

**APPLICATION PURSUANT TO
SECTIONS 24, 24.1, 36, and 70(1)(a) OF THE *TELECOMMUNICATIONS*
ACT, 1993
TO DISABLE ON-LINE ACCESS TO
PIRACY SITES**

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Cinema, Television and Radio Artists (ACTRA), Association
québécoise de l'industrie du disque, du spectacle, et de la video
(ADISQ), Asian Television Network (ATN), Association québécoise de
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DHX Media, Entertainment One, Ethnic Channels Group, Fairchild
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(IATSE), Landmark Cinemas, Maple Leaf Sports and Entertainment
(MLSE), Movie Theatre Association of Canada (MTAC), Québecor
Média Inc., Rogers Media, Television Broadcasts Limited (TVB), TIFF,
and Union des artistes (UDA).**

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A. OVERVIEW

1. This application is brought jointly by a broad coalition of more than 25 directly affected stakeholders including unions, guilds and associations representing Canadians that work in the film, television, and music industries, independent production and media companies, broadcasters, distributors, exhibitors, and Internet service providers (ISPs). The key points in the application are:

- Piracy is a large and growing problem that **threatens the massive employment, economic, and cultural contributions** of Canada's film, television, and music industries.
- To combat the piracy problem, the CRTC should create an independent agency to identify websites and services that are **blatantly, overwhelmingly, or structurally engaged in piracy**. Following due process and subject to judicial oversight, ISPs would ultimately be required to disable access to the identified piracy sites and services.
- The coalition **supports net neutrality and the free flow of legal content on the Internet**. The system we propose does not raise net neutrality issues. ISPs remain neutral and simply implement decisions of the CRTC that restrict the distribution of **content that is unlawful**. Net neutrality does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online.¹
- This system would have **extensive checks and balances**, including notice requirements; rights for the website, ISPs, and interested parties to give evidence and participate in a hearing; review and oversight of all decisions by the CRTC; and additional oversight by the courts through potential appeals and judicial review in the Federal Court of Appeal.
- **More than 20 of Canada's international peers have established similar regimes**, including the UK, Australia, France, Belgium, Portugal, Spain, Italy, Ireland, Sweden, