijuana by Parliament, might the provinces approach the Commission requesting that the online sale and distribution of recreational marijuana be blocked, because it contradicts with yet-to-be established provincial laws? Would this not encourage compliance with Canadian law, similar to the way that the coalition characterizes their request to block copyright and privacy violations? Would cities and municipalities seeking to protect their local transportation industries request that the Commission block access to Uber? Will provinces such as Quebec appeal to the Commission to block access to non-authorized online gambling sites?
63. The coalition's application makes such mission creep inevitable – and weighed against the purported benefits of blocking copyright and privacy violations online, cannot be justified. To permit blocking on the basis of copyright or privacy violation online would invite a host of similar requests, dragging the Commission far beyond the bounds of its home statutes and into realms far removed from Parliament's intention.

**A bridge too far – the proposed use of section 24 is dramatically removed from its historical use and intended purpose**

64. We submit that the coalition's interpretation of the broad policy objectives relating to the social and economic fabric of the country, the economic and social requirements of users, and the protection of persons' privacy is strained, and too far from the substance and context of the *Act* and its objectives to be of assistance in making the case for extending the Commission's jurisdiction to encompass ordering site blocking.

**Section 36**

65. While the use of sections 70(1)(a), 24, and 24.1 of the *Telecommunications Act* to instantiate a regime of site blocking on the basis of copyright and/or privacy violations by online sites and services would be misguided, and in our view represents a use of those powers that is too far removed from the objectives of the *Act* and the interpretive context that surrounds them, employing section 36 of the *Act* would be beyond the pale.
66. As discussed above, the Commission has recently recognized that section 36, which prevents carriers from controlling the content or influencing the meaning or purpose of telecommunications carried for the public without prior approval from the Commission, forms one of two central pillars of network neutrality policy in Canada. Indeed, network neutrality, or common carriage as it is more formally known, is a central animating principle of telecommunications policy in Canada. As such, invoking this principle, not in the service of preventing content control, but rather to further such control (as the coalition's

application does) represents a perverse reading of the principle that would serve to stymie the very idea that it stands for.

67. Common carriage has been a cornerstone principle since the earliest days of telecommunications in Canada. The idea that communication network operators should not control the content of the messages they carry, and that such control would run counter to the interest of users and the wider economy, was first recognized by the courts as early as 1891 in the case of *Electric Despatch v. Bell Canada*. The Commission's predecessor, the Board of Railway Commissioners, held shortly after the turn of the century that carriers must not use their rate-setting capabilities to discriminate between different types or sources of traffic, finding that such discrimination could have negative effects not just on competition in downstream markets but on democratic practice and expression. The Commission itself upheld this stance during the 1970's, and extended it to ensure that carriers could not offer themselves an undue preference in the *Challenge Communications* case.<sup>27</sup>
68. The principle of common carriage has been upheld numerous times in recent years, both by the Commission itself, as well as the courts and by commitments from the government. These include the 2012 FCA/SCC *ISP Reference*; the Commission's 2009 *Internet Traffic Management Practices (ITMP) Framework*; the Bell Mobile TV case; both in front of the Commission and as upheld by the Federal Court of Appeal; the Vidéotron Unlimited Music case; the differential pricing proceeding that led to a framework prohibiting price discrimination on the basis of content. All of these decisions have served to strengthen and protect this crucial principle of telecommunications policy, despite being opposed at each step of the way by carriers, many of which are party to the coalition's present application.
69. The principle of common carriage has served the Canadian communications system well as it has evolved through successive technologies over the last century. Common carriage has guaranteed citizens the right to an open communication system that places the prerogative of how to communicate in their hands. It has freed carriers from liability for the messages that they carry, reducing risk to their businesses and enabling them to make the investments necessary to ensure that Canada's communication system continues to keep step with modern society. It has enabled business across the economy as well, by restraining the potential for network owners to leverage their intermediary position to foreclose potential new innovation and competition downstream.

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<sup>27</sup> We have submitted in greater detail on this topic to the Commission previously, specifically in the context of the examination of differential pricing practices in 2016. See: Klass, B., Winseck, D., Nanni, M., & McKelvey, F. (2016). "There ain't no such thing as a free lunch: Historical and international perspectives on why common carriage should be a cornerstone of communications policy in the Internet age". Submitted to the Canadian Radio-television and Telecommunications Commission, Telecom Notice of Consultation CRTC 2016-192, Examination of differential pricing practices related to Internet data plans. Available at: <http://www.cmcrp.org/policy-interventions/>

70. Section 36 itself comes to the *Act* by way of a clause that was originally included in Bell Canada's charter in the late 1960's.<sup>28</sup> As we have previously submitted to the Commission, the inclusion of this provision in Bell's charter was intended to prevent the incumbent telephone monopoly from stifling innovation from new, innovative service providers – at the time, cable television distributors. The provision was later generalized when it was adopted, nearly word-for-word, into the *Telecommunications Act* in 1993. Since that time, section 36 has been sparsely invoked, but in what follows, we show that when it has, it has been done so in a way that serves to shore up the prohibition against content control by ISPs, not, as the coalition would have it, to enable new, expansive means of control.
71. In some ways, the strength of section 36 appears to have waned since its original inclusion in Bell's charter. Following the enactment of the *Telecommunications Act* in 1993, the Commission, supported by government, allowed vertical integration between cable operators, programming undertakings, and telecommunications common carriers. This was originally contemplated in the landmark *Review of regulatory framework*, Telecom Decision CRTC 94-19, and was later cemented by the government's Convergence Policy. However, there are several facets of the trend toward allowing vertical integration that differ from the present request in significant ways.
72. First, where carriers have been allowed to become involved in content control, common carriage obligations have been maintained for the telecommunications operations of vertically integrated firms. This was made explicit in both the *Review of regulatory framework* as well as the Convergence Policy. In the former, the Commission had the following to say about allowing vertical integration:

“The Commission considers that the development of innovative and advanced services will only be impeded by attempts to restrict on technological grounds the services telephone companies may carry. As long as any investment made during the transition is economically justified and appropriately recovered, the telephone companies should not be restricted in terms of the technology they adopt.

The Commission therefore affirms that, subject to the licensing of service providers where required, **broadcasting or content-based services may be distributed on a common carrier basis over telephone company facilities**, whether those facilities are narrowband or broadband in nature. With respect to services that require a licence or in respect of which the Commission may issue an exemption order, the Commission notes that section 4(4) of the [Broadcasting] Act exempts a carrier from its provision where the carrier acts solely as a common carrier.

[...]

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<sup>28</sup> See: Standing Committee on Transport and Communications, Minutes of Proceeding and Evidence, No. 3, Thursday, October 19, 1967. Bill C-104, An Act respecting The Bell Telephone Company of Canada. House of Commons: Second session – Twenty-seventh Parliament, 1967.

**In a competitive environment governed by open access and unbundling**, the Commission considers that, not only would telephone company participation not prejudice the diversified development of innovative and advanced services, but telephone companies could make an important contribution to increasing the number and diversity of services, including services of an interactive or transactional nature, available to consumers.

The Commission has considered the arguments of parties in this proceeding as to the involvement of the telephone companies in the content of services they may wish to provide. In the opinion of the Commission, the regulatory framework in this Decision, **particularly safeguards to deal with vertical integration, are sufficient to deal with cross-subsidy and access issues. Given these safeguards**, the Commission considers that telephone companies can enter the content side of the information services business without prejudicing its development” (emphasis added).<sup>29</sup>

73. Similarly, in the Convergence Policy, the government stated that:

“It is Government policy to [...] ensure that **anyone acting as both a broadcasting undertaking as defined by the *Broadcasting Act*, and as a “Canadian carrier” as defined by the *Telecommunications Act* is subject to both Acts, for those activities to which they respectively apply.**

[...]

As telecommunications carriers become involved in providing broadcasting services and broadcasting undertakings become involved in providing telecommunications services, it is Government policy that the following principles should apply:

**Regulation should prevent cross subsidies from monopoly or utility services to competitive services, and between broadcasting and telecommunications services;**

[...]

While new technologies allow providers of telecommunications and broadcasting services to offer similar services, **the distinction between telecommunications, broadcasting and their services will remain.** Different policy objectives require distinct regulatory mechanisms” (emphasis added).<sup>30</sup>

<sup>29</sup> Telecom Decision CRTC 94-19, *Review of regulatory framework*, section 4, “Convergence”. 16 September 1994. Available at: <https://crtc.gc.ca/eng/archive/1994/DT94-19.htm>

<sup>30</sup> Convergence Policy Statement, available at: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf05265.html>

74. The relevant issue here is that, when permitted to enter broadcasting, common carriage provisions have continued to apply to the telecommunications operations of the vertically integrated telephone companies (and vice versa for broadcasting companies entering the field of telecommunications). In light of this observation, the coalition's proposal raises the spectre of vertically integrated companies using the proposed regime to create a loophole that would allow their broadcasting operations to, in effect, exert editorial control over the content that is carried by their affiliated telecommunications branches. Consider that the coalition's proposal contemplates a special role for Canadian carriers in both the establishment and composition of the IPRA:

“The coalition recommends that, should the Commission adopt this proposal, **the members of the coalition that are Canadian carriers be directed by the Commission to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop a proposed governance structure and constating documents for the IPRA** to be considered in a follow-up proceeding held by the Commission.

While the IPRA is expected to be self-funding after it is established, **members of the coalition have agreed to voluntarily provide reasonable seed funding to establish the IPRA and support its initial operations.**

The coalition also recommends that the Commission establish criteria against which both it and the IPRA could evaluate whether a particular site is blatantly, overwhelmingly, or structurally engaged in piracy. Should the Commission adopt this proposal, it **could direct the members of the coalition that are Canadian carriers to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop the proposed criteria** that would also be considered in the follow-up proceeding held by the Commission” (Fairplay, 2018, paras. 81-84).

75. We believe that this aspect of the proposal raises serious concerns regarding the supposed separation between the IPRA's decision making power, on the one hand, and that of the vertically integrated carriers which would compose a substantial part of the IPRA's structure and process, on the other. Conflicts of interest, or at bare minimum the appearance of same, would be sure to arise, particularly in the case where broadcasting affiliates of the Canadian carriers referred to above would approach the IPRA with requests to evaluate sites for compliance with copyright. In effect, these broadcasters would make appeals to a board made up at least in part of their own affiliated ISPs, which would, in turn, recommend to the CRTC that it issue blocking directives against those same ISPs. This, we submit, would be an effort on the part of those vertically integrated carrier/ISP/broadcaster/BDUs to do indirectly what they cannot do directly: i.e. to control the content or influence the meaning or purpose of telecommunications carried for the public.

76. Nor does the fact that such requests would be made through a structurally separate broadcasting affiliate before being filtered through the IPRA before ultimately being imposed on affiliated ISPs resolve this conflict. This is shown by reference to the finding of

the Federal Court of Appeal in *Bell Mobility Inc. v Benjamin Klass*. In concurring reasons to that judgment, which upheld the reasonableness of a determination by the CRTC that the *Telecommunications Act* applies to the transmission of programs by a vertically integrated mobile wireless carrier (i.e. Bell), Justice Dawson accepted “the submission of the CRTC that a company cannot avoid regulation under the *Telecommunications Act* by choosing a particular corporate structure”.<sup>31</sup> In our view, where a broadcaster that is affiliated with one of the ISPs involved in the IPRA, which ISP would ultimately be subject to an order by that agency, would in effect be taking advantage of its corporate structure to avoid the prohibition on content control found in section 36 of the *Telecommunications Act*. This situation would not only run counter to the FCA’s judgment in *Klass*, but on a more general level it gives the lie to the coalition’s misguided claim that the proposed regime would not conflict with Canada’s network neutrality policy and regulation.

77. Additionally, we wish to draw the Commission’s attention to a separate but significant concern with the coalition’s proposal. As referred to above, in the Convergence Policy, the government stated its policy that “[r]egulation should prevent cross subsidies from monopoly or utility services to competitive services, and between broadcasting and telecommunications services”.<sup>32</sup> Yet, in the present application, the coalition intimates that just such cross-subsidization is taking place, and cites such cross subsidy as a reason to support its request for relief:

“BDUs will not continue to invest in new telecommunications infrastructure, technologies, and distribution models if piracy, which relies on stolen content and existing Internet connections (often the result of investment by the same legitimate BDUs), continues to compete with them at no or little cost.

[...]

More importantly, hundreds of millions of dollars are no longer invested by BDUs, both in affiliation payments to Canadian broadcasters that are ultimately directed to programming and in Canada’s telecommunications infrastructure” (Fairplay, 2018, paras. 42 & 47).

78. The foregoing is a bald statement to the effect that revenues from the BDU sector, entry into which is restricted by the requirement to hold a broadcasting licence, are being used to subsidize the telecommunications sector, which is competitive and does not require a licence to enter and operate. If what the coalition states here is true, then it should be of significant concern for the Commission in a sense that goes beyond the central issues raised in the current proceeding.

<sup>31</sup> *Bell Mobility Inc. v. Klass*, 2016 FCA 185, para 70. Available at: <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/145408/index.do?r=AAAAAQAFa2xhc3MB>

<sup>32</sup> Convergence Policy Statement, available at: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf05265.html>

79. The second key observation to be gleaned from the Commission’s invocation of section 36 since its inclusion in the *Telecommunications Act* is that, while the use of section 36 has allowed carriers to become involved in *providing* content, it has not, to our knowledge, permitted *blocking* content.<sup>33</sup> This is illustrated by several of the few times that the Commission has directly addressed its power under section 36.
80. In Telecom Decision CRTC 97-2, the Commission granted cable carriers – broadcasting distribution undertakings (BDUs) -- permission under section 36 to be involved in the content of full channel TV services (i.e. Alphanumeric services to be displayed on a television screen) they offered after their entry into the field of telecommunications service provision. Consistent with our interpretation above, this use of the power enabled the carriers to provide content, given questions raised by the expansion of their business to include telecommunications services.<sup>34</sup> Similarly, in Telecom Decision CRTC 99-4, the Commission responded to a request by Stentor for its members to become involved in the content of the Internet access services they offered to the public. As a result of that request, the Commission granted final approval to all Canadian carriers under section 36 to become involved in the content of their Internet services. In that decision, the Commission gave the example of “creating the services home page and selecting links to other websites” as the types of involvement contemplated.<sup>35</sup> Presumably, this decision also enabled carriers to operate email services and provide customer support online. Consistent with our interpretation above, these decisions allowed carrier involvement to *provide* services online, not to block them. Additionally, as the next examples show, the permission granted in 99-4 was clearly not unlimited.
81. In 2006, the Commission responded to an application filed on behalf of Richard Warman, requesting that the Commission allow ISPs to block certain websites on the grounds that the impugned sites promulgated hate speech, incitement to genocide, and as such were contrary to the *Criminal Code*. Similar to the instant case, Mr. Warman also argued that these websites constituted “a gross violation of his privacy” and that they must be blocked in order “to prevent the ever increasing possibility of personal harm to himself and the community at large”.<sup>36</sup>
82. In its response to this request, the Commission recognized “that the Application raises extremely serious issues”.<sup>37</sup> Yet it also noted that “it is a creature of statute and can only

<sup>33</sup> This has, to our knowledge, been the case, except where such permission is expressly connected to a provision in the statute that permits blocking, such as nuisance calls. See, for instance, Compliance and Enforcement and Telecom Regulatory Policy CRTC 2016-442, 7 November 2016. Available at: <https://crtc.gc.ca/eng/archive/2016/2016-442.htm>

<sup>34</sup> Telecom Decision CRTC 97-2, February 5, 1997. Available at: <https://crtc.gc.ca/eng/archive/1997/DT97-2.HTM>

<sup>35</sup> Telecom Decision CRTC 99-4, March 31, 1999. Available at: <https://crtc.gc.ca/eng/archive/1999/dt99-4.htm>

<sup>36</sup> Telecom Commission Letter – 8622-P49-200610510, August 24, 2006. Available at: <https://crtc.gc.ca/eng/archive/2006/lt060824.htm>

<sup>37</sup> Ibid.

exercise the powers granted to it by Parliament.”<sup>38</sup> While recognizing that “the Application raises serious and fundamental issues of law and policy”,<sup>39</sup> it was nevertheless unequivocal in its decision to deny the request. Its central reason: “**section 36 of the [Telecommunications] Act would not allow it to require Canadian carriers to block the web sites**” in question (emphasis added).<sup>40</sup> This example, therefore, is consistent with the interpretation of section 36 set out above, namely that, when it has been engaged, section 36 has been used to allow carriers to be involved with *providing* content online, not with *blocking* access to it for end users. We are unaware of any other specific requests for the Commission to engage this power to block access to telecommunications on the basis of the content of those communications, save for the present application. We do note, and will now turn to, a relevant application submitted in 2016 to the Commission by the Public Interest Advocacy Centre regarding Québec Bill 74 and purported ISP blocking.<sup>41</sup>

83. In 2016, PIAC submitted an application to the Commission alleging that the proposed Québec bill 74, which would require ISPs operating in the province to block end-user access to gambling websites not authorized by the provincial government, is in contradiction with section 36 of the *Telecommunications Act*. Although the Commission ultimately suspended PIAC’s application pending the disposition of court challenges to certain provisions of the Québec bill, it nevertheless set out a preliminary view regarding its interpretation of section 36 of the *Telecommunications Act* in a letter of September 1, which it confirmed in its final decision on the matter.<sup>42</sup> In developing its interpretation, the Commission referred to its previous findings in the *Internet Traffic Management Practices (ITMP) Framework* (TRP CRTC 2009-657), as follows:

“In that decision [2009-657], the Commission found that an ITMP that led to the blocking of the delivery of content to an end-user would engage section 36 of the Act and, consequently, would require the prior approval of the Commission in order to be implemented.

The Commission also found that such an application where it would further the telecommunications policy objectives set out in section 7 of the Act. **At the time, the**

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> For PIAC’s application, see: <https://services.crtc.gc.ca/pub/instances-proceedings/Default-Default.aspx?lang=eng&YA=2016&S=C&PA=t&PT=pt1&PST=a#201607186> . We also note that the issue of blocking was raised in the proceeding which led to Telecom Regulatory Policy 2009-657, although not in the context of a request to block but rather in terms of the role of section 36 with respect to the use of internet traffic management practices.

<sup>42</sup> See: Telecom Decision CRTC 2016-479, Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act. December 9, 2016. Available at: [https://crtc.gc.ca/eng/archive/2016/2016-479.htm?\\_ga=2.219325982.684512933.1522291976-1855986362.1441292956](https://crtc.gc.ca/eng/archive/2016/2016-479.htm?_ga=2.219325982.684512933.1522291976-1855986362.1441292956)

**Commission considered that this would require exceptional circumstances”**  
(emphasis added).<sup>43</sup>

84. The Commission’s preliminary interpretation of section 36, as stated in that letter and confirmed in its later decision on the matter, reads as follows:

“Consistent with the above, the Commission is of **the preliminary view** 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. **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 under approval under the Act”** (emphasis added).<sup>44</sup>

85. The coalition’s application goes to great length to argue that its proposal would further the telecommunications policy objectives. For reasons we have attended to above in the context of sections 24 and 24.1 of the Act, these efforts are misguided and are ultimately too far removed from the intention, wording, and context of the Act to form a sufficient connection for the purpose of granting the relief requested. A similar analysis applies to the request for approval to institute site blocking under section 36. The request is mainly grounded in concerns related to copyright, not the telecommunications; the purported harms to the social and economic fabric of the country are exaggerated (as we also discuss in greater detail below); copyright infringement does not have an impact on the costs of telecommunications services, and thus is not relevant to the social and economic requirements of users of telecommunications services, and the proposed remedies may in fact increase costs for those users; and by introducing privacy as a possible reason to block sites, the coalition itself has opened the door to an expanding array of potential reasons that the blocking power may be engaged, infringing not only upon the Commission’s bounded jurisdiction but upon expression rights of Canadians.

86. Thus, in our view, approval under section 36 for ISPs to block websites on the basis of copyright infringement does not meet the test of contributing to the telecommunications policy objectives and must accordingly be rejected. Furthermore, while the McCarthy Opinion acknowledges the Commission’s stipulation that such approval would only be forthcoming in “exceptional circumstances”,<sup>45</sup> the coalition’s application itself ignores this

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<sup>43</sup> Telecom Commission Letter Addressed to Distribution List and Attorneys general, September 1, 2016. Available at: [https://crtc.gc.ca/eng/archive/2016/lt160901.htm?\\_ga=2.119367950.684512933.1522291976-1855986362.1441292956](https://crtc.gc.ca/eng/archive/2016/lt160901.htm?_ga=2.119367950.684512933.1522291976-1855986362.1441292956)

<sup>44</sup> Ibid.

<sup>45</sup> McCarthy Opinion, 2018, p. 22.

factor, instead arguing that “two principles emerge” from the *ITMP Framework* and the Québec Budget Act/Gambling issue:

“First, the Commission will consider whether to grant approval under section 36 based on whether the measure approved “would further the telecommunications policy objectives set out in section 7 of the Act”. Second, the Commission considers that it has the primary mandate to consider whether a service provider can disable access to a site and that its approval is required regardless of other legal or juridical requirements.”<sup>46</sup>

87. As well as failing to make the case that the proposed regime would contribute materially to the telecommunications policy objectives, the coalition has not demonstrated that there are exceptional circumstances that would merit the establishment of website blocking as it requests. Despite claims that Canada’s creative sector “will be doomed to fail” if the Commission doesn’t implement site blocking on the basis of copyright infringement, the evidence suggests that creative industries in Canada are fairing well, as we show below.
88. In light of the above, claims that the coalition’s proposal does not run afoul of Canadian network neutrality law, policy, and regulation – which have section 36 of the *Act* at their centre – ring hollow. Despite its pledge of rhetorical fealty to the principle of network neutrality or common carriage, this application must be seen as just another attempt in what is proving to be a long pattern of opposition by vertically integrated carriers to public interest regulation.
89. Just as Parliament rejected the idea that ISPs should act as gatekeepers within the copyright framework in 2012, so too have the Commission and the courts rejected the idea time and again that the Commission should harness common carriers to promote and protect the “Canadian Broadcasting System.” The ISP Reference case in 2012 and the Mobile TV decision in 2015, and upheld by the Federal Court of Appeal a year later, are two such cases. Similar efforts to do much the same thing by zero-rating Canadian content so that it does not count against people’s wireless and internet data-caps in order to give Canadian content an advantage over foreign media and entertainment services were also rejected in a landmark ruling by the Commission early last year—a decision that fortified common carriage/net neutrality in the meantime.
90. Fairplay’s proposal for a new website blocking scheme under the authority of the CRTC is just the latest in a protracted series of efforts to kill common carriage. On at least **eight** recent occasions many of the same members of the Fairplay coalition have tried to chip away at, or eliminate altogether, the idea that those who own the networks that people’s everyday lives, the economy, government and society rely on should not control or influence the meaning of the content and communications running through them: 1. the Bell Mobile TV case; 2. Vidéotron’s Unlimited Music case; and 3. the zero-rating

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<sup>46</sup> Fairplay application, 2018, para. 92.

proceeding—all before the CRTC. The zero-rating proceeding ended up in a landmark ruling that bolstered common carriage/network neutrality in Canada. However, to get there the Commission had to push aside Bell’s full court push to have it accept that exempting Canadian television services from customers’ data caps would be good for the “Canadian Television System”. Quebecor said much the same thing. The CMPA was emphatic that lifting data caps would be a boon for Canadian television. The CBC was in favour of zero-rating Canadian content as well. Rogers, to its credit, broke ranks with its peers in that case but rejoined the flock by backing Fairplay’s website blocking proposal.

91. The same swirling constellation of common interests also pressed their case before the Heritage Committee’s review of the state of local media, Heritage Minister Melanie Joly in the context of the Canadian Culture in a Digital Age policy-framework setting exercise; 6. They have banded together to pay economists and that usual stable of industry consultants to write reports in favour of such propositions, and to deride common carriage as a fetishistic alter upon which media jobs and Canadian culture are being sacrificed (the Miller and Nordicity reports). 7. Bell and Rogers’ call to block virtual private networks (VPNs) as a means to protect and preserve the valuable rights that they have acquired to distribute American programming in Canada, and to supposedly level the playing field between them and the deep-pocketed US services increasingly competing with them for rights and eyeballs in the Canadian television market. In 2015, Rogers executive David Purdy [reportedly](#) called for VPNs to be shut down VPNs, a call also echoed by Bell executive Mary Ann Turcke who targeted the of VPN to get access U.S. version of Netflix. As she told [an industry conference](#),

“It has to become socially unacceptable to admit to another human being that you are VPNing into U.S. Netflix. Like throwing garbage out your car window – you just don’t do it. We have to . . . tell people they are stealing. When we were young and made the error of swiping candy bars at the checkout of the grocery store, what did our parents do? They marched us back in, humiliated us, told us to apologize to the nice lady and likely scolded us on the way home.”

92. They brought at similar message to a committee on international trade last fall, and again to last month’s Parliamentary Committee on Access to Information, and Ethics.
93. Common carriage regulation is vital to constraining these carrier/BDU/ISP/broadcasters’ ability to exert control over communications in a way that serves their own private interest at the expense of the public, and here, as in the past, the Commission must act to uphold it.

### **Policy Direction**

94. Section 47 of the *Telecommunications Act* requires that the Commission exercise its powers and perform its duties “in accordance with any orders made by the Governor in Council

under section 8". In our view, the coalition's proposal is inconsistent with the 2006 Policy Direction.<sup>47</sup> Specifically, the relevant provision of the Direction read as follows:

the Commission should

(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

95. It is impossible to discern whether the coalition's proposal will be efficient, since no technical particulars have been submitted with respect to the workings of the proposed blocking mechanisms. However, submissions to this proceeding by the Internet Society and CIRA have identified significant deficiencies in known website blocking measures. As we detail further below, experience from other jurisdictions strongly suggests that website blocking measures are inefficient at achieving their stated purpose.
96. Furthermore, the fact that all Canadian ISPs would be required by this proposal to adopt measures to institute site blocking is highly intrusive in market forces, as ISPs, from the largest, national carriers, down to local or regional operations, would be required to adopt mandated technologies and business practices unrelated to their core commercial concerns. Considering also the tenuous connection between the coalition's request and the telecommunications policy objectives, we consider that the proposed regime does not meet the test for efficiency, proportionality, and minimal intrusiveness set out in the Policy Direction, and accordingly must be rejected.

#### **A methodological critique of Lobbyonomics.**

97. Even if it were within the Commission's jurisdiction to grant the coalition's request, the evidence presented would be insufficient to justify the establishment of such a radical and far reaching proposal. In the following section, we analyse the evidence presented by the coalition in support of its claims that copyright infringement will inevitably cause the Canadian creative sector to fail, and find it sorely lacking. In contrast to the exaggerated claims supporting the notion that Canadian culture is on life support, we present reliable data showing that it is in fact fairing well by any measure.
98. Global advertising for pirate sites was \$227 million in 2013, according to a report by Media Link/Digital Citizens Alliance cited by the coalition's application (para 31).<sup>48</sup> The figure,

<sup>47</sup> Order issuing a direction to the CRTC on implementing the Canadian telecommunications policy objectives, SOR/2006-355. Available at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/page-1.html#h-1>

<sup>48</sup> Digital Citizens Alliance (Feb 2014). Good money gone bad, A Report on the Profitability of Ad-Supported Content Theft, <http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>

however, is suspect. For one, its estimate that top-tier infringing sites like Pirate Bay were bringing in \$6 million per year is close to the figure that the Motion Picture Association of America (MPAA) touted at court hearings in the Pirate Bay case in Sweden, i.e. 35 million krona (~\$5.2 million USD, 2010 value). However, in that case, the court settled on a much lower figure presented in the police investigators report: 1.2 million krona (~\$169 thousand USD, 2010 value).<sup>49</sup> The Media Link/Digital Citizens Alliance builds its estimate for what *all* top tier pirate sites obtained in advertising revenue in 2013 off of the much higher MPAA figure that the Swedish court had rejected rather than the one that it accepted.

99. Second, the Media Link/Digital Citizens Alliance report has been superseded by a newer 2017 report, *Measuring Digital Advertising Revenue to Infringing Sites*, by the Trustworthy Accountability Group (TAG)—a trade association comprising a who’s who of the world’s biggest advertising, media and Internet companies.<sup>50</sup> The TAG report claims that pirate sites brought in \$111 million in 2016<sup>51</sup>—less than half the figure that the coalition’s application cites.
100. Yet, even this lower figure raises questions given that it is based on estimates for top-tier piracy sites’ advertising revenues that are based on cost-per-thousand (CPM) rates that appear exceedingly high. Indeed, the TAG report puts advertising CPM for non-premium and premium ads at \$2.50 and \$5, respectively. The Citizens Digital Alliance, in contrast, had used a standard figure of 0.30 cents for both kinds of ads under the assumption that most of the “premium ads” put on pirate sites end up in the bargain bin.<sup>52</sup> It should also be noted that the auditing firm that wrote the report, ErnestYoung, makes a disclaimer that they produced the report based on values given to them, and that values themselves were not audited or verified.
101. However, it is also the case that even if the figures are close to being correct, they account for a tiny sliver of total global advertising revenue. Total worldwide advertising revenue across all media in 2016 was \$462.6 billion. In other words, the amount of

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<sup>49</sup> Elert, N. Henrekson, M. & Wernberg, J. (2016). Two sides to the Evasion: the Pirate Bay and Interdependencies of Evasive Entrepreneurship. Research institute of Industrial Economics, p. 15, fn. 5. <http://www.ifn.se/wfiles/wp/Wp1103.pdf> (Subsequently published in the *Journal of Entrepreneurship and Public Policy*, 5[2]).

<sup>50</sup> The Trustworthy Accountability Group members include NBCUniversal, Disney, the Wall Street Journal, Facebook, Time Warner Cable, Colgate-Palmolive, Omnicom Media Group, the American Association of Advertising Agencies, Association of National Advertisers, Fox, Unilever, Google, GroupM, Procter & Gamble, the Interactive Advertising Bureau, Publicis Groupe, McDonald’s USA, PG Mediabrands, JPMorgan Chase, and Warner Bros, to name some of the most prominent. See Trustworth Accountability Group (n.d), *About Us*.

<sup>51</sup> Trustworthy Accountability Group (2017). Measuring digital advertising revenue to infringing sites, p. 3. <https://www.tagtoday.net/hubfs/Measuring%20digital%20advertising%20revenue%20to%20infringing%20sites.pdf>

<sup>52</sup> Pirate sites generate \$111 million in advertising revenue per year. *TorrentFreak* (Oct 15, 2017). <https://torrentfreak.com/pirate-sites-generate-111-million-in-ad-revenue-a-year-171005/>

advertising attributable to piracy sites being claimed in the two reports accounts for between .02% and .05%, respectively, of total worldwide advertising revenue.<sup>53</sup>

102. Similar questions arise with respect to claims that the coalition’s application makes about the impact of piracy on the film and music industries. Citing a report from Frontier Economics (2016), for example, the coalition claims that the total “commercial value of digital piracy of film alone (excluding TV) is well over 50 times that amount [i.e. the \$227 million in lost advertising revenue claimed by the Media Link/Digital Citizen Alliance report], or approximately \$160 billion.”<sup>54</sup> It adds a further sense of urgency to the problem by observing that home video revenue dropped “by more than 20% between 2005 and 2010 after having increased steadily until then.”<sup>55</sup> Furthermore, it observes that even though box office revenues “have remained relatively constant during the same period,”<sup>56</sup> they *should have* increased based on trends in the decade before 2002. Why we should take events from the 1990s as a measure of what should have happened after 2002, Frontier Economics does not say, but it is emphatic in the conclusions it draws: “BitTorrent [i]s responsible for these negative developments.”<sup>57</sup> This, we submit, is a classic case of the *post hoc ergo propter hoc* logical fallacy.
103. Crucially, Frontier Economics’ numbers seem improbable. For one, the \$160 billion figure it cites is nearly *twice* the value of worldwide film revenues from all release windows *combined*: i.e. box office, DVD/Blue-Ray sales/rentals, pay TV, VOD, SVOD and TVOD. Moreover, as Figure 1 below shows, revenue across all release windows rose considerably from roughly \$50 billion at the turn-of-the-21<sup>st</sup> Century to \$89 billion last year. The idea that the formal film market constitutes roughly half the value of the pirate film market does not seem credible.

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<sup>53</sup> PriceWaterhouseCoopers (2017). *Global Entertainment and Media Outlook: 2017-2021*. New York: Author (subscription needed).

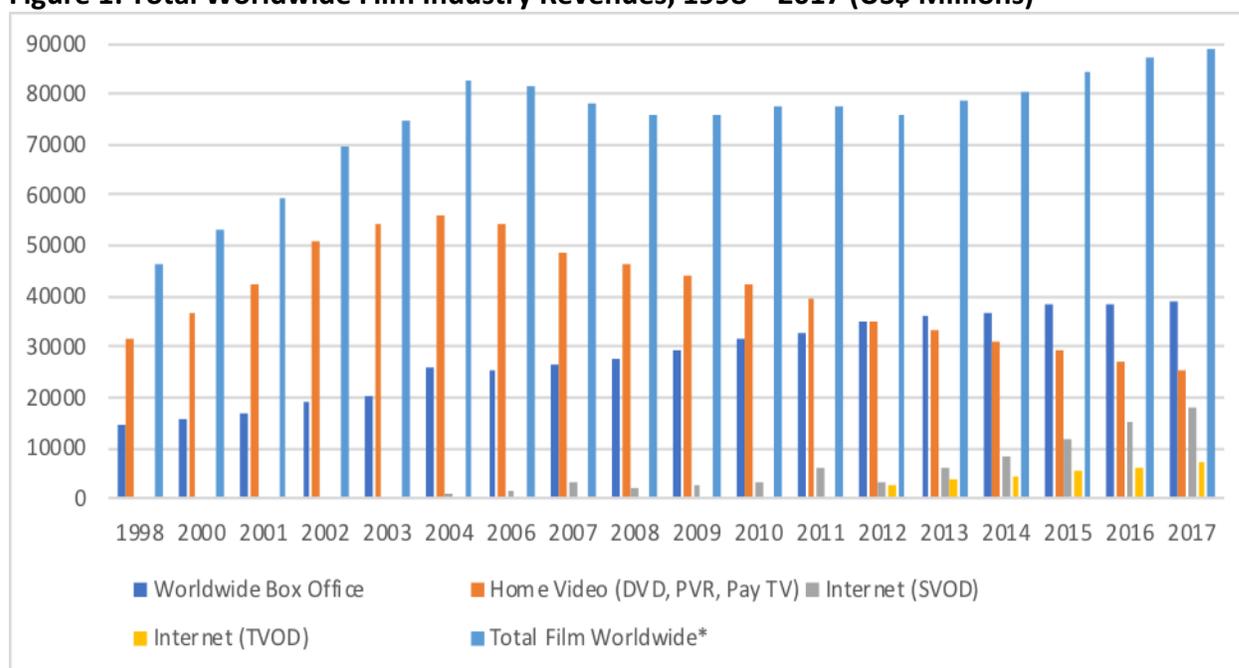
<sup>54</sup> Fairplay (2018), para 57 citing Frontier Economics (2016). *The economic impacts of counterfeiting and piracy: Report prepared for BASCAP and INTA*. Paris: International Chamber of Commerce. <https://cdn.iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>

<sup>55</sup> Frontier Economics (2016), p. 24.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

**Figure 1: Total Worldwide Film Industry Revenues, 1998 – 2017 (US\$ Millions)<sup>58</sup>**



104. Frontier and Fairplay cherry pick from the windows that suit their purpose—namely those where revenues are in decline or staying flat: home video and box office—and ignore those that do not fit their case. For example, the statement about declining home video revenue is, indeed, true, as Figure 1 shows. The claim about box office revenue, however, is not. Box office revenue has actually grown significantly from \$26.2 billion to \$38.9 billion from 2007 to 2017. Domestic North American box office revenues have been sluggish, but they have risen, not fallen. The international box office, in contrast, has soared. Revenues for TVOD, SVOD and streaming segments are also growing very fast, having risen from \$6.3 billion in 2012 to \$24.7 billion last year. Revenue for the film industry overall is at an all-time high at \$88.9 billion last year.

105. The methodology the report uses to arrive at the alleged loss of \$160 billion to the film industry due to piracy is also unrealistic. For one, it assumes that watching a pirated movie offers a similar experience to watching a DVD or downloaded/streamed movie at home or as a substitute for visiting the cinema. The authors then construct a weighted average price that people would have paid for each film if they were not able to watch it for free: \$3.35 per movie. They multiply this figure by an estimated 47.8 billion illegal movie downloads in 2015, which then leads them to report: “a value of pirated movies of about \$160 Billion.”<sup>59</sup> As mentioned earlier, however, given that the result is nearly twice the worldwide revenue for all movie release windows, it is hard to believe. The assumption that people would have

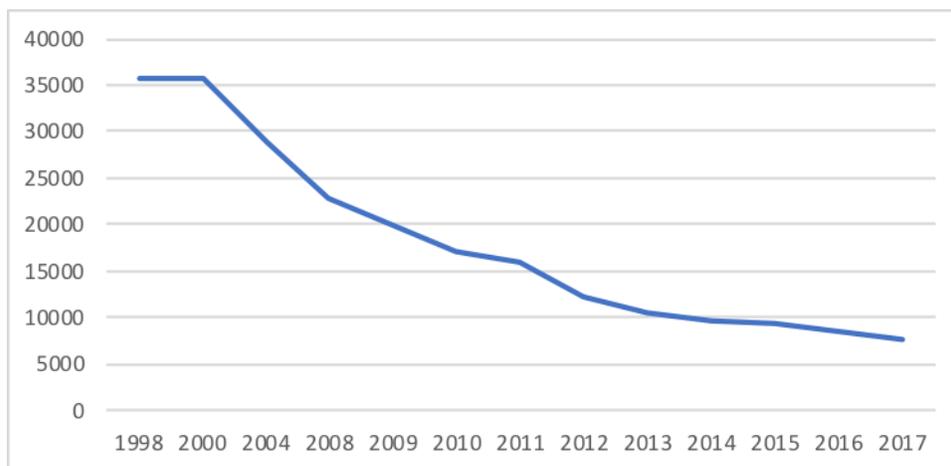
<sup>58</sup> Sources: Motion Picture Association (2017). Theatrical Market Statistics for US/Canada and International box office revenues (plus earlier years [https://www.mpa.org/wp-content/uploads/2017/03/MPAA-Theatrical-Market-Statistics-2016\\_Final.pdf](https://www.mpa.org/wp-content/uploads/2017/03/MPAA-Theatrical-Market-Statistics-2016_Final.pdf)); PriceWaterhouseCoopers (2017). *Global Entertainment and Media Outlook, 2017 - 2021* (plus previous years; e.g. 2012, 2010, 2009, 2003) for other categories.

<sup>59</sup> Frontier Economics (2016), p. 27 and Annex A.

otherwise paid \$3.35 for each film pirated if were not available further strains credulity, for reasons that will be explored further below.

106. Much the same critique of Frontier Economics' findings for the movie industry also apply to its analysis of the effects of copyright infringement on the music industry. True to form, Frontier Economics selectively and misleadingly chooses the "recorded music" segment of the music industry to draw conclusions about the music industry as a whole, stating that "the global *recorded music industry* has not changed significantly between our last report in 2011."<sup>60</sup> Where the evidence points in the opposite direction, as it does, for example, in terms of how the increased availability and adoption of commercial streaming music services in the US and Germany have led to a significant drop in people pirating music, the consultant begrudgingly takes note but does not follow through on what this might mean for its own analysis.
107. If we follow Frontier Economics and focus solely on the "recorded music" segment of the music industry, its portrait of a dire situation is accurate. Figure 2 illustrates the point, showing that recorded music revenues have plunged over the last decade-and-a-half. The pace of losses has slowed in recent years, but the direction is still down.

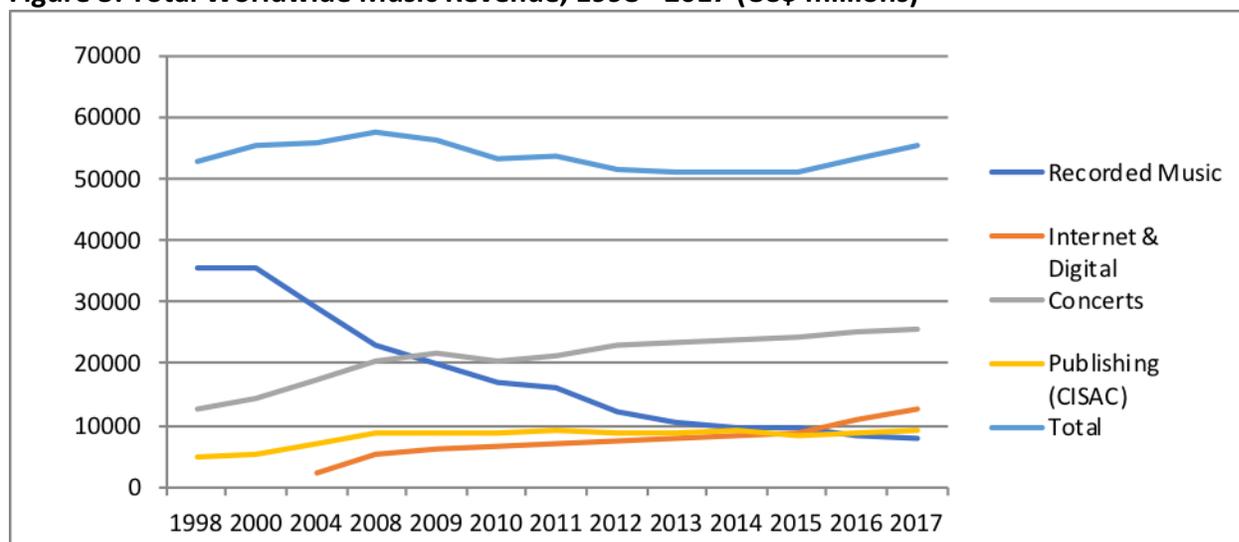
**Figure 2: Worldwide Recorded Music Revenue, 1998-2017 (Millions USD)**



108. Open the lens wider, however, to consider all segments of the music industry, and the portrait of doom and gloom that so often accompanies the discussion of music and piracy takes on a wholly different look. In fact, combine recorded music, publishing, digital/internet, and concerts all together and total global music revenues rose from \$51.3 billion in 2012 to \$55.2 billion last year. Figure 3, below, illustrates the point.

<sup>60</sup> Emphasis added. Frontier Economics (2017), p. 28.

**Figure 3: Total Worldwide Music Revenue, 1998 - 2017 (US\$ millions)<sup>61</sup>**



109. Frontier Economics' uniformly bleak view is belied by the recorded music industries' own reports as well. Take the International Federation of the Phonographic Industry's (IFPI) *Global Music Report*, for example. It observes that, "in 2016, the global recorded music market grew by 5.9%, the fastest rate of growth since IFPI began tracking the market in 1997. This was a second consecutive year of global growth for the industry."<sup>62</sup> Indeed, despite a few minor set-backs along the way, worldwide revenues for recorded music (i.e. physical copies, digital and over the internet) have trended upwards for the past five years.

110. The weakness of the methods used by Frontier Economics are also apparent when we think about its dubious assumption that all shows and films downloaded are equal to shows and movies actually watched. For one, that assumption neglects differences in quality. Another report from the Information Technology and Innovation Fund (ITIF) that the Fairplay application also relies on to bolster its case inadvertently makes the point when it introduces a screenshot from the piracy site "ExtraTorrent" to illustrate how easy it is to obtain popular movies from such sites, with the following titles in view: *Star Trek Beyond*, *Suicide Squad*, and *Mechanic 2: Resurrection*. Yet, a closer look reveals that these pirate copies are unlikely to be substitutes for the real thing because, amongst other things, as the captions for the titles show, the recordings have been done with hand held cameras. Uploaders "have tried to remove the horrible crackles, amp, hissing," the Portuguese

<sup>61</sup> Sources: Recorded Music and Internet/Digital from PriceWaterhouseCoopers (2017), *Global Entertainment and Media Outlook, 2017 - 2021* (plus previous years; e.g. 2012, 2010, 2003). Concert revenue from 2012 onward is from the 2017 version of the PWC GEMO. Prior to that, the report combines Concert and Music Festivals together. Based on overlaps in the years covered between earlier and newer versions of the report, we can see that the more narrowly defined new "Global Live Music" category is about 82.8% of the previous category, which was then used to try harmonize the run of data before and after 2012. Revenue from publishing rights is from CISAC, the International Confederation of Societies of Authors and Composers as cited in each cell.

<sup>62</sup> IFPI (2017). *Global Music Report 2017*, p.10. <http://www.ifpi.org/downloads/GMR2017.pdf>

subtitles might be annoying but the movie is watchable, and so on.<sup>63</sup> Such low quality fare is unlikely to be a big draw for those who would otherwise enjoy the real thing in a proper movie theater or from a legitimate video service.

111. The assumption that pirated content is a perfect substitute for the real thing also ignores other potential explanations about the impact of the former on the latter. For example, an independent academic study commissioned by Industry Canada in 2007 showed that pirated content can stimulate consumption that would not have otherwise taken place. In other words, it could have a “try before you buy,” or “sampling effect,” as the report’s authors Birgitte Andersen & Marion Frenz put it.<sup>64</sup> A more recent survey of the research finds that clicks on pirated links can be positively related to greater use of legal sites. It also finds that the biggest users of pirate sites also tend to be amongst the biggest purchasers of legitimate copies.<sup>65</sup> The assumption that everything downloaded from a piracy site is also viewed rather than left sitting idle on a hard-drive is also questionable.<sup>66</sup>
112. While these are our own observations about the quality of Frontier Economics’ analysis, below is what the independent Hargreaves report, *Review of Intellectual Property and Economic Growth*, commissioned by the UK Government, had to say about an earlier version of Frontier’s work for the Business Action to Stop Counterfeiting and Piracy (BSCAP): “We have examined this frequently cited study and found a number of methodological limitations, which together indicate likely overstatement of the extent and impact of piracy.<sup>67</sup> The Hargreaves Report listed some of the shortcomings in this and similar studies:
- the uncertain and disputed nature of the preponderance of data makes it difficult to reach confident conclusions about the impact of copyright piracy on growth;
  - the assumption that all illegal downloads are lost sales is questionable because the user may not have paid a higher price for a legal copy absent of cheap or free illegal versions;
  - money not spent on legal copies is not lost to the economy but may be spent elsewhere. While this is cold comfort for those directly affected, it cautions us about drawing inferences about economy-wide effects on the basis of available research (as the coalition’s application does);

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<sup>63</sup> ITIF (2016). *How Website Blocking Is Curbing Digital Piracy Without “Breaking the Internet,”* p. 4. <http://www2.itif.org/2016-website-blocking.pdf>

<sup>64</sup> Andersen, B. & Frenz, M. (2008). The Impact of Music Downloads and P2P Filesharing on the Purchase of Music: A Study for Industry in Canada. Ottawa: Industry Canada. <http://www.dime-eu.org/files/active/0/AndersenFrenzPAPER.pdf>. The paper was subsequently published in a peer reviewed journal in 2010: Andersen, B., M. Frenz. (2010). Don’t blame the P2P file-sharers: the impact of free music downloads on the purchase of music CDs in Canada. *Journal of Evolutionary Economics*, 20, 715-740.

<sup>65</sup> Aguiar L. & B. Martens (2013). Digital Music Consumption on the Internet: Evidence from Clickstream Data, *JRC Technical Reports, Institute for Prospective Technological Studies Digital Economy*. Working Paper 2013/04, Joint Research Centre, Brussels: European Commission: <https://core.ac.uk/download/pdf/82399540.pdf>

<sup>66</sup> Frontier Economics (2016), p. 30.

<sup>67</sup> Hargreaves, I. (2011). *Review of Intellectual Property and Economic Growth*, p. 74. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf)

- in line with the independent study for Industry Canada referred to earlier, it also found that pirate copies can prompt purchases of the real thing, concert tickets or other merchandise.<sup>68</sup>

113. The review concludes by stating that “we have not found either a figure for the prevalence and impact of piracy worldwide or for the UK in which we can place our confidence. Published estimates of piracy and infringement have also been questioned by the US Government Accountability Office.”<sup>69</sup> Given the poor quality of the evidence in this area, the report advises us to “be wary of expecting tougher enforcement alone to solve the problem of copyright infringement.”<sup>70</sup> Lastly, it offered a scathing indictment of the conditions that give rise to this state of affairs:

. . . Much of the data needed to develop empirical evidence on copyright . . . is privately held. It enters the public domain chiefly in the form of “evidence” supporting the arguments of lobbyists (“lobbynamics”) rather than as independently verified research conclusions.<sup>71</sup>

114. Another review conducted under the auspices of the World Intellectual Property Organization reached similar conclusions. It also singled out BASCAP and Frontier Economics for the poor quality of their research and evidence.<sup>72</sup> Pointing to a study conducted by the latter for the former, the Clift Advisory Committee criticized it for being “based on a number of debateable assumptions . . . no original data collection . . . [and] the generation of new assumptions, of inherently untestable validity.”<sup>73</sup> None of this is to say that there is no piracy problem—there is—but rather that getting a proper sense of its scale is an elusive task, and made more difficult by the hired research that floods “the marketplace of ideas” in debates over copyright policy, where clients’ interests tend to outstrip the pursuit of genuine disinterested understanding by a long stretch. In a more charitable vein, independent scholars state that the available evidence is, at best, “mixed and inconclusive.”<sup>74</sup>

115. Similar issues beset a recent [Circum Network Inc \(2016\)](#) report prepared for the Department of Canadian Heritage, “Examination of the ‘follow-the-money’ approach to copyright piracy reduction,”<sup>75</sup> and which the coalition also calls on for support. The review notes that beyond relying on fourteen interviews, its methodology used an “online

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<sup>68</sup> Hargreaves (2011), p. 73.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid., p. 6.

<sup>71</sup> Ibid., p. 18.

<sup>72</sup> [Clift, C. and Advisory Committee on Enforcement](#) (2011). *A review of statistical information on counterfeiting and piracy*. Geneva, Switzerland: World Intellectual Property Organization.

<sup>73</sup> [Clift, C. and Advisory Committee on Enforcement](#) (2011), para 54.

<sup>74</sup> Mansell, R. & Steinmueller, W. E. (2013). Copyright infringement online: the case of the Digital Economy Act judicial review in the United Kingdom. *New Media and Society*, 15(8). pp. 1312-1328.

<sup>75</sup> Circum Network Inc (2016). Examination of the “follow-the-money” approach to copyright piracy reduction: Final Report prepared for the Department of Canadian Heritage. <https://www.canada.ca/en/canadian-heritage/services/copyright-policy-publications/follow-money-piracy.html>.

search for additional documentation that was *not advocacy-related*.<sup>76</sup> That declaration, however, is belied by the fact that its review is mostly a collection of claims and counter-claims made by trade associations and industry players, for example: Digital Citizens Alliance, Google, IFPI, INCOPRO, the MPAA.

116. It also relies extensively on industry sponsored research without either acknowledging it as such, or even citing it properly. For example, a 2014 study on how search engine results can influence piracy levels is included amongst the supposedly non-advocacy based research. But the study itself notes on the front page that it was funded by the MPAA—hardly an independent source. Circum also cites three other papers on search engines and piracy and related topics by Mike Weatherley as part of what is, more or less, an uncritical survey of what the advertising and media industries are doing to combat piracy. The incomplete citations for these papers in Circum’s review gives pause for reflection on the quality of its effort from the beginning, but scratch the surface and one finds that these papers were not written by independent researchers at all, but by an MP in the UK government and Intellectual Property advisor to the then Prime Minister David Cameron. And bearing directly on the independent status of the effort—or the lack thereof—is the fact that Weatherly is “formerly the Vice President (Europe) for the Motion Picture Licensing Company.” The MPLC describes itself as having “more than 500,000 licencees that represents more than 900 rights holders worldwide, from major Hollywood studios to independent and local producers . . . . MPLC works closely with a variety of institutions and anti-piracy groups and the company is dedicated to the education of organisations, facilities and companies about copyright law and compliance.”<sup>77</sup> The MPLC also works closely with the MPAA and the UK-based Federation Against Copyright Theft (FACT). In fact, the papers from Weatherly that Circum cites were highlighted by the MPAA as it ramped up its campaign to persuade governments to double-down on efforts to have search engines suppress pirate sites from appearing in their results.<sup>78</sup> In short, while Circum explicitly sets itself up as reviewing state-of-the-art and independent research, it offers little more than another loop in the circuit of lobbyonomics.

117. The coalition also offers a few other studies to shore up the base of the argument that website blocking is effective. One such study is a 2016 paper by Danaher, Smith and Telang, “Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer

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<sup>76</sup> Emphasis added. [Circum Network Inc \(2016\)](#).

<sup>77</sup> Motion Picture Licensing Company (n.d). Welcome to the Motion Picture Licensing Company. <http://www.themple.co.uk/>

<sup>78</sup> Marcich, C. (May 29, 2014). UK’s MP Mike Weatherley urges search engines to take more responsibility for curbing piracy. *MPAA Blog*. <https://www.mpa.org/uks-mp-mike-weatherley-urges-search-engines-to-take-more-responsibility-for-curbing-piracy/> and McCoy, S. (Sept. 3, 2014). Endorsing Mike Weatherley’s Call for Search Engines to play a bigger role in supporting a safe and secure online environment. *MPAA Blog*. <https://www.mpa.org/endorsing-mike-weatherley-call-for-search-engines-to-play-a-bigger-role-in-supporting-a-safe-and-secure-online-environment/#.WqsKR5PwYfE>

Behavior.”<sup>79</sup> The coalition invokes the study a few times to the effect that website blocking has “been successful in reducing rates of piracy and increasing the rate at which customers purchase creative content legally.”<sup>80</sup> Circum’s review for Heritage Canada does the same. The Danaher et. al. paper also serves as the launch pad for the ITIF review of research that it claims highlights “how website blocking is curbing digital piracy without breaking the internet.”<sup>81</sup> ITIF also holds up the 2016 study alongside “another recent survey of the literature [that] concludes that the vast majority (25 of 29 empirical papers) affirm that piracy harms content creators.”<sup>82</sup> The upshot of these studies is that website blocking is effective and serves creators well, all the while, at least from ITIF’s view, without “breaking the internet.”

118. Once again, however, scratch the surface of the 2016 paper by Danaher et. al. and it is less than what it is held up to be. For one, it generalizes its findings for the UK to the whole world. Given the considerable variance across copyright regimes, however, such a generalization is questionable. Second, and of great importance with respect to the Fairplay version of website blocking being advocated for, Danaher et. al. are at least crystal clear that the UK website blocking framework is explicitly anchored in the UK’s copyright law, which only authorizes website blocking on the basis of a court order and oversight. Both measures are absent from the coalition’s proposal. Third, like so much of the research drawn on to advance the case for website blocking and other stringent copyright enforcement measures, the “Website Blocking Revisited” study is not the product of self-generated, independent scholarly research but, as its front page acknowledges, a paper funded by the MPAA.

119. Fourth, the UK Intellectual Property Office challenged an earlier iteration of this study that found a positive impact of the three strikes measures in France on the sales of music on iTunes in the country. According to the Intellectual Property Office, however, “there are a number of methodological limitations with the study which prompt more questions than answers.”<sup>83</sup> Another study by French academic researchers concurred. This research also went much further:

. . . Our econometric results indicate that the law has no substantial deterrent effect. In addition, we find evidence that individuals who are better informed

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<sup>79</sup> Danaher, B., Smith, M.D., Telang, R. (2016). Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior. <https://techpolicyinstitute.org/wp-content/uploads/2016/04/UK-Blocking-2-0-2016-04-06-mds.pdf>

<sup>80</sup> Fairplay (2018), paras 15 and 18, for example.

<sup>81</sup> ITIF (2016), p. 1.

<sup>82</sup> Ibid., p. 3.

<sup>83</sup> Intellectual Property Office (2015). International Comparison of Approaches to Online Copyright Infringement: Final Report, p. 52. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/549462/International\\_Comparison\\_of\\_Approaches\\_to\\_Online\\_Copyright\\_Infringement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/549462/International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf)

about the law and piracy alternatives substitute away from monitored P2P networks and illegally access content through unmonitored channels.<sup>84</sup>

120. Perhaps the most telling thing of all was the rebuff delivered by reality to the Danaher et. al. study when France abandoned its three-strikes regime—culminating in internet disconnection—in 2013. Leading up that, France’s culture minister at the time, Aurélie Filippetti, made it clear “the suspension of access to the Internet seems to me a disproportionate penalty for the purpose.”<sup>85</sup> The National Assembly voted to kill Hadopi altogether three years later.<sup>86</sup>
121. That the French copyright administrative tribunal, Hadopi, and the three-strikes policy specifically, had encountered severe headwinds since the outset, however, does not even register in the Danaher et. al. paper. Of particular importance to the coalition’s application given its attempt to sidestep the need for enabling legislation and court oversight, in 2009 the Conseil Constitutionnel said that the French legislature did not have the right to devolve controls on Internet access—e.g. the three-strikes regime—to an administrative authority (Hadopi) that would operate without judicial oversight because that would violate citizens’ communication rights under the *1789 Declaration of the Rights of Man* and presumptions of innocence.<sup>87</sup>
122. In sum, the copyright regime that Danaher et. al. find so effective was ultimately found by the French legislature, Constitutional Court and scholars to be ineffectual, costly, and an affront to citizens’ fundamental human rights. It may be coincidence, but the fact of the matter is, like so much of this group’s work, this paper by Danaher et. al was also funded by yet another industry trade group—the International Federation of Phonographic Industries. In addition, the authors thanked “the four major record labels for generously providing data to support this research.”<sup>88</sup> In short, the paper had all the characteristics of hired research that the Hargreaves and Clift Advisory Committee had recently chastised, but seemingly with little to no effect on these authors.
123. One final point on this score, recalling the “other survey” mentioned earlier that was cited by ITIF as demonstrating that the vast majority of research “affirms that piracy harms content creators,” and that website blocking is a good thing. As it turns out, that study was

<sup>84</sup> Arnold, M. Darmon, E. Dejean, S. & Penard, T. (2014). Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-Strike (Hadopi) Law, available at <http://ssrn.com/abstract=2380522>

<sup>85</sup> Manenti, B. (August 1, 2012). Aurélie Filippetti: "I will reduce the credits of the Hadopi," *L'Obs*. <https://o.nouvelobs.com/high-tech/20120801.OBS8587/aurelie-filippetti-je-vais-reduire-les-credits-de-l-hadopi.html>; BBC (July 10, 2013). France ends three-strikes internet piracy ban policy. <http://www.bbc.com/news/technology-23252515>

<sup>86</sup> TorrentFreak (May 2, 2016). National Assembly ‘kills’ French three-strikes anti piracy law. <https://torrentfreak.com/french-kill-three-strikes-anti-piracy-law-160502/>

<sup>87</sup> O’Brien, D. (July 10, 2009). France declares three strikes law unconstitutional. *Electronic Frontier Foundation*. <https://www.eff.org/deeplinks/2009/06/three-strikes-dead-in-france>

<sup>88</sup> Danaher, B, Smith, M.D., Telang, R. and Chen, S. (2013). The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France. *The Journal of Industrial Economics*. <https://pdfs.semanticscholar.org/615f/61aa93b96fca3fb6be3a0951954a93ffbb9b.pdf>

written by two of the three authors who wrote the 2016 paper that the ITIF, Fairplay and Circum hold in such high regard: Michael Smith and Rahul Telang. A closer look at the list of studies that Smith and Telang examine reveals that an astonishing number of the twenty-five papers that they argue offer empirical support for the proposition that “piracy hurts creators” were written by none other than themselves.<sup>89</sup>

124. All of this, reveals the great daisy chain of self-referentiality amongst a small, tight-knit circle of consultants, think tanks and trade associations who cite one another’s work approvingly, while being sure to maintain a thin veneer of separation to conceal their ties to one another. There is another facet to this phenomenon insofar that many of the same interests cross-referencing one another in this policy echo chamber have also been implacably hostile to net neutrality. This is the case of ITIF, the MPAA and RIAA who have consistently funded the researchers cited above, and other groups such as the Technology Policy Institute and Phoenix Centre of Advanced Legal and Economic Public Policy Studies. Each one of them has been showcasing the Danaher et. al. studies just reviewed, while several of them have participated in proceedings before the CRTC recently in support of Canadian ISPs’ efforts to dismantle or chip away at common carrier (net neutrality) principles.<sup>90</sup> The point is relevant because, in light of such realities, the assertion that the coalition’s’s proposed website blocking scheme is copacetic with net neutrality ring incredibly hollow.

### **Canadian media are booming and not in crisis**

125. The coalition’s application defines “Piracy” as 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.”<sup>91</sup> Given this definition, we focus on those sectors to determine whether or not the calamity facing them on account of rampant piracy is as the application and its backers say.

126. Earlier, we covered some of the data with respect to the situation globally for the film, music and advertising industries. The broad finding there was that the claims being made are badly flawed, often mistaken, and generally misleading. As we also showed, this is not a novel finding but one that systematic and independent reviews of the relevant literature in the field have made, especially in studies commissioned by industry and trade associations.

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<sup>89</sup> Smith & Telang (2012). *Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales*. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2132153](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132153)

<sup>90</sup> ITIF (2016); Smith, M. D. (April 14, 2016). *Website Blocking Revisited*. *Technology Policy Institute*, <https://techpolicyinstitute.org/2016/04/14/website-blocking-revisited/>; Beard, T. R. Ford, G.S. & Stern, M. (2017). *Phoenix Center Policy Paper No. 52 Fixing Safe Harbor: An Economic Analysis* <http://www.phoenix-center.org/pcpp/PCPP52Final.pdf>.

<sup>91</sup> Fairplay (2018), para 10.

127. The data and analysis that we present below on the evolution and current state of the TV, film, music and video gaming industries in Canada also paints a decidedly different portrait than the one presented in the coalition’s application, and the reports it cites. As we show, production in the TV and film industries in Canada is up, and in recent years, markedly so. In terms of revenue, we show that while the TV, film, music and video game industries have undergone remarkable—and, to be sure, often wrenching—changes over the past decade or so, there has been no collapse of revenues for each of these sectors or combined. In fact, revenues are generally on the rise.
128. The discrepancy between the “sky is falling” scenario cast by the coalition’s application versus what many participants in the TV, film, music and gaming industries are touting elsewhere is often jarring, so discordant are the two stories. Indeed, the most recent version of the *Profile 2017: Economic Report on the Screen-based Media Production Industry in Canada* co-produced by the Canadian Media Production Association and the Department of Canadian Heritage is brimming with superlatives as it describes the incredibly good fortunes of the TV and film industries in Canada in recent years. A few examples help to illustrate the point. The report opens with a graphic highlighting the situation, with the total volume of film and television production in Canada jumping to \$8.38 billion in 2016/17—an all-time high and up 24.3% over the year before. Full-time jobs are even more (27.3%), the contribution of TV and Film production soaring in lock-step (up 24%) and foreign investment also at never before seen heights at \$3.7 billion last year—an increase of 41%.<sup>92</sup>
129. Much of growth in the last year was due to a spike in the volume of foreign location production in Canada, and that in turn, is an offshoot of the rapid growth of internet-based TV services such as Netflix, Amazon and Hulu, in particular, vastly ramping up production for their own services. As a recent report by Nordicity (2018), *Digital Media at the Crossroads*, observes, their combined spending on production has shot upwards from \$4 billion (USD) in 2013, to \$10 billion in 2015 and roughly \$14 billion last year. As Nordicity also observes, a significant slice of that investment is being made in Canada.<sup>93</sup>
130. Again, the CMPA/Canadian Heritage report is telling about the increasing integration of Canada into the world media system on account of these significant developments. To take a few examples, international co-productions—long the cornerstone of media globalization—are on the rise, with deals, memoranda and \$503 million in spending between Canadian TV and film producers and 55 countries taking place in 2016.<sup>94</sup> There are also numerous examples of Canadian series and even TV formats being exported around the world, including *Orphan Black*, *Love It or List It*, *Frontier*, *Annedroids*, *Long Time Running*

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<sup>92</sup> CMPA/Heritage Canada (2018). *Profile 2017: Economic Report on the Screen-based Media Production Industry in Canada*, especially see pp. 1, 7 and 15. [http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/CMPA\\_2017\\_ENG\\_FEB\\_26.pdf](http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/CMPA_2017_ENG_FEB_26.pdf)

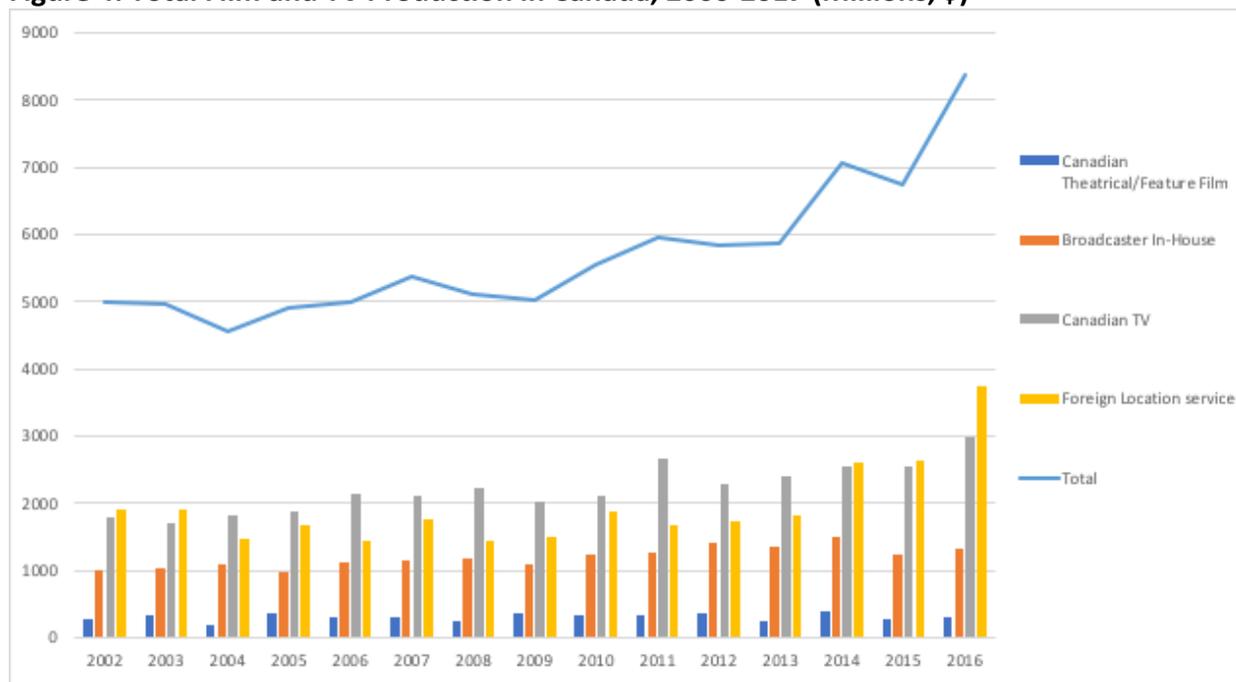
<sup>93</sup> Nordicity (2018). *The Digital Media Universe in Canada: Measuring the revenues, the audiences and the future prospects*, p. 31. <http://www.nordicity.com/media/201839ctgexyrdxr.pdf>

<sup>94</sup> CMPA/Heritage Canada (2018). *Profile 2017: Economic Report on the Screen-based Media Production Industry in Canada*, p. 7. [http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/CMPA\\_2017\\_ENG\\_FEB\\_26.pdf](http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/CMPA_2017_ENG_FEB_26.pdf)

and 19-2. Financiers are also loosening their clutch on the purse strings as these developments take hold and grow roots.<sup>95</sup> In other words, these developments do not appear to be one-offs, but part of a longer-term trend that has been building over the last several years.

131. A few glimpses of the data help to illustrate the point. Total investment in TV and film production in Canada reached record highs of \$8.4 billion in 2017—up from \$6.7 billion the year before and from \$5.8 in 2012. To put this another way, total investment rose nearly 25% in the latest year and 43% since 2012. Figure 4 below illustrates the trend.

**Figure 4: Total Film and TV Production in Canada, 2000-2017 (Millions, \$)<sup>96</sup>**



132. It is also instructive to compare and contrast this with investments by the Canadian TV and film groups who are leading the charge for a website blocking scheme to tamp out “flagrant piracy.” To put things charitably, in-house broadcast TV and film production investment by Canada’s television groups has held the line over the last decade; it has fallen by 6% since 2012—a year that we have chosen because it is when the *Copyright Act* that allegedly has caused so much mischief was adopted. Look beyond what one might think would otherwise be the engines of TV and film production in Canada, and the story is clear: times are good. To the extent that piracy is a problem, it is not killing the geese who are laying golden eggs in unprecedented quantity, and not just in BC, Ontario and Quebec, the CMPA/Heritage report observes, but from sea-to-sea-to-sea.

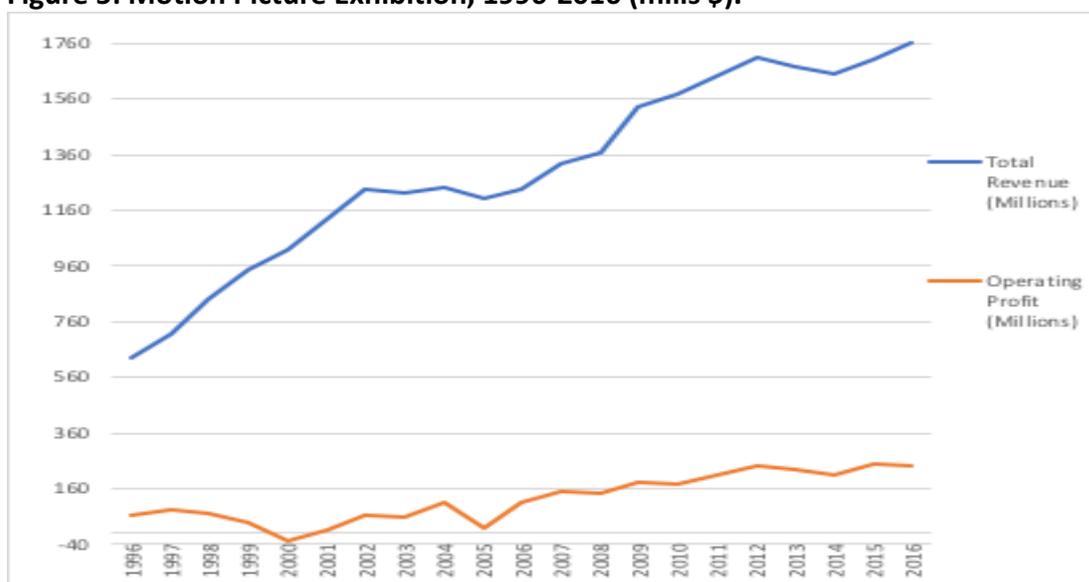
<sup>95</sup> CMPA/Heritage Canada (2018). p. 8.

<sup>96</sup> CMPA/Heritage Canada (2018). Economic Profile, Exhibit 1-2 Total volume of film and TV production in Canada; CMPA (2010). Economic Profile, Exhibit 1-1 Total volume of film and TV production in Canada.

133. Let us turn from the focus on making TV and film to the people and money spent on watching them. On the one hand, there is no doubt that movie theatre attendance has fallen over the long haul, from 125 million paid admissions in 2002, or four visits to the movie theatre per person in 2002, to 101.1 million tickets and 2.8 trips to the cinema in 2016. However, the decline has mostly abated in the past five years, with the number of tickets sold per capita staying relatively flat (i.e. 101-102 million tickets) and 2.8 to 3 trips to the movies per year per person. Given all of the other media and entertainment options available that have emerged, and the multiple new distribution windows within the film industry, this is to be expected. Whether or not this is a real problem turns on looking at the “big picture.”

134. Part of the “big picture” means examining trends on the basis of revenue and operating profits. Motion picture theatre revenue in 2016 was \$1,764.4 million—up from \$1,647 million two years earlier and by a third over the last decade. Operating profits have also recovered from a disastrous decade from the late 1990s until the mid-2000s when they gyrated between being in the red and single digit margins in the black. They have climbed steadily since from 9% in 2008 to the 13-15% range for the last five years.<sup>97</sup>

**Figure 5: Motion Picture Exhibition, 1996-2016 (mills \$).**



135. Figure 5 and the discussion above obviously identify some wrenching moments for the film theatre business, but this is hardly a compelling portrait of piracy-induced distress. It is possible, of course, that things may have been even better had piracy not existed, but that

<sup>97</sup> Statistics Canada. Table 501-0010 - Movie theatres and drive-ins, by summary characteristics, annual (1996/97-2003/4)—based on March-to-March calendar, but which is counted here as end of the previous year; Table 361-0012 Motion picture theatres, summary statistics (2005-2013); Table 361-0068, Motion picture theatres, summary statistics (2014, 2016); Table 361-0070, Motion picture theatres, theatre operations (2014, 2016); Table 361-0028, Motion picture theatres, operating expenses; Table 2 Profile of the motion picture theatre industry by province and territories, 2006 to 2008.

is a counter-factual hypothetical that we can never prove. It is just as likely, as well, as some of the literature we reviewed earlier concludes, that such practices serve to whet the appetite for the real deal.

136. Change our focus to TV and the story actually gets better. To be sure, however, and as with other media covered earlier (e.g. “home video” in film and “recorded music” in music—see above for the discussion of global trends and below for a discussion of the situation in Canada), we can point to *specific segments* of the TV landscape to paint a portrait of woes and punishing blows being dealt not just to the industry but to people who work in them. When it comes to TV, it is advertising-supported broadcast TV that plays this role.
137. Like other advertising dependent media, broadcast TV is in trouble, although once again the source of those woes is more complicated and multi-pronged than simplistic explanations that “blame the internet,” piracy, etc. would have. As with newspapers, the explanation involves a mixture of factors related to self-inflicted wounds arising from excessive consolidation, stagnating advertising across all media (and decline based on per capita and “real dollar” measures), and the fact that internet giants like Google and Facebook are far more efficient at doing what advertising-supported media like broadcast TV and newspapers used to do best: deliver audiences to advertisers.
138. Overall broadcast TV revenues in Canada, including the CBC and its annual public funding, slid from an all-time high in 2011 of \$3,501.7 million to \$2,883.9 million in 2016—nearly a 20% decline. Lay-offs and cut-backs are now a constant theme as well. Between 2012 and 2014, for instance, local broadcast TV news staff were cut by 4%.<sup>98</sup> In 2015, at least another 1,200 full-time television and radio jobs were cut: 460 at Bell, 439 at Rogers, 244 at the CBC, and 129 at CHCH.<sup>99</sup> And in 2016, Rogers cut at least 260 jobs at its television, radio and publishing divisions and Corus (Shaw) cut ten positions at Global News and another 70 at its community TV stations in Calgary, Edmonton and Vancouver. A recent study prepared for the Friends of Canadian Broadcasting and Unifor by Peter Miller estimates that if current policy and economic trends persist, up to half of the local TV

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<sup>98</sup> N. Newman et al. (2016). Digital News Report 2016, p. 80, [http://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Digital%2520News%2520Report%25202016.pdf?utm\\_medium=referral&utm\\_source=digitalnewsreport.org](http://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Digital%2520News%2520Report%25202016.pdf?utm_medium=referral&utm_source=digitalnewsreport.org)

<sup>99</sup> CBC News (2015). CBC Sheds More Than 140 Jobs in Local News, *CBC News*, <http://www.cbc.ca/news/entertainment/cbc-sheds-more-than-140-jobs-in-local-news-1.3010204>; J. Bradshaw (2015). CHCH’s Woes Sign of a Larger Crisis in Local Broadcasting, *The Globe and Mail*, <https://www.theglobeandmail.com/report-on-business/restructuring-of-hamiltons-chch-sign-of-larger-crisis-in-local-broadcasting/article27751584/>; C. Dobby (2016). Rogers Media to Cut 200 Jobs Across TV, Radio, Publishing Divisions, *The Globe and Mail*, <https://www.theglobeandmail.com/report-on-business/rogers-media-to-cut-200-jobs-across-tv-radio-publishing-divisions/article28371743/>; J. Bradshaw (2015). Bell Media to Cut 270 Jobs in Toronto, 110 in Montreal, *The Globe and Mail*, <https://www.theglobeandmail.com/report-on-business/bell-media-to-cut-jobs-in-toronto-montreal/article27130545/>.

stations in fifty-six small and mid-size cities—and up to 900 jobs—could be lost, gutting the core of local broadcasting and journalism, if it comes to pass.<sup>100</sup>

139. Yet, focusing in on broadcast TV, while undoubtedly still important, is akin to looking through the wrong end of the telescope. Turn things the right way around, however, and the clouds of doom and gloom dissipate. Indeed, this is something of a golden age of TV given the diversity of choices available (i.e. with nearly 800 services distributed in Canada) and, as we saw earlier, given the boom in film and TV production in Canada, and not just for Canadian screens, but those around the world.
140. Take pay TV, for example. Revenue for pay TV services have risen fairly swiftly from \$3.7 billion in 2011 to \$4.4 billion in 2016. Over-the-top (OTT) services are growing even faster, with revenue leaping six-fold in just five years, soaring from \$115 million in 2011 to \$744 million in 2016—a figure that we base on IHS Markit’s estimate that there were 5.3 million Netflix subscribers in Canada alongside Bell’s CraveTV, the then still functioning shomi service jointly owned by Rogers and Shaw, and Videotron’s illico.<sup>101</sup> The CRTC’s most recent *Communication Monitoring Report* also offers valuable new insights into internet streaming video services like Netflix, CraveTV, illico, Amazon Prime, SNSports, etc. as well as transactional video on demand services such as Apple’s iTunes. However, we find its estimate that Netflix had 6.2 million subscribers and revenue of \$766 million in a streaming TV market worth \$1082.1 million in Canada last year implausible.<sup>102</sup> The point, however, is not to quibble with the Commission on the matter but rather to suggest that we are working with conservative assumptions about the state-of-affairs.
141. Figure 6, below, shows the overall growth across all of the main segments of TV in Canada, and for the TV marketplace as a whole. As the latter shows, total TV revenue in Canada climbed to just over \$8.0 billion in 2016.<sup>103</sup> If we used the Commission’s more liberal numbers, the picture would be even brighter, with total TV revenue being just shy of \$8.4 billion.

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<sup>100</sup> Nordicity and P. Miller (2015). Near Term Prospects for Local TV in Canada, 5, <https://www.friends.ca/files/PDF/nordicity-miller-report-on-future-of-local-tv-final.pdf>

<sup>101</sup> CMCR Project (2017). *The Growth of the Network Media Economy in Canada, 1984-2016*, p. 36. [http://www.cmcrp.org/wp-content/uploads/2017/11/Growth\\_of\\_the\\_Network\\_Media\\_Economy\\_November\\_2017.pdf](http://www.cmcrp.org/wp-content/uploads/2017/11/Growth_of_the_Network_Media_Economy_November_2017.pdf); IHS Markit (2016).

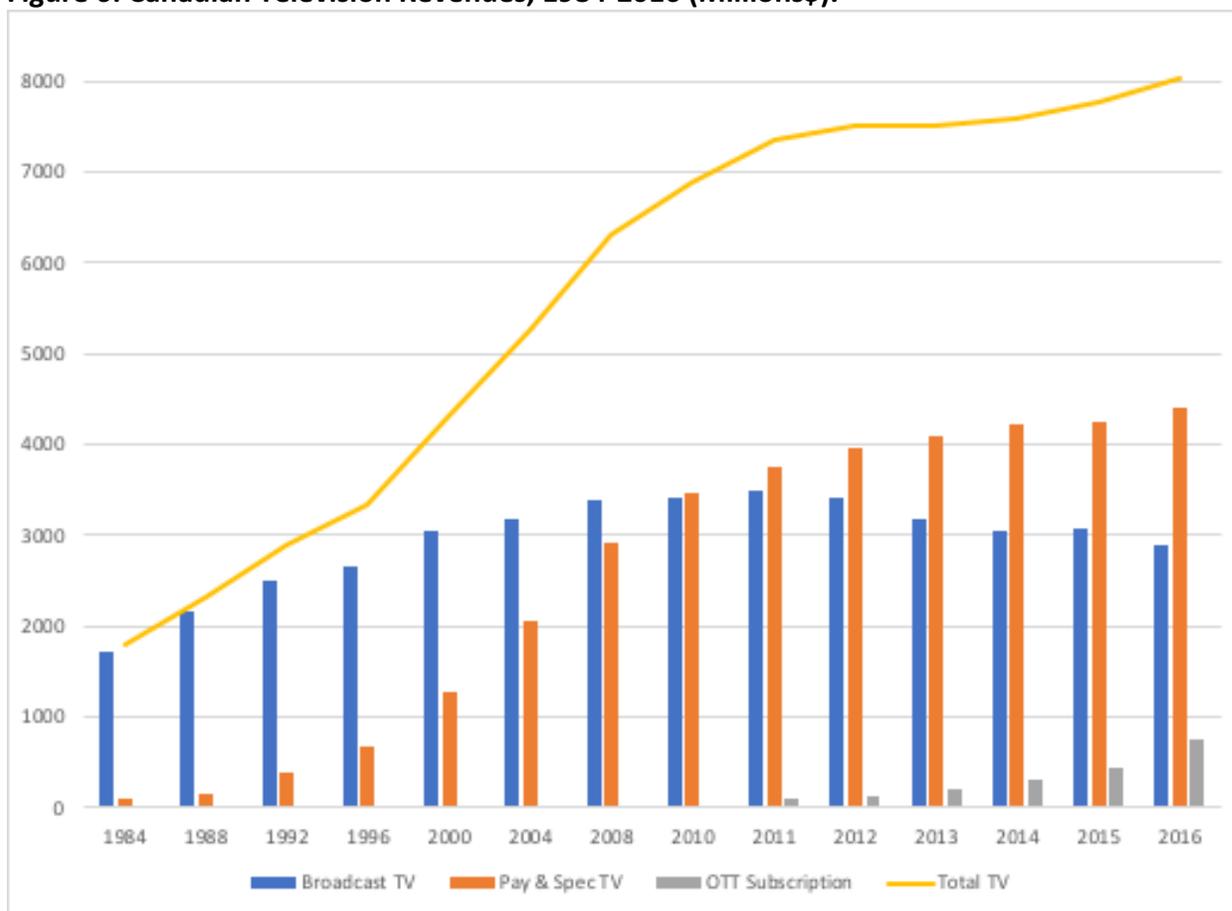
Canadian SVOD service shomi to close November 2016. <https://technology.ihs.com/584102/canadian-svod-service-shomi-to-close-november-2016>.

<sup>102</sup> CRTC (2017). *Communications Monitoring Report*, pp. 146-148.

<https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2017/cmr2017.pdf>.

<sup>103</sup> CMPA/Heritage Canada (2018). *Profile 2017: Economic Report on the Screen-based Media Production Industry in Canada*, Exhibits 2-5 and 3-8. [http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/CMPA\\_2017\\_ENG\\_FEB\\_26.pdf](http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/CMPA_2017_ENG_FEB_26.pdf)

Figure 6: Canadian Television Revenues, 1984-2016 (Millions\$).<sup>104</sup>



142. The numbers also do not add up in the coalition's application with respect to the relationship that it alleges exists between piracy, broadcasting distribution undertakings (BDUs) and the health of the creative and cultural industries in Canada. It correctly points to the fact that total cable subscribers have drifted downwards from their all-time high of 11.5 million (2013) to 11.1 million (2016), in recent years, and accounting for population growth, from 84.3% at its highpoint in 2012 to 79% of all households in 2016.<sup>105</sup> This much is uncontested. Things go off the rails, however, in the daisy-linked chain of assumptions it then makes about how many subscribers there would have been had piracy not entered into the equation to draw people away from the "broadcasting system" in favour of getting pirated material over the open internet.

<sup>104</sup> Includes private commercial TV revenue + CBC annual Parliamentary appropriation. Data is from the CRTC's annual *Communication Monitoring Report*, Aggregate Annual Returns, Broadcasting Policy Monitoring Report and Individual Pay, Pay-per-view, Video-on-Demand and Specialty Services Financial Summaries, as well as corporate annual reports.

<sup>105</sup> Our estimate of for current BDU subscription levels is somewhat higher than the CRTC's figure (76.2%) for reasons that we explain in the CMC Project's (2017) *Growth of the Network Media Economy in Canada, 1984-2016 report*, p. 25.

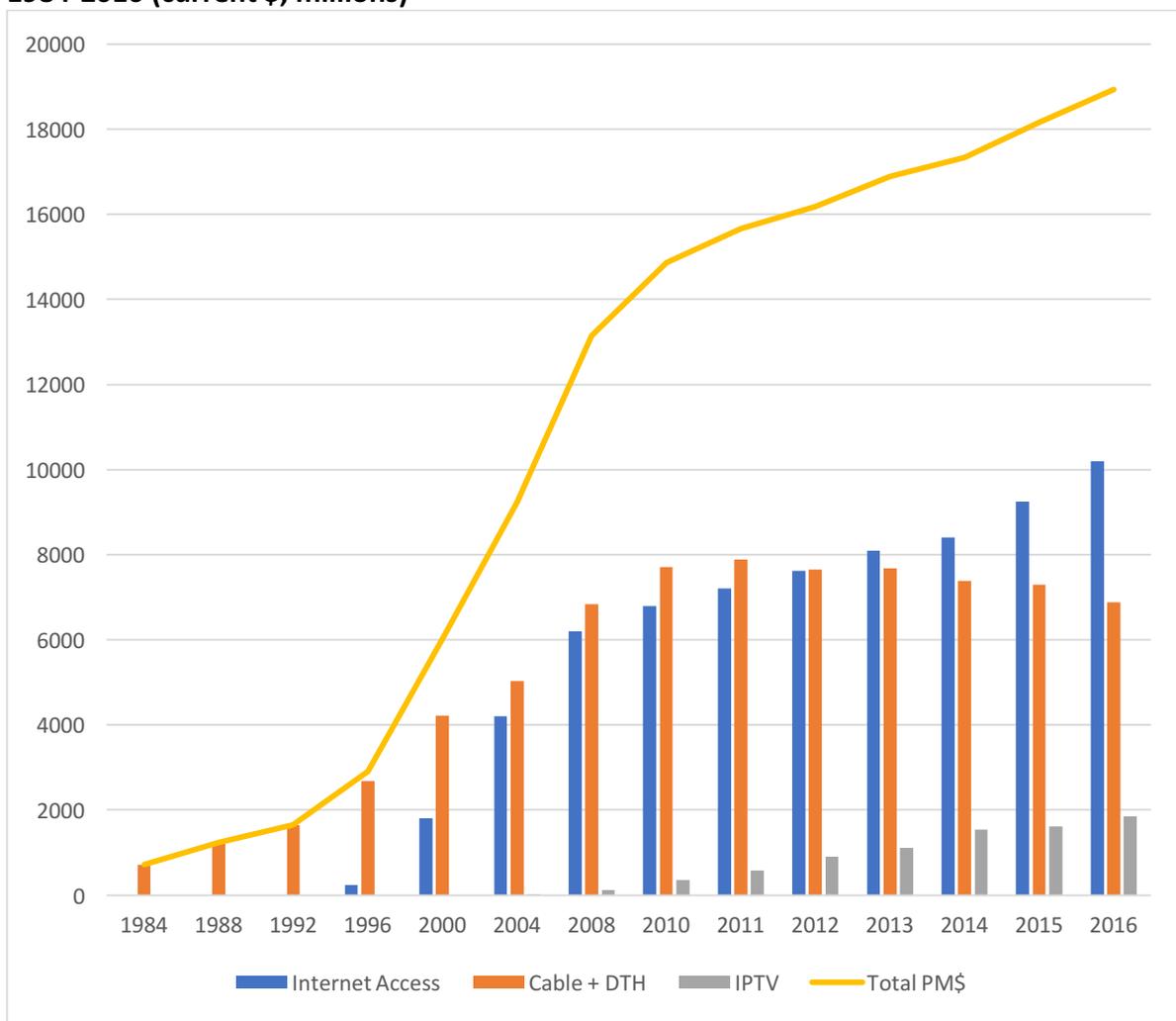
143. The coalition’s application begins its foray down this path by adding the 700,000 new homes in Canada since “peak cable” in 2012 to the 400,000 “lost BDU subscribers” just mentioned and offers an estimated average revenue per user (ARPU) of between \$50-80. While admitting that “it is impossible to determine precisely how many of these 1.1 million households are lost subscribers due to piracy,” it takes a stab at it anyway by assuming that “[i]f even one third of the lost or never obtained subscriptions are in part attributable to piracy, the lost revenues for BDUs would be between \$220 million and \$350 million.”<sup>106</sup> It expands the range further by bringing an estimate from Sandvine that North America cable operators are losing \$4.2 billion to piracy every year, of which \$500 million applies to Canada, according to the Fairplay application.
144. By the end of these questionable assumptions, we arrive at a range of estimated losses to BDUs between \$250 million and \$500 million. With 5% of BDU revenue earmarked for the Canadian Media Fund and, in turn, the production of Canadian TV, this adds up to between \$11 million and \$25 million forfeited to the creative and cultural industries community every year, with lost investment in telecommunications infrastructure on top of that.
145. These assumptions and figures, however, are not credible. We can simplify things greatly by taking the average ARPU figure that the CRTC publishes every year: \$65.08 in 2016,<sup>107</sup> while rejecting the Sandvine figure altogether, given its unknown pedigree. In addition, instead of adding all 700,000 new homes to the 400,000 “lost subscribers” since 2012, let us assume that 80% of them were potential new subscribers, or in other words 560,000. Let us also assume that Fairplay’s guestimate that one-third of them might have been lost to piracy is true. This gives us a potential of 360,000 potential “lost subscribers” due to piracy. Multiply that figure by the CRTC’s annually published BDU ARPU just to keep things simple and clear, and we arrive at a figure of \$282.7 million in lost BDU revenue and \$14.1 million lost to the creative and cultural industries community. In other words, our “high estimate” is equivalent to the lower end of the Fairplay application’s low estimate. Of course, the result is not a miniscule amount in absolute terms, but relative to the scale of investments in TV and film production in Canada detailed above, it is. Yet, the bigger issue here is that this is another example of big numbers bandied with no sense of scale, but all unmistakably meant to leave the impression of a crisis—if not already on our doorstep, clearly in the making.
146. Moreover, it cannot be forgotten that this focus on BDUs also obscures the high levels of diagonal integration that exist in Canada between BDUs, ISPs and mobile network operators. If we look at this narrowly to just include internet access alongside BDUs on the grounds that whatever losses are taking place with respect to the latter are being made up—and some—via the companies’ internet access services a less dire picture once again emerges.

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<sup>106</sup> See for example, Fairplay (2018), paras 43-45.

<sup>107</sup> CRTC (2017), CMR, Table 4.3.7 Monthly revenues per subscriber, by type of BDUs.

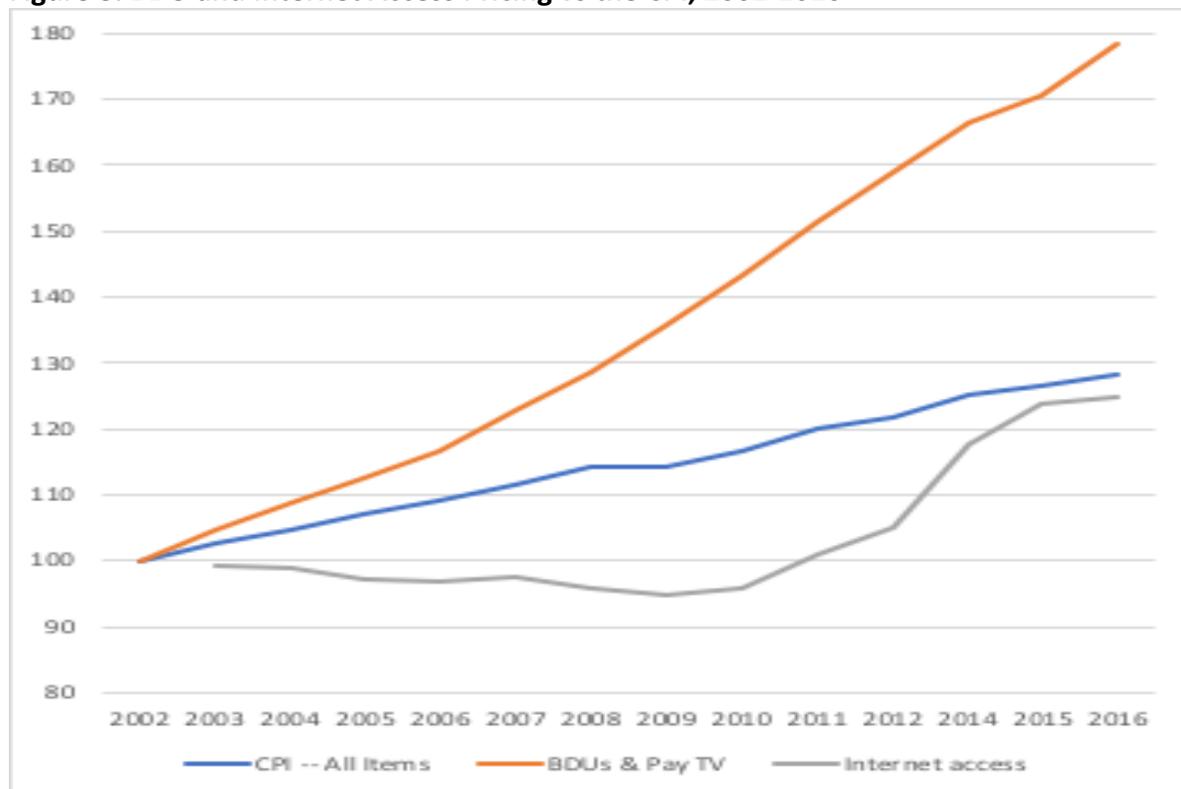
**Figure 7: Revenues for the Internet Access and Broadcasting Distribution Undertakings, 1984-2016 (current \$, millions)**



147. The point gains even more force if we also realize that not only is the internet emerging as *the* infrastructure that supports all forms of communication and media services, so too are mobile wireless services becoming part of the reconfigured internet- and mobile wireless-centric media ecology of the 21<sup>st</sup> Century. On that score, lost BDU revenue is dwarfed by the vast rise in mobile wireless revenue. Yet, to keep a more focused view, the idea that lost BDU revenue has been amply offset by increased internet access revenue is illustrated by Figure 8 below. This figure shows that just as BDU subscriber losses began to be felt, the price that people had to pay—as measured against the consumer price index—began to soar. The industry knew full well that cable’s days were numbered and raised pricing of internet access accordingly—without correspondingly dropping them for BDU

services. This is likely a far greater consideration than whatever role, if any, piracy plays in why people “cut the cord.”

**Figure 8: BDU and Internet Access Pricing vs the CPI, 2002-2016**<sup>108</sup>



148. The remaining paragraphs of this section of the CMCR Project’s submission looks at the music and video game industries in Canada. For years, the music industry has been held up as the posterchild of the bad things that happen to good media because of piracy. Yet, as in so much else in these claims, the kernel of truth is swaddled in much that is very difficult to swallow.

149. While “recorded music” in Canada continues to slump, the other key elements that make up the music industries have been undergoing a major phase of development after years of turmoil. Music Canada, the International Federation of Phonographic Industries (IFPI) and a recent study by Nordicity all point to new life in the industry as commercial music services delivered over the internet take off. Music Canada, for instance, touts the Canadian music market as being the seventh largest in the world. While still in its early stages for the uptake of streaming music services, such services took root in 2015 and have been on the rise since, replacing digital downloads as a source of revenue in 2015. Indeed, Canadians were streaming 300% more music in 2017 than the year before, while Nordicity

<sup>108</sup> Statistics Canada. Table 326-0020 - Consumer Price Index, annual (2002=100)

points to “record-breaking streaming revenues for major labels.”<sup>109</sup> There is also thought to be considerable room for further growth given high levels of internet connectivity and broadband use in Canada.<sup>110</sup> In fact, a 2015 report, co-produced by Music Canada and the IFPI, *The Mastering of a Music City*, holds up the music scene in Canada, and in the Toronto area in particular, as a model that diverse cities around the world, from Melbourne, Australia and Austin, Texas, to Kuala Lumpur, Malaysia, are eager to learn from and build on.<sup>111</sup>

150. SOCAN—the body that represents the performing rights interests of songwriters, composers and music publishers—points to record royalties. In 2016, SOCAN once again broke revenue records on almost every front, the organization boasts in its most recent annual report.<sup>112</sup> Royalty payments in 2016 climbed to an all-time high of \$330 million, up from \$273 million in 2012 and \$209 million in 2007. International royalties for Canadian-created music in 2016 were also up nearly a third since 2013. In particular, royalties from Internet streaming services have soared, rising 118% in the last year. In short, new commercial internet-based music services, strong growth in TV and film royalties, and licensing agreements for live performances and the use of music in public venues are expanding opportunities and driving growth in terms of performance royalties.<sup>113</sup> While revenue from concerts has fluctuated greatly over the past decade, between 2012 and 2016 they were on the upswing, rising from \$627 million to \$914 million.<sup>114</sup>

151. All of these developments have more than offset the very substantial losses that have taken place—and continue—in recorded music. Over the last five years, the music industry in Canada as a whole has grown at a relatively brisk pace, with revenue rising from \$1.6 billion in 2012 to \$2 billion in 2016. Thus, as we have seen throughout this submission, it is misleading to cherry-pick specific aspects of any media market—“home video” for the movie industry, broadcast TV for television, and “recorded music” for the music industry—and let that part stand for the whole. Add up the revenues across recorded music, digital/internet, publishing and live music, and total revenues for the music industry have grown, as Figure 9 illustrates below.

<sup>109</sup> Nordicity (2018). *Digital Media at the Crossroads: Measuring the revenues, the audiences and the future prospects*, pp. 61-62. <http://www.nordicity.com/media/201839ctgexyrdxr.pdf>

<sup>110</sup> IFPI (2017). *Global Music Report 2016*, p. 37. <http://www.ifpi.org/downloads/GMR2016.pdf>; IFPI (2016). *Global Music Report 2015*, p. 41. <http://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf>; Music Canada (2016). *Licensing Digital Music in Canada*, p. 2. <https://musiccanada.com/wp-content/uploads/2016/01/Licensing-Digital-Music-in-Canada.pdf>; Nordicity (2018). *Digital Media at the Crossroads: Measuring the revenues, the audiences and the future prospects*, p. 60. <http://www.nordicity.com/media/201839ctgexyrdxr.pdf>

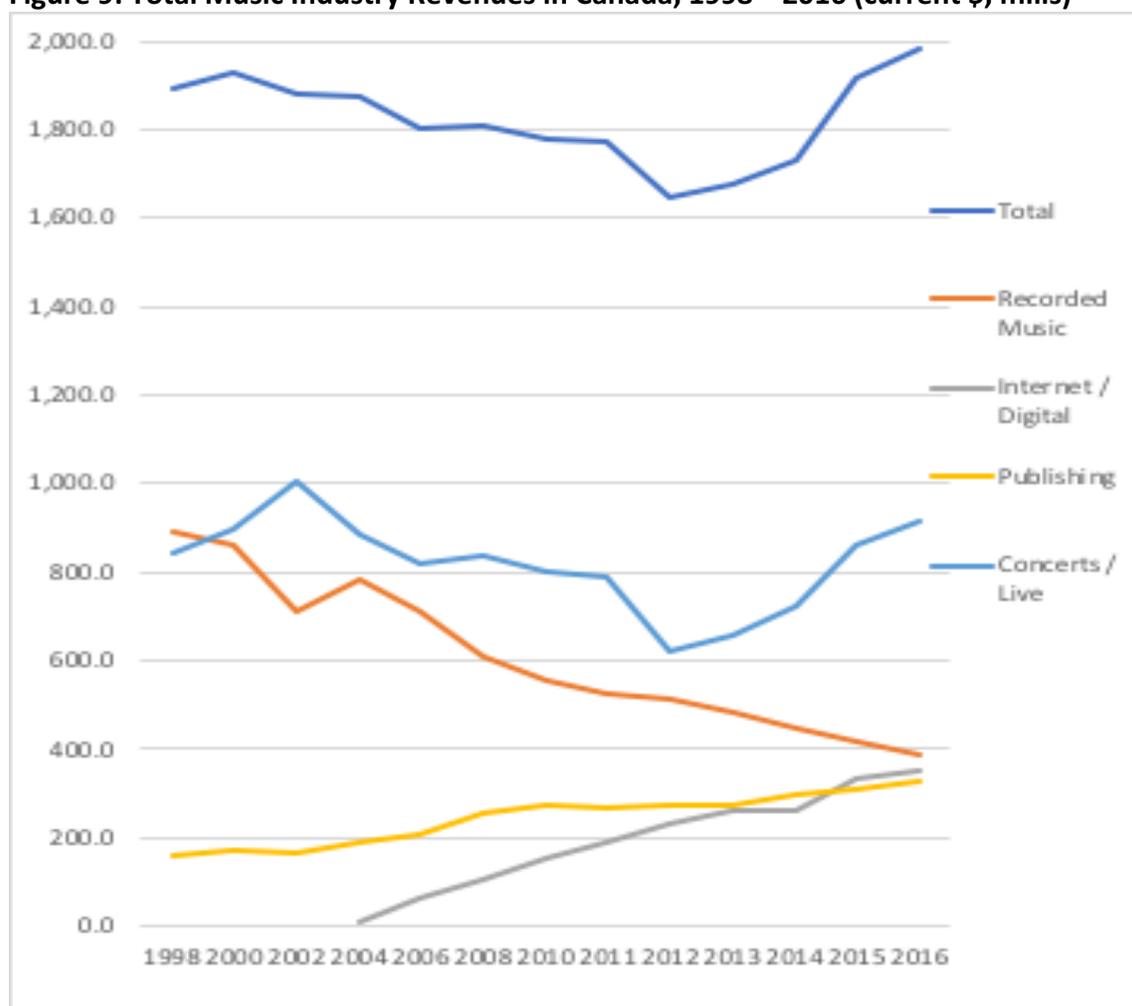
<sup>111</sup> Music Canada & IFPI (2016). *The Mastering of a Music City*. <https://musiccanada.com/wp-content/uploads/2015/06/The-Mastering-of-a-Music-City.pdf>; IFPI (2017). *Global Music Report 2016*, p. 37. <http://www.ifpi.org/downloads/GMR2016.pdf>

<sup>112</sup> SOCAN (2017). *Annual Report 2016*. p. 1. [http://socanannualreport.ca/wp-content/uploads/2017/06/8773\\_SOCAN\\_Annual\\_Report\\_Print\\_V2\\_ENG.pdf](http://socanannualreport.ca/wp-content/uploads/2017/06/8773_SOCAN_Annual_Report_Print_V2_ENG.pdf).

<sup>113</sup> Ibid., pp. 4-7.

<sup>114</sup> PWC (2017). *Global Entertainment and Media Outlook, 2017 – 2021*. <https://www.pwc.com/gx/en/industries/tmt/media/outlook.html>

**Figure 9: Total Music Industry Revenues in Canada, 1998—2016 (current \$, mills)<sup>115</sup>**



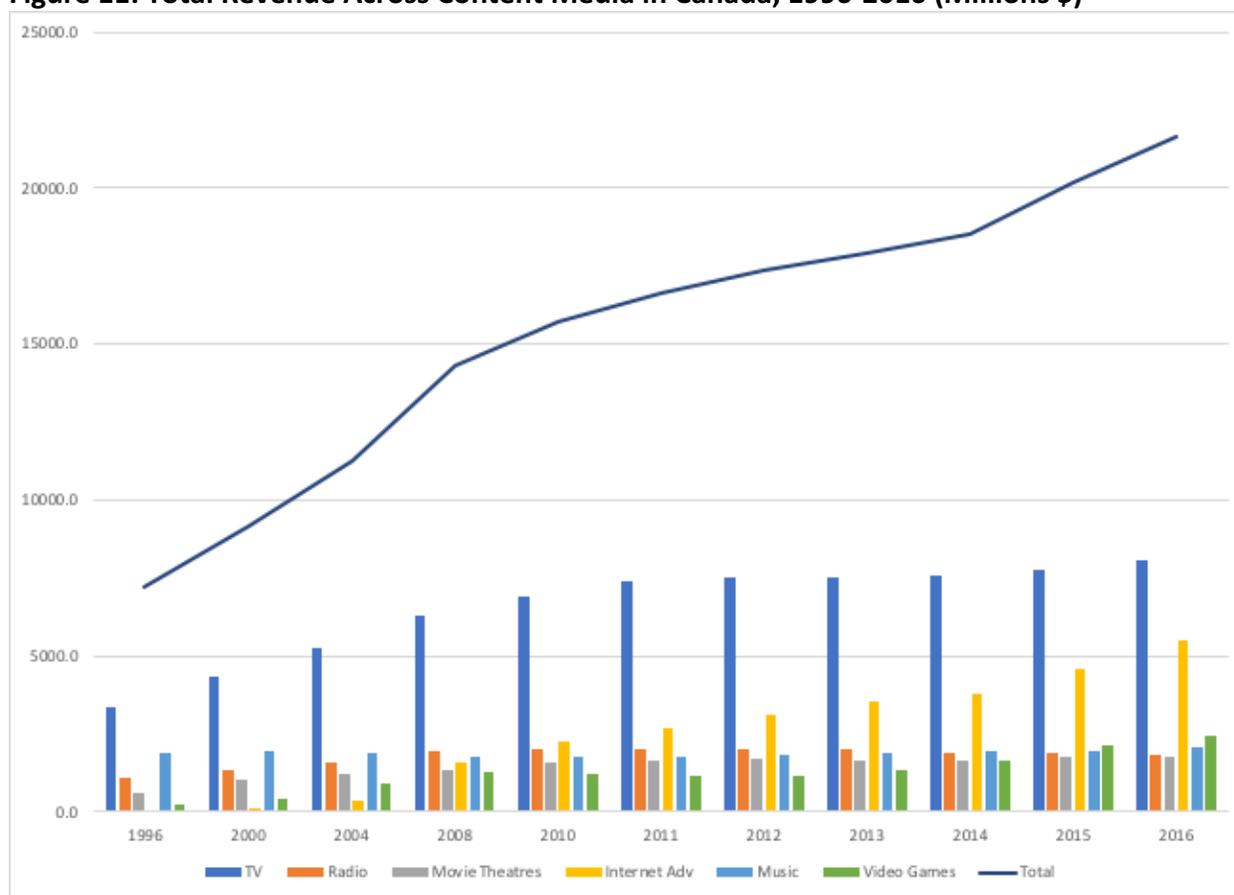
152. The CMCR Project has not systematically examined the trends and major players in the video game industry in the past for a variety of reasons that boil down to the difficulty of getting at the underlying data that we need. There is, however, enough data available from PriceWaterhouseCoopers' *Global Entertainment and Media Outlook* to give us a snapshot of revenues across each of the main segments of the video game industry: advertising, app and browser-based games, as well as console and PC games. Figure 10 below is clear that while revenue across these segments of the industry rose quickly from the late-1990s and into the next decade, before stagnating between 2008 and 2012, things have turned around since. Indeed, revenues have risen swiftly in the past five years from just under \$1.2 billion to nearly \$2.6 billion last year.

<sup>115</sup> Recorded Music from Statistics Canada, *Sound Recording and Music Publishing, Summary Statistics CANSIM TABLE 361-0005*; Stats Can. (October 2005). *Sound Recording: data tables*, catalogue no. 87F0008XIE; Stats Can, *Sound Recording and Music Publishing*, Cat. 87F0008X, 2009; Internet and concerts from PriceWaterhouseCoopers, *Global Media and Entertainment Outlook, 2017-2021* (various years). USD converted to CDN\$ using Bank of Canada Year Average of Exchange Rates <http://www.bankofcanada.ca/rates/exchange/annual-average-exchange-rates>; Publishing from SOCAN, *Financial Report* (various years).

**Figure 10: Video Games Revenues in Canada, 2000-2017 (current \$, mills)<sup>116</sup>**

	1998	2000	2004	2008	2010	2011	2012	2013	2014	2015	2016	2017
Advertising							71.4	74.5	90.2	119.1	145.8	159.2
App & Browser-based							334.4	526.3	738.2	1,032.9	1,241.0	1,330.1
Console							596.0	558.8	629.3	757.5	810.2	820.0
PC-Based							167.5	175.7	195.1	237.3	257.9	262.6
Total	268.8	448.9	925.37	1250.7	1189.3	1135.6	1,169.2	1,335.3	1,652.8	2,146.8	2,455.0	2,571.9

153. Adding up all of the main sectors of the content media in Canada and the picture is evident: revenues doubled from \$7.2 billion to \$14.3 billion between 1996 and 2008, and have continued to rise briskly since, reaching \$21.6 Billion in 2016. Figure 11 below gives a snapshot of the results. These trends are similar to what we observed earlier at the global level for the film and music industries.

**Figure 11: Total Revenue Across Content Media in Canada, 1996-2016 (Millions \$)<sup>117</sup>**

<sup>116</sup> PriceWaterhouseCoopers, *Global Media and Entertainment Outlook, 2017-2021* (various years). USD converted to CDN\$ using Bank of Canada Year Average of Exchange Rates <http://www.bankofcanada.ca/rates/exchange/annual-average-exchange-rates>; Publishing from SOCAN, *Financial Report* (various years).

<sup>117</sup> Sources are as cited in the sector-by-sector discussion above.

154. The only real fly-in-the-ointment in this overall picture is that falling advertising has hit the over-the-air segment of the television industry and radio hard (and newspapers and magazines even harder). These sectors, however, are not covered here because they are not relevant to the issues at hand. While the Fairplay application strains to draw a link from piracy to advertising, that link is weak, for the reasons noted earlier. Even if the link attempted was accepted for the sake of argument, the impact, as we saw, is miniscule at less than .05% of total advertising revenue. Advertising revenue has not weakened as a basis of support for *some* media (e.g. broadcast TV, radio, newspapers) but because advertising spending in Canada (similar trends apply to the US) appears to have hit a ceiling and to even be declining when examined on a per capita basis, inflation adjusted dollars and relative to the size of the whole media economy. The advertising revenue that does remain, moreover, is increasingly being funneled into internet advertising, and to two digital behemoths specifically: Google and Facebook. Together, they accounted for roughly 72% of internet advertising revenue in Canada in 2016 and one-third of *all advertising revenue across all media*.<sup>118</sup>
155. For two decades now, we have had the “death of” movies, music and TV trope, with techno-enthusiasts having drunk much too deeply from the Schumpeterian “creative destruction” well, combined with doomsayers who have argued that the internet and rampant piracy are killing culture.<sup>119</sup> They have created a toxic narrative that policy entrepreneurs—all-too-often working on behalf of vested industrial interests—are drawing on extensively to push through policy wish-lists that would otherwise likely be dead in the water. The Fairplay website blocking proposal is one such opportunistic bid, and like many that have come before it, selectively cherry-picks the evidence in order to advance a cause. That evidence, and the narrative around which it is mobilized, is fundamentally flawed and misleading. To put it simply, neither the grand story of a “culture in crisis” nor the evidence needed to sustain it come close to supporting the drastic measure the Commission is being called for on to enact and oversee. The Commission should reject it on this and the other grounds that we—and others in this proceeding—have set out.
156. Ultimately, as has been reasonably well-established in the literature, the availability of services that allow people to consume content using the communication networks and devices of their choice helps to foster both a functioning set of media and cultural industries while limiting the potentially baleful effects of piracy. As the Intellectual Property Office in the UK observes, “there is an increasing recognition that a large part of that solution [to online copyright infringement] is the creation of a seamless global digital marketplace.”<sup>120</sup>

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<sup>118</sup> Canadian Media Concentration Research Project (201). *Media and Internet Concentration in Canada, 1984-2016*, Table 5. [http://www.cmcrp.org/wp-content/uploads/2017/11/CMCR\\_Media\\_Internet\\_Concentration\\_27112017\\_Final.pdf](http://www.cmcrp.org/wp-content/uploads/2017/11/CMCR_Media_Internet_Concentration_27112017_Final.pdf)

<sup>119</sup> Taplin, J. (2017). *Move fast and break things: How Facebook, google, and Amazon cornered culture and undermined democracy*. New York: Little Brown.

<sup>120</sup> Intellectual Property Office (2015). International Comparison of Approaches to Online Copyright Infringement: Final Report, pp. 14-15. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/549462/International\\_Comparison\\_of\\_Approaches\\_to\\_Online\\_Copyright\\_Infringement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/549462/International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf); Kairamo, P. (2013). Address by the Director General, WIPO

For now, however, even as the otherwise questionable study done by Circum observed, “Canadian representatives of rights holders consulted as part of this study tended not to give online piracy fighting a high priority.”<sup>121</sup> This has meant a great deal more energy seems to have been spent pushing on the familiar policy levers that abound within the cultural and creative industries and policy communities in Canada rather than taking advantage of obvious developments in how media and culture are being created, circulated and consumed in “the Internet Age.”

157. More than this, however, the issues at stake are portentous ones when it comes not just to markets and copyrights, but also the very nature of the internet- and mobile wireless-enabled communications and media that so much of not only the economy but society, politics, culture and our everyday lives rely on. The values attending the issues at stake here are not narrowly about markets and property but also about the kinds of communication and culture that are fit for citizens in a democracy.

### **International Comparative Review of Website Blocking in Forty OECD and EU Countries**

158. Copyright law and copyright infringement are very complex phenomena that turn on many specific factors and vary greatly between countries. Different jurisdictions have different rules, and much turns on how copyright is configured, and specific knowledge and specific laws are needed to fit these complex and messy conditions. Some of the factors upon which the issues turn include enforcement in other countries and the state of communications and media development, with the state of broadband development being key to streaming and downloading infringing content but also the basis for legal, competitive and affordable online digital services to take hold.<sup>122</sup> It is also essential to keep in mind that copyright is not just about securing creators’ rights but citizens’ rights to access, use and share knowledge, information and media under the conditions set out in copyright law.<sup>123</sup> While we are not copyright experts, we have used the knowledge that we do have about such issues as communication and media scholars to assess how countries reasonably comparable to Canada have dealt with the issue of website blocking, and to assess the Fairplay application’s claims.

159. The coalition’s application points to “at least 20 countries, including most of Canada’s closest partners, [that] have implemented regimes to disable access to piracy sites. These include both regimes that are operated through the courts (for example, the UK) and either alternative or additional administrative regimes (for example, Portugal, which in 2015

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Assemblies – September 23 to October 2, 2013. [http://www.wipo.int/about-wipo/en/dgo/speeches/a\\_51\\_dg\\_speech.html](http://www.wipo.int/about-wipo/en/dgo/speeches/a_51_dg_speech.html).

<sup>121</sup> Circum Network Inc (2016). Examination of the “follow-the-money” approach to copyright piracy reduction.

<sup>122</sup> IPO (2015). *International Comparison of Approaches to Online Copyright Infringement*, pp. 1-2.

<sup>123</sup> Boyle, J. (2008). *The Public Domain: Enclosing the Commons of the Mind*. New Haven, CN: Yale University; Geist, M. (ed.). *From “Radical Extremism” to “Balanced Copyright” : Canadian Copyright and the Digital Agenda*. Toronto: Irwin Law.

established a regime to provide for disabling of access to piracy sites that is overseen by the Inspecção Geral Das Actividades Culturais)".<sup>124</sup> The coalition appears to rely primarily on the Information Technology and Innovation Foundation's (ITIF) review of international conditions that concludes "that 25 nations have enacted policies and regulations regarding website blocking".<sup>125</sup>

160. Based on this review, we found 21 countries that have either relied upon a transposition of the European Union's 2001 Copyright Directive into national legislation or—in the case of countries outside the EU—have adopted equivalent laws, and that these laws<sup>126</sup> have been regularly used to authorize website blocking. We found that 18 of these countries block websites by court order: Australia, Austria, Belgium, Chile, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, the Netherlands<sup>127</sup>, Norway, Spain, Sweden and the UK<sup>128</sup> and that four countries block websites by way of administrative procedures: Italy<sup>129</sup>, Portugal, South Korea, and Turkey.<sup>130</sup> On this score, we agree with ITIF and Fairplay that, "since 2010, [the EU 2001 Copyright Directive] has been relied upon in 18 countries across the EU and resulted in final orders issued against more than 2,000 copyright infringing sites".<sup>131</sup>

161. However, we part ways with them on the basis of the following six points.

### False Equivalencies

162. First, the suggestion that there's a mix—with the implicit assumption that the mix is relatively balanced, or at least not lopsided—of "regimes. . . operated through the courts . . . and either alternative or additional administrative regimes" is misleading. As we mentioned earlier, we found only four countries that allow website blocking by way of

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<sup>124</sup> Fairplay (2018), para 64.

<sup>125</sup> Information Technology and Innovation Foundation (2016). *How Website Blocking Is Curbing Digital Piracy Without "Breaking the Internet"*, p. 12.

<sup>126</sup> With the exception of Chile.

<sup>127</sup> For further insights, see: Australia: [active](#); Austria: [active](#); Belgium: IITF report; Chile: [inactive](#); Denmark: IITF report; Finland: [active](#); France: IITF report; Germany: [active](#); Greece: [active](#); Iceland: [active](#); Ireland: [active](#); Israel: [active](#); Netherlands: [active](#); Norway: IITF report; Spain: IITF report; Sweden: [active](#); United Kingdom: IITF report; In the Netherlands, website blocking was permitted between 2012 and 2014 before being dropped on the basis of a Court of Appeal decision that found such measures ineffective. However, the situation is now once again in flux with a decision by the Supreme Court expected soon ([Woitier, 2014](#); [Cooke, 2018](#)).

<sup>128</sup> See, for example, Fairplay at para 62.

<sup>129</sup> Italy allows website blocking through both court orders and by the telecoms and broadcasting regulator, AGCOM.

<sup>130</sup> Countries that block via administrative procedure: Italy: IITF report; South Korea: [active](#); Portugal: referenced in IITF report; Turkey: [active](#).

<sup>131</sup> Fairplay, para 64.

administrative procedures: i.e. Italy<sup>132</sup>, Portugal, South Korea, and Turkey.<sup>133</sup> Administrative tribunals are not the same as courts and court orders.

163. The use of administrative tribunals along the lines anticipated by Fairplay’s application is the exception, not the norm. They are also found in countries where a weaker sense of the “rule of law” prevails, and in countries that *The Economist* most recent annual “Democracy Index” ranks as “flawed democracies” (i.e. South Korea, Italy, Portugal) and as hybrid authoritarian democracy (i.e. Turkey).<sup>134</sup> Website blocking implicates core values of free speech, privacy, autonomy, knowledge, markets and democracy, despite the Fairplay application’s (and ITIF’s review) seeming eagerness to brush them aside in order to naturalize their story that website blocking is ‘no big deal’. It is.

### Where website blocking is accepted, court orders come standard

164. Second, as identified earlier, a total of at least seventeen countries only allow ISPs to disable access to copyright infringing websites (and services) after a court order is obtained.<sup>135</sup> Take Australia, for example, where the recently adopted Copyright Amendment (Online Infringement) Act of 2015 allows “the Federal Court of Australia to order a [website blocking] injunction to require a carriage service provider (CSP) to take reasonable steps to disable access to an online location (website blocking)” (Section 115A).<sup>136</sup> After opposing website blocking for years, with iiNet leading the charge on common carrier (net neutrality), cost and customer care grounds, they have largely fallen into line. Three court cases in 2017 have settled the terrain and now the ISPs—for better or worse--don’t even show up anymore at the proceedings where the courts hear the industry’s pleas for website blocking injunctions, so long as the order is properly administered—although there is a sense they remain vigilant.<sup>137</sup>

165. Unlike the website blocking plan being pitched to the CRTC by the Bell-, Rogers-, Shaw- and Videotron-led Fairplay coalition that anticipates a large role for them in setting up the website blocking scheme they are proposing—and a prominent and, as far as we can see, permanent—seat at the operating table, the Australian telcos play no role in the creation or

<sup>132</sup> Italy allows website blocking through both court orders and by the telecoms and broadcasting regulator, AGCOM.

<sup>133</sup> Countries that block via administrative procedure: Italy: IITF report; South Korea: [active](#); Portugal: referenced in IITF report; Turkey: [active](#).

<sup>134</sup> *The Economist* (2017). *Democracy Index 2017: Free speech under attack: A report by The Economist Intelligence Unit*. [http://pages.eiu.com/rs/753-RIQ-438/images/Democracy\\_Index\\_2017.pdf](http://pages.eiu.com/rs/753-RIQ-438/images/Democracy_Index_2017.pdf).

<sup>135</sup> On this point about the absence of court orders, also see Geist, M. (2018). The case against Bell Coalition’s website blocking plan, Part 4: Absence of court orders would put Canada at odds with almost everyone. *Michael Geist Blog*. <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-4-absence-court-orders-put-canada-odds-almost-everyone/>

<sup>136</sup> (Spies & Nagy, 2015, p. 210.

<sup>137</sup> Three key recent cases on the relevant issues: 1. Foxtel Management Pty Limited v TPG Internet Pty Ltd [2017] FCA 1041; 2. Universal Music Australia Pty Limited v TPG Internet Pty Ltd [2017] FCA 435 (28 April 2017); 3. Roadshow Films Pty Ltd v Telstra Corporation Ltd [2016] FCA 1503; Also see [Australia \(2014\) Online Copyright Infringement Discussion Paper.pdf](#).

operation of website blocking, except to block websites when ordered to do so. As far as we can see, even in the countries that take a relatively permissive, albeit “rule-of-law” bound, approach to disabling pirate sites, in none of them have the telcos and ISPs played a role anything like the one the Fairplay proposal anticipates for them in Canada—as our earlier analysis of this contorted view of section 36 of Canada’s *Telecommunications Act* indicated.

166. Ireland also shows us the central importance of explicit enabling legislation and the role of court orders. In 2010, while hugely sympathetic to copyright claims being made by the recording music giant EMI, and *really wanting to* order Pirate Bay blocked, the High Court demurred. There was no enabling legislation that allowed it to do so, no matter how much it wanted to.<sup>138</sup> Two years later, the government revised the *Copyright and Related Rights Act*, and within a year of that EMI had its victory and six of Ireland’s largest ISPs were required to block The Pirate Bay: UPC, Imagine, Vodafone, Digiweb, Hutchison 3G Ltd and O2.<sup>139</sup> The Irish approach to copyright infringement has been aggressive in this regard ever since.
167. The Fairplay application’s characterization of the supposed “fast track” approach adopted in the UK in 2003 is also misleading.<sup>140</sup> There, the new “measure” adopted was *The Copyright and Related Rights Regulations 2003*—a much sturdier set-up than what Fairplay has in mind.<sup>141</sup> The new act implemented Article 8(3) of the EU’s Infosoc Directive. Website blocking had to be done through a court order. The ISP had to have “actual knowledge of another person using their service to infringe copyright.” It was not until eight years later, however, that the first website was blocked (Newzbin2).
168. The UK situation is fundamentally different from Fairplay’s proposal for two reasons: it explicitly adopted enabling copyright legislation and, second, court orders are required to authorize ISPs to disable access infringing sites. In addition, British ISPs have been none too eager to take an active role in such efforts and have fought them tooth-and-nail, at times, as we will see momentarily.
169. In France, the Conseil Constitutionnel said that the legislature could not devolve controls on Internet access—i.e. the 3 strikes regime— to the copyright administrative authority (Hadopi) because it operated without judicial oversight and, critically importantly, would violate citizens’ communication rights under the *1789 Declaration of the Rights of Man* and presumptions of innocence.<sup>142</sup> These offensive 3 strikes rules were abandoned in 2013, and relatively new Hollande Government of the time looked set to dismantle Hadopi

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<sup>138</sup> <https://cyberlaw.stanford.edu/page/wilmap-ireland>

<sup>139</sup> The case is *EMI Records vs UPC Communications*. The analysis here relies on [Spies & Nagy, 2015](#), p. 212; [Reilly, 2013](#).

<sup>140</sup> Fairplay, para 15.

<sup>141</sup> §97A is the operative section, it appears. <https://www.legislation.gov.uk/id/uksi/2003/2498>; <https://www.legislation.gov.uk/id/uksi/2003/2498/regulation/31>

<sup>142</sup> O’Brien, D. (July 10, 2009). France declares three strikes law unconstitutional. *Electronic Frontier Foundation*. <https://www.eff.org/deeplinks/2009/06/three-strikes-dead-in-france>

altogether, or at least to starve it of resources. When a 2016 vote in the National Assembly to dismantle Hadopi by 2022 passed, this seemed to sound the death knell for the agency, but this action was later reversed by the senate.<sup>143</sup> In its 2017 Report, an emboldened Hadopi called for “faster blocking of sites, expanding to the blocking of mirror sites [and] tackling unauthorized streaming platforms”.<sup>144</sup> Yet, what the French case illustrates is that fundamental rights of speech and due process *are* at stake, and because of this the necessity of court orders and a well thought out *legislative scheme* are essential.

170. The cases of France, the UK, Ireland and Australia are not meant to be exhaustive but illustrative, and they tell us a few things: first, all of them underscore the importance of “the rule of law”, and political legitimacy. Second, they show us the court orders play a determinative role. Finally, telcos don’t play an active role in any of these regimes—indeed, at least in the UK and Australia, they have actively opposed these schemes, at least until a proper legal footing was put in place for them to do what they were being asked to do.

### **More Cherry-Picking: The Coalition application fails to identify countries that don’t—or rarely—disable access to websites**

171. Our third criticism of Fairplay and ITIF’s characterization of the landscape is that they fail to identify countries that rarely engage in website blocking and which have not revised or adopted new copyright laws that explicitly create a framework for such an approach or, in the case of the European Union, relied on a transposition of the Copyright Directive. This a significant oversight because there are 18 such countries: Canada, Croatia, Cyprus, the Czech Republic, Estonia, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, New Zealand, Poland, Romania, Slovak Republic, Slovenia, Switzerland, and the United States. Moreover, at least six of these countries have explicitly *rejected*, or withdrawn legislative proposals for, website blocking or other severe anti-piracy measures as an option: Canada (the *Copyright Act*), Mexico (Supreme Court ruling), the Netherlands,<sup>145</sup> Poland<sup>146</sup>, Switzerland<sup>147</sup>, and the United States (i.e. SOPA and PIPA, in 2011). In sharp contrast to the rather sanguine view of website blocking taken by the coalition, such measures have been and still are a hotly contested issue—as the response to the Commission’s proceeding on the coalition’s application from all quarters amply demonstrates.

<sup>143</sup> La Figaro (2016). <http://www.lefigaro.fr/secteur/high-tech/2016/05/26/32001-20160526ARTFIG00132-les-senateurs-sauvent-la-hadopi-de-la-disparition.php>.

<sup>144</sup> <https://torrentfreak.com/seven-years-of-hadopi-nine-million-piracy-warnings-189-convictions-171201/>

<sup>145</sup> In the Netherlands, website blocking was permitted between 2012 and 2014 before being dropped on the basis of a Court of Appeal decision that found such measures ineffective. However, the situation is now once again in limbo with a decision by the Supreme Court expected soon (Woitier, 2014; Cooke, 2018).

<sup>146</sup> <http://www.thenews.pl/1/12/Artykul/91997,Government-stopped-from-preparing-illegal-antiinternet-piracy-legislation>

<sup>147</sup> <https://smetille.ch/2017/11/29/revision-du-droit-dauteur-et-obligations-des-hebergeurs/>

172. In the United States, for example, “broadband ISPs are not required to comply with the notice-and-takedown protocol in Section 512(c) [of the Digital Millennium Copyright Act, because they do not control the content that transits their networks”.<sup>148</sup> In addition, “[C]opyright owners have been unsuccessful in getting courts to interpret the DMCA to require proactive monitoring and graduated response...”.<sup>149</sup> The Stop Online Piracy Act would have required ISPs to block access to ‘rogue websites’ but the bill failed in the face of massive public protests as well as bi-partisan political opposition in Congress. As a result, in the US, there is no role for ISPs or the FCC in setting up and carrying out website blocking schemes. As we will see in a moment, the Copyright Alert System that did set up a voluntary scheme for such purposes was short-lived, and wound down in 2016.
173. To take another example, New Zealand does not allow websites responsible for illegal file-sharing to be blocked. “It’s just against the way the internet works. Site-blocks are actually a really poor solution because they can be evaded by pretty simple technological tools”, observes InternetNZ.<sup>150</sup> As an aside, there is a modest mistake in the ITIF report that Fairplay relies on which Quebec is held out as an example of having a website blocking in place to disable access to illegal gambling sites when that option was rejected by the CRTC.<sup>151</sup>
174. It’s worth stopping to pause for a moment to dwell on two other crucial facts about the Canadian situation: first, as we saw earlier in our submission, the Government of Canada rejected calls for website blocking by not including such measures in the *Copyright Act* (2012), despite a chorus of calls to do otherwise (and, to repeat, from many of the same voices now before us again). At the time, Industry Canada advised against such a route as well for two reasons. For one, its own commissioned studies offered a convincing argument that the negative impact of piracy and p2p networks on music sales was being overblown and the potential benefits of both downplayed. It was also the case that Industry Canada was concerned that anything further than the notice-and-notice regime adopted clashed with “Charter of Rights considerations”.<sup>152</sup> The Office of the Privacy Commissioner raised similar concerns.<sup>153</sup>

### **Bad box, big numbers**

175. However, as several recent cases show, this does not mean that the Canadian courts

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<sup>148</sup> Bridy, 2016, DCMA+, p. 6.

<sup>149</sup> Bridy, 2016, DCMA+, p. 7.

<sup>150</sup> Hatton, 2017.

<sup>151</sup> ITIF (2016), p. 12.

<sup>152</sup> Andersen, B. & Frenz, M. (2007). The Impact of Music Downloads and P2P Filesharing on the Purchase of Music: A Study for Industry in Canada. Ottawa: Industry Canada. <http://www.dime-eu.org/files/active/0/AndersenFrenzPAPER.pdf>. The paper was subsequently published in a peer reviewed journal in 2010: Andersen, B., M. Frenz. 2010. Don’t blame the P2P file-sharers: the impact of free music downloads on the purchase of music CDs in Canada. *Journal of Evolutionary Economics*, 20, 715-740; [Canada, 2012](#), Sec 3.2.3.

<sup>153</sup> the Office of the Privacy Commissioner ([Canada, 2012](#), Sec 3.2.3,

cannot already order website blocking or otherwise take stern steps to disable access to websites, apps, services and content that run afoul of copyright law. The Supreme Court of Canada has required Google to de-index (on a global basis) the website of a company that was flagrantly trading in trademarked goods without authorization, and despite an injunction against doing so.<sup>154</sup> Bell, Rogers and Videotron have also been able to get court orders disabling access to after-market set-top boxes that have been explicitly designed to access to pirated content. These boxes—and the reasonably well-known Kodi boxes—can be configured for “good” and “bad” uses, and when configured with add-ons of the latter type, the telcos have been able to block their sale.<sup>155</sup>

176. The discussion of Kodi boxes in the Fairplay application tends to elide the distinction between non-infringing uses of Kodi to play games, listen to music, watch TV or a film, and/or a million other things, all based on open source code, which is a core part of computing and internet culture (and law) not just in Canada but around the world.<sup>156</sup> Sandvine, whose material the Coalition application relies on extensively at this point, stresses that the “[u]nofficial Kodi Add-ons *can be* configured to access unlicensed live and on-demand content”.<sup>157</sup> The distinction that it tries to draw below on this point, however, is unconvincing and evasive:

. . . Whether the remote streaming complies with applicable laws will be for the courts to decide, but for the purposes of this report we are going to assume the position that the large catalog of official Add-ons that stream content from their original sources (e.g., YouTube and BBC iPlayer) is licensed content and complies with applicable laws and that streaming content via the unofficial Add-ons examined by Sandvine do not have the proper legal rights from the content owner (“unlicensed content”) and do not comply with applicable laws.<sup>158</sup>

177. Sandvine—and Fairplay’s—assumption that the use of a Kodi box by *anyone* in the house is a close substitute for the whole household disconnecting from “the legitimate broadcasting system” is both naïve, and does not account for significant differences between media usage within households. It is also worrisome insofar as it embodies these companies’ view of the internet-enabled media and communications spaces of the 21<sup>st</sup> Century in terms similar to the closed “broadcasting system” view of the half-century or more. Oblique references to BDUs and ISPs having deep insights into how people use Kodi devices (and presumably) as part of Sandvine’s explanation of how it arrives at its estimate

<sup>154</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do>; <http://philippalmerlaw.ca/national-courts-future-internet-google-inc-v-equustek-solutions-inc/>

<sup>155</sup> iTVBox.net case. Again, it’s “preloaded boxes” that are the problem. *Bell Canada v. 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612, 271 A.C.W.S. (3d) 831, aff’d 2017 FCA 55, 278 A.C.W.S. (3d) 385 (Bell Canada); [http://www.barrysookman.com/wp-content/uploads/2018/02/Bell-v-Lackman-2018\\_FCA\\_42.pdf](http://www.barrysookman.com/wp-content/uploads/2018/02/Bell-v-Lackman-2018_FCA_42.pdf)

<sup>156</sup> See Benkler, Y. (2006). *The Wealth of Networks*. New Haven, CN: Yale University; Boyle (2009).

<sup>157</sup> *Emphasis added*, [Sandvine, 2017](#), p. 3.

<sup>158</sup> [Sandvine, 2017](#), p. 1.

that there are the might raise the Commission’s eyebrow with respect to the privacy implications this statement raises.

178. Sandvine’s estimate that pegs the number of households in Canada with a Kodi box as being around 10% seems high to us, but this is not a real big concern. What happens next, however, is significant. First, that number is then translated into an estimate of how many of these are engaged in piracy, which Sandvine pegs at 7%—a figure that Fairplay repeats in its application.<sup>159</sup> Three or four problems emerge here: first the idea that rates of licit to illicit uses of Kodi boxes found in the US can simply stand for the situation in Canada is at least questionable, especially given our point at the outset of this section on how much conditions vary across jurisdictions. Second, it is a leap to go from saying that “7% of Canadian households have a Kodi device *configured* to access unlicensed content”, to inferring that it’s actually/actively being used in that way.<sup>160</sup> While seemingly a small point, Sandvine also reports two different values in these reports: 7% in the first one (released in May 2017); 6.5% in the latter (released in November). The Fairplay website blocking application, of course, chooses the higher figure. Finally, by the time this talking point makes it into a Fairplay inspired op-ed in the *Huffington Post*, that figure had grown to 14%—twice the already suspect original value. We call it the Pinocchio number.<sup>161</sup>

### Reversals and Roll-backs are not in the Picture

179. Our fourth concern is that while Fairplay’s general observation that website blocking for blatant piracy sites has become more common is correct, it does not indicate that roll-backs and reversals have accompanied the process all-along-the-way.

180. We already pointed to some aspects of this with respect to the US, just above, in relation to how website blocking was rejected as an option when SOPA was pulled. The ITIF review refers to “Copyright Alert System” that emerged shortly thereafter as a source of inspiration for tough measures in the battle against piracy, but this “6 strikes, graduated response” and voluntary initiative adopted that had been adopted in 2012 between the five largest broadband ISPs—AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon—on the one side, and the MPAA and RIAA, on the other, stopped operating in 2016.<sup>162</sup>

<sup>159</sup> Fairplay (2018), para 31.

<sup>160</sup> *Emphasis added*, Sandvine (May 2017). *Global Internet Phenomenon Spotlight: the Fully-Loaded Kodi Ecosystem*. <https://www.sandvine.com/blog/2017/05/global-internet-phenomena-spotlight-the-fully-loaded-kodi-ecosystem>; Sandvine (Nov 2017). *Global Internet Phenomenon Spotlight: Television Piracy*. <https://www.sandvine.com/blog/2017/11/global-internet-phenomena-spotlight-subscription-television-piracy> The company also reports two different values in these reports: 7% in the first one; 6.5% in the latter. The Fairplay application, of course, chooses the latter.

<sup>161</sup> Fairplay (Feb 28). To protect Canadian creators, put access to piracy sites under CRTC control. *Huffington Post*. [https://www.huffingtonpost.ca/fairplay/internet-piracy-website-blocking-proposal\\_a\\_23372463/](https://www.huffingtonpost.ca/fairplay/internet-piracy-website-blocking-proposal_a_23372463/). Parenthically, the op-ed does acknowledge both Sandvine reports, so presumably those holding the pen no there are lower and higher values in circulation, and choose the higher one even though one might think the more recent of the two figures would have pride of place.

<sup>162</sup> Bridy, 2016, DCMA+, pp. 8-11.

181. The Netherlands is another example of where website blocking has been implemented (with court oversight) to block The Pirate Bay since early 2012. That, however, came undone in January 28, 2014, when the courts ordered website blocking of The Pirate Bay to be dropped on grounds that it was ineffective—a conclusion reached on the basis of an independent study by academics at the University of Amsterdam and Tilburg University.<sup>163</sup> That this is still far from stable ground, however, is evidenced by the fact that the Supreme Court in the Netherlands is currently deliberating over the fate of website blocking, with the results expected soon.<sup>164</sup>

182. Lastly with respect to examples of reversals and roll-backs, in 2010, the UK Government introduced §17 and §18 of the *Digital Economy Act*, which gave the Secretary of State the power to introduce court ordered website blocking and a framework to govern its use which could have been “potentially much broader than that which operates under section 97A [of the Copyright, Designs and Patents Act].”<sup>165</sup> Shortly thereafter, Secretary of State for Culture, Jeremy Hunt, convened meeting with stakeholders and asked Ofcom to evaluate whether sections §17 and §18 of the *Digital Economy Act* could work. For Hunt’s part, he declared: “ I have no problem with the principle of blocking access to websites used exclusively for facilitating illegal downloading of content. But it is not clear whether the site blocking provisions in the Act could work in practice, so I have asked Ofcom to address this question”.<sup>166</sup>

183. Four things led the government to drop the expanded website blocking scheme contained in the *Digital Economy Act*. First, public consultations revealed that people disliked the idea and, thus, the tactic lacked political legitimacy. Second, academics disliked the idea too.<sup>167</sup> Third, two of the biggest ISPs in the UK—BT and TalkTalk vehemently opposed such measures.<sup>168</sup> While they lost their court appeals on account of the Court’s deference to Parliament’s wisdom in these matters, the website blocking provisions were dropped anyway by the government on recommendation of Ofcom. Thus, despite the

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<sup>163</sup> Poort, J. Leenheer, J. van der Ham, J. & Dmitru, C. (2013). *Baywatch: two Approaches to Measure the Effects of Pirate Bay* (Working Paper). <https://www.scribd.com/document/162193035/Baywatch>; <http://www.lefigaro.fr/secteur/high-tech/2014/01/28/32001-20140128ARTFIG00574-le-blocage-des-sites-de-piratage-juge-inefficace-aux-pays-bas.php> and <http://torrentfreak.com/isps-no-longer-have-to-block-the-pirate-bay-dutch-court-rules-140128/>

<sup>164</sup> In the Netherlands, website blocking was permitted between 2012 and 2014 before being dropped on the basis of a Court of Appeal decision that found such measures ineffective. However, the situation is now once again in limbo with a decision by the Supreme Court expected soon ([Woitier, 2014](#); [Cooke, 2018](#)).

<sup>165</sup> Ofcom, 2010, p. 47. [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/12838/1-186872101-attachment1.pdf?lang=en](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/12838/1-186872101-attachment1.pdf?lang=en)

<sup>166</sup> <https://www.gov.uk/government/news/ofcom-to-review-aspects-of-digital-economy-act>

<sup>167</sup> Mansell, Robin and Steinmueller, W Edward (2013) *Copyright infringement online: the case of the Digital Economy Act judicial review in the United Kingdom*. *New Media and Society*, 15 (8). pp. 1312-1328.

<sup>168</sup> [BT Plc and TalkTalk Telecom Group Plc -v- Secretary of State for Culture, Olympics, Media and Sport and others, 2012](#).

positive ruling for the government from the courts, in July 2011, Hunt announced “the Government will not bring forward regulations on site blocking under the *Digital Economy Act* at this time.”<sup>169</sup> Cabinet Minister Vince Cable referred to this climb down as “common sense”.<sup>170</sup>

184. Ofcom’s views seemed to have carried the most weight in the Government’s decision to drop §17 and §18 of the *Digital Economy Act*. It argued that the new measures would not be effective for generating web sites to be blocked. They were unlikely to be any better than the alternative already available under the copyright law (sec 97A). In a passage that should be especially resonant with Canadian observers, Ofcom further argued: “we do not think that using the *Digital Economy Act* would sufficiently speed up the process of securing a blocking injunction, when compared to using section 97A of the *Copyright Designs and Patents Act*, which already provides a route to securing blocking injunctions”<sup>171</sup>
185. It also raised concerns that website blocking could collide with the right to freedom of expression and other civil and political rights enshrined in Article 10 of the *European Convention on Human Rights*. As Ofcom said, “The freedom to receive information is not only applicable to speech on matters of public concern but involves cultural expressions in addition to ‘pure entertainment’”.<sup>172</sup> In other words, such rights are not just high-minded ideals that apply to a restrictive sense of politics but the stuff of people’s everyday lives, and the means of communication they use.
186. Ofcom raised several other concerns that are worth quickly reprising. First, Ofcom suggested that attempts to block websites would be fairly easy to circumvent. As it said, this is because
- . . . infringing website operators can readily change the structure of a websites, particularly commonplace database driven websites . . . . We believe that in the short-term site blocking by DNS based blocking is . . . the quickest to implement. DNS blocking impedes the resolution of a domain name to an IP address. We note that many ISP DNS servers are able to implement blocking via software vendor supported functionality or via the manual insertion of blocking DNS records. In the longer term, however, the widespread adoption of *DNS Security Extensions (DNSSEC)* will be incompatible with DNS based blocking.<sup>173</sup>
187. Ofcom also circled back to the issue of public legitimacy in this regard by observing that the less fair the regime is seen to be, the greater the incentive to skirt around it using

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<sup>169</sup> DCMS (Autust, 2011). *Next steps for implementation of the Digital Economy Act*, p. 7. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78090/Next-steps-for-implementation-of-the-Digital-Economy-Act.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78090/Next-steps-for-implementation-of-the-Digital-Economy-Act.pdf)

<sup>170</sup> <https://www.theguardian.com/technology/2011/aug/03/government-scraps-filesharing-sites-block>.

<sup>171</sup> Emphasis added, Ofcom (2010), p. 6.

<sup>172</sup> Ofcom (2010), p. 6.

<sup>173</sup> Ofcom (2010), p. 43.

readily available technologies will be, e.g. VPNs. In other words, web blocking must be seen as fair lest perceptions of unfairness increase circumvention efforts. “It is our current belief that the blocking of discrete URLs, or web addresses, is not practical or desirable as a primary approach”, the UK communications regulator continued.<sup>174</sup>

188. Second, Ofcom flagged the idea that there is something of a basic incompatibility between “copyright owners’ unrealistic expectations for a speedy process, with blocks implemented potentially within hours of an application being made . . . given the constraints imposed on the Court sby the *DEA*, the need for the process to be fair to the legitimate interests of site operators and end users, and the practical challenges arising from the current state of site blocking technologies and internet governance.”<sup>175</sup>
189. Third, identifying site owners in order to open up the legal framework to a fair right of reply by those accused of harbouring illicit content and encouraging piracy would be difficult because of limitations and inaccuracies of the WHOIS database.<sup>176</sup> This concern is likely to become more acute in light of the upcoming adoption of the *General Data Protection Regime* in the EU this May. Current policy work on WHOIS, to ensure better compliance with the new data protection law in Europe and in the over 80 countries beyond the EU which have privacy laws, could constrain information which is published in the WHOIS. Consequently, contact with registrants may involve an extra step through a web-based form, and since those who are indeed violating law or terms of service are unlikely to respond, the investigator may have to contact the registrar concerning the domain in question.<sup>177</sup> This is of particular interest to the Faiply proposal given that it targets foreign websites. Thus, the concern that Ofcom raised in its cautionary advice to the UK Government about how “it may be impossible for the Court to identify or contact the site operator”<sup>178</sup> takes on even more gravity in light of the coming changes to the WHOIS database brought about by the GDPR.
190. Fourth, there is a basic conundrum between the different techniques that can be used to effect website blocking: 1. IP address blocking, 2. DNS blocking, 3. URL blocking as well as 4. Shallow versus Deep Packet Inspection (plus three hybrid combinations of each). Each has its strengths in meeting stated goals but also significant weaknesses in terms of their degree of effectiveness, ease of circumvention, and scope for potential problems like over-blocking and false positives. In simple terms, the less precise the measures (options 1 and 2), the more likely they will lead to over-blocking of legitimate content. Blocking an entire website takes down not just the copyright claimants’ content from the impugned site or service but *all* content, whether they have a claim in it or not. The more precise the tool used (options

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<sup>174</sup> Ofcom (2010), p. 43.

<sup>175</sup> Ofcom (2010), p. 49.

<sup>176</sup> Ofcom (2010), p. 22.

<sup>177</sup> Perrin, S. (2018). Comments on GDPR Interim Compliance Models for WHOIS & Associated Privacy Compliance Issues. <https://www.icann.org/en/system/files/files/gdpr-comments-perrin-icann-proposed-compliance-community-submitted-models-29jan18-en.pdf>.

<sup>178</sup> Ofcom (2010), p. 22.

3 and 4), the greater the privacy concerns.<sup>179</sup> The fact that Sandvine, with its powerful network surveillance and traffic management tools lurks in the background of this application gives expression to such concerns in the present.<sup>180</sup>

191. Consequently, “where there is a potential risk to the legitimate interests of other site operators, for example those sharing the same IP address as the targeted site or operating within the same domain zone, then it may be the Court would have to consider what impact a block would have on those parties, as well as the end users of those sites. It is unclear from the DEA how such issues would be treated in practice.<sup>181</sup> Of course, one might argue the matter was resolved between the court’s treatment of the issues in the *Newzbin1* and *Newzbin2* decisions in 2010 and 2011, respectively, and, therefore, website blocking given the all clear. This would be a very partial, and flawed, reading.
192. In the first case, the court rejected site blocking on the grounds that, despite the site being guilty of secondary infringement, a court order would also take down content that the site did not own. The latter case, a year later, began the website blocking scheme for copyright purposes in the UK under §97A of the ‘old’ Copyright Designs and Patents Act of 2003, which we introduced earlier. The response to that, however, is not that this was equal to the “all clear” but that the provisions in place made no pretense of being a “fast track” to anything. Thus, content that due process and a workable procedural framework—after eight years of laying dormant but during which multiple consultations, court challenges, the expert advice of Ofcom, and the *rejection of the DEA’s “fast track” measures* had taken place—the UK appears to have found a procedure that the courts could live with.
193. There is simply no comparison between that context and the evolutionary processes behind it and what the telco-backed coalition is proposing for Canada. Moreover, in contrast to appeals for “fast track” measures, the recent run of events in the UK does not subordinate the principles and values of free speech in a democratic society—all of which are well-moored in common “free speech tests”—to market concerns and statutorily given private rights. In other words, in due deference to concerns that the DEA’s fast-track measures would be likely to disproportionately affect the legitimate interests of any person and potentially undermine freedom of expression,<sup>182</sup> the events since 2011 suggest that a structured framework has been put into place that helps make peace between conflicting drives and interests. So, yes, the UK now allows website blocking, as both ITIF and the Fairplay proposal are at pains to highlight, but as they ignore/downplay that process sent

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<sup>179</sup> Ofcom (2010), pp. 43-44.

<sup>180</sup> See, for example, Sandvine (nd). Regulatory Traffic Blocking: Safety and Security Compliance for National Networks. <https://cdn2.hubspot.net/hubfs/482141/downloads/solutions/regulatory-compliance/sandvine-sb-regulatory-traffic-management.pdf>; Sandvine (nd). ScoreCard for Telecom Regulators Broadband performance metrics for all network operator types <https://cdn2.hubspot.net/hubfs/482141/downloads/solutions/regulatory-compliance/sandvine-sb-regulatory-quality-monitoring.pdf>; Procera Networks (renamed Sandvine after recent acquisition)(nd). Use cases. [https://cdn2.hubspot.net/hubfs/482141/WhitePapers/Procera\\_UseCase\\_Book.pdf](https://cdn2.hubspot.net/hubfs/482141/WhitePapers/Procera_UseCase_Book.pdf).

<sup>181</sup> Ofcom (2011), p. 48.

<sup>182</sup> Ofcom (2011), p. 47.

down well-developed channels and with a clear eye to free speech, privacy and democratic values. All of this is unlike anything found in either the tenor of their advocacy for website blocking or the details of the Consortium's proposal.

### Slippery Slopes

194. While the coalition's application argues that there's no need for concern that the measures it is proposing steps could open a flood-gate of new uses, the reality is that experience cautions otherwise. Once again, Ofcom's advice to the UK government is instructive. The use of website blocking measures would likely lead to more pressure from rights holders that "consideration . . . be given to action targeted at third parties that facilitate circumvention, such as VPN providers and search and index sites".<sup>183</sup>
195. Similar concerns arose in Australia, as well. When it adopted measures in 2012 that required all major "internet access providers to block 'the worst of the worst' child abuse sites . . . [a]ssurances [were given] that this would not be a slippery slope leading quickly to other kinds of content, specifically allegedly copyright infringing websites".<sup>184</sup> Those promises, however, soon fell by the wayside as the use of website blocking turned to disabling access to copyright infringing sites. In 2015, during its review of new copyright legislation, the Australian Parliamentary Joint Committee on Human Rights expressed "concerns that the new provisions would be utilised against virtual private networks (VPNs)", to which the Department of Communications gave its assurance that VPNs were not the target of the legislation."<sup>185</sup>
196. While the UK and Australia appear to have thus far held the line and *not* expanded blocking to include VPNS, in Canada it is clear that these concerns are well-grounded given statements by some of the country's biggest ISPs. In 2015, Rogers executive David Purdy reportedly called for VPNs to be shut down, for instance.<sup>186</sup> Bell executive Mary Ann Turcke followed suit, disparaging VPN usage to access the U.S. version of Netflix, telling an industry conference:

. . . It has to become socially unacceptable to admit to another human being that you are VPNing into U.S. Netflix . . . . We have to get engaged and tell people they are stealing.<sup>187</sup>

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<sup>183</sup> Ofcom (2011), p. 8

<sup>184</sup> Grattan, 2012. <https://www.smh.com.au/technology/backdown-on-internet-filter-plan-20121108-290qr.html>.

<sup>185</sup> Australia Parliamentary Joint Committee on Human Rights (44 Parliament, May 2015). [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2015/Twenty-second\\_Report\\_of\\_the\\_44th\\_Parliament](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2015/Twenty-second_Report_of_the_44th_Parliament).

<sup>186</sup> <https://www.techdirt.com/articles/20150227/12343330164/rogers-exec-pouts-about-vpns-publicly-dreams-canadian-ban.shtml>

<sup>187</sup> [https://www.thestar.com/business/tech\\_news/2015/06/04/netflix-stealing-comment-nets-backlash-for-bell-media-chief.html](https://www.thestar.com/business/tech_news/2015/06/04/netflix-stealing-comment-nets-backlash-for-bell-media-chief.html); Geist, M. (June 8, 2015). Sorry Bell, Accessing U.S. Netflix is not theft. <http://www.michaelgeist.ca/2015/06/sorry-bell-accessing-u-s-netflix-is-not-theft/>.

197. Underlying these concerns is that copyright holders often seem to have an implacable appetite for whatever measures they can obtain to lock down their content. In the UK, for example, after the website blocking measures of the *Digital Economy Act* were dropped voluntary agreements were adopted—with pushing and prodding by the Department of Culture, Media and Sport, that “enroll advertisers, search engines and financial intermediaries into the copyright enforcement regime.”<sup>188</sup> And while website blocking has floundered in the courts in the Netherlands, as we saw earlier, copyright holders and intermediaries have devised a wholly private system of voluntary regulation focused on a notice-and-take-approach that mirrors the contours of developments in the UK.<sup>189</sup>
198. As Boise State University copyright scholar Annemarie Bridy observes, this logic is also at play in the US: “In Congress, the courts, and the media, they [copyright owners] have demanded that online intermediaries of all kinds do more to protect their intellectual property rights. In particular, they have sought new ways to reach and shutter “pirate sites” that are beyond the reach of U.S. law. In recent years, their demands have been answered through an expanding regime of ‘DMCA-plus’ enforcement”.<sup>190</sup> The “follow the money” approaches that are the focus of Circum’s review for the Department of Canadian Heritage are of this type.
199. The issues raised by this steady sense of mission creep both within the parameters of the law and beyond are three-fold. First, the call for VPNs to be thwarted by Bell and Rogers, and concerns raised in the UK and Australia that such measures were next in line in the battle against piracy, reveals how strong is the momentum is to slide down the slippery slope. Second, as Bridy observes, “As the gap widens between what the law requires and what intermediaries are agreeing to do on a voluntary basis, there is good reason to be concerned about the expressive and due process rights of users and website operators, who have no seat at the table when intermediaries and copyright owners negotiate “best practices” for mitigating online infringement, including which sanctions to impose, which content to remove, and which websites to block without judicial intervention”.<sup>191</sup> Third, the steady mission creep of extra-judicial processes and “voluntary agreements” are becoming a growing concern to the courts, human rights agencies (e.g. the UN Committee on Human Rights) and scholars, and critically scrutinized as such.<sup>192</sup>

### **Freedom of Expression and the right to seek, receive and impart information and privacy rights are at the core of copyright infringement cases**

<sup>188</sup> IPI, 2015, p. 20; Tusikov, 2017.

<sup>189</sup> IPI, 2015, p. 20.

<sup>190</sup> Bridy, 2016, DCMA+, p. 3.

<sup>191</sup> Bridy, 2016, DCMA+, p. 2; Also see Tusikov, 2017.

<sup>192</sup> IPO, 2015, p. 3; Belli, L. & Zingales, N. (2017). Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police. In Belli, L. & Zingales, N. (eds.). [Platform Regulations](#) (pp. 41-64) and most of the other chapters in the collection; Bridy, 2016; Tusikov, 2017.

200. The coalition cavalierly dismisses claims that its proposal clashes with fundamental issues such as common carriage (net neutrality) and core human rights associated with freedom of expression and privacy. This view, however, clashes with the consistent concerns about just such issues that have been raised in national legislative contexts, as we have seen above. It also runs head on into the long-held views of international human rights organizations. The United Nations Office of the High Commissioner for Human Rights, for instance, observes in the latest *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* that,

. . . [s]ince privately owned networks are indispensable to the contemporary exercise of freedom of expression, their operators also assume critical social and public functions. The industry’s decisions, whether in response to government demands or rooted in commercial interests, can directly impact freedom of expression and related human rights in both beneficial and detrimental ways.<sup>193</sup>

201. Observacom also argues that these ideas are becoming “more important than ever as governments and various groups push ever harder to restrict online content under the banner of fighting ‘fake news,’ countering terrorism, or combating illegal content and hate speech. Calls to block websites are part of this trend.”<sup>194</sup> While concerns may indeed be mounting, such considerations are also long-standing, and at the heart of Article XIX of the *United Nations Declaration of Human Rights*, of which Canadians can be justifiably proud given the lead role that McGill University law professor John Humphrey played in penning the document back in 1948 when it came into force. Those ideas have animated our discussion of communication ever since. They are more important than ever in light of the development of the internet as *the* common infrastructure not just for commerce but human communication, *tout court*.

202. Animated by such concerns, the *Joint Declaration Concerning the Internet* penned by the regional Freedom of Expression Rapporteurs in 2011 referred to “actions such as the mandatory blocking of websites are extreme actions that may *only be* justified in accordance with international standards, such as the protection of minors from sexual abuse . . .”.<sup>195</sup> This statement is worth quoting from it at length. Thus, to help set the footing, the statement begins with the statement that “Freedom of expression applies to the Internet, as it does to all means of communication”.<sup>196</sup> In the matter of intermediary responsibility, the Rapporteurs are once again on point:

<sup>193</sup> UN Special Rapporteur (2017) *Freedom of Opinion and Expression - Annual Reports*. [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/35/22](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22).

<sup>194</sup> Observacom (2018). The risks of the increasing intervention of big intermediaries in Internet content. <http://www.observacom.org/sitio/wp-content/uploads/2018/02/The-risks-of-the-increasing-intervention-of-big-intermediaries-in-Internet-content-OBSERVACOM.pdf>

<sup>195</sup> [Freedom of Expression Rapporteurs Issue Joint Declaration Concerning the Internet, June 1, 2011](#)

<sup>196</sup> [Freedom of Expression Rapporteurs Issue Joint Declaration Concerning the Internet, June 1, 2011](#)

. . . No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others . . . as long as they do not specifically intervene in that content or refuse to obey a *court order to remove that content*, where they have the capacity to do so ('mere conduit principle') . . . . At a minimum, intermediaries should not be required to monitor user-generated content and *should not be subject to extrajudicial content takedown rules* which fail to provide sufficient protection for freedom of expression.<sup>197</sup>

203. And finally, in specific reference to filtering and blocking mandates, the *Rapporteurs* are blunt:

. . . Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) *is an extreme measure – analogous to banning a newspaper or broadcaster* – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.<sup>198</sup>

204. The totality of such documents strike the clear and consistent note that intermediaries should not be in the position of making judgements about the legality of content in the absence of rule-of-law mechanisms, although the coalition's approach involves the companies at the outset in making preliminary lists that the Commission will be called on to make a final determination. At the very least, this is skating very close to the edge of what these statements are suggesting should be a non-starter. The manner in which the coalition propose the IPRA be constituted and steered over time, with the ISPs having a steady hand on the tiller at all times, as we described in detail earlier, also sits uncomfortably with the what these statements identify as deeply problematic. So, too, does the framework the coalition proposes for the IRPA clash with the admonition that "Companies should interpret governments' jurisdictional authority appropriately narrowly to minimize the adverse impact of takedown orders on the right to freedom of expression as well as the admonition that [c]ompanies should act at arms-length from government rather than be deputized by them"—although in this case it is almost the other way around, with the companies boldly seeking to deputize the Commission in carrying out what they see as 'good for business'.<sup>199</sup>

205. When it comes to website blocking, the Joint Rapporteurs' statement is also clear: "the removal of disputed content should take place only when there is a *specific (explicit) legal basis* for doing so and the content in question has been specifically adjudicated as being illegal and a court order has been issued."<sup>200</sup> And lastly, "*any limitation* to the right to freedom of expression has to follow: a three-part cumulative test: First, it needs to be

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<sup>197</sup> [Freedom of Expression Rapporteurs Issue Joint Declaration Concerning the Internet, June 1, 2011](#)

<sup>198</sup> *Emphasis added*, [Freedom of Expression Rapporteurs Issue Joint Declaration Concerning the Internet, June 1, 2011](#)

<sup>199</sup> [Freedom of Expression Rapporteurs Issue Joint Declaration Concerning the Internet, June 1, 2011](#)

<sup>200</sup> *Emphasis added*, [Freedom of Expression Rapporteurs Issue Joint Declaration Concerning the Internet, June 1, 2011](#)

‘prescribed by law’. Second, it is required to ‘protect the rights of others’ (principle of legitimacy). Third, it needs to be proven to be ‘necessary’ and the least invasive means.<sup>201</sup> The ECJ and General Advocate struck similar positions with respect to SABAM case in Belgium.

206. These are far more than just high-minded clouds of rhetoric; they actively shape the context in the European Union where website blocking has, as we agree, become more common, although not *unbridled*, as the coalition seems to imply at times. Thus, in a watershed case that paved the way for the greater use of website blocking in relation to disabling access to copyright infringing sites and services seen in recent years, in the *UPC Telekabel v Constant Film* case the Court of Justice of the European Union made it very clear that while disabling access to website can be an acceptable method to combat copyright infringement, its use “must strike a balance between (i) copyrights and related rights, (ii) ISPs freedom to conduct a business, and (iii) the freedom of information of internet users, whose protection is ensured by Article 11 of the Charter.”<sup>202</sup> Moreover, while ISPs have an obligation to take serious steps to curb subscribers’ access to infringing copyright material, and this *can* include website blocking, courts cannot be too prescriptive in terms of dictating how network operators achieve the ends being sought. This is done out of respect for ISPs’ freedom to conduct their business as they see fit, within the bounds of the law.<sup>203</sup>

207. Lastly, the *UPC Telekabel* case is emphatic that court orders and active court oversight are sine qua non aspects of this process. Those orders, in turn, “must observe the limitations arising from [EU Copyright] Directives 2001/29/EC and 2004/48/EC . . . [and] the requirement that a fair balance be found . . . *in fine*, of the Charter, between all applicable fundamental rights”.<sup>204</sup>

208. All of which is respectfully submitted.

209. \*\*\*END OF DOCUMENT\*\*\*

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<sup>201</sup> UNHRC, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (16 May 2011), p. 8.

[http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).

<sup>202</sup> European Court of Justice (2014). *UPC Telekabel Wien GmbH v Constant in Film Verleih GmbH* (Austria), para 47.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=157732>.

<sup>203</sup> European Court of Justice (2014). *UPC Telekabel Wien GmbH v Constant in Film Verleih GmbH* (Austria), paras 48-54.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=157732>.

<sup>204</sup> *emphasis added*, European Court of Justice (2014), paras 44 and 63.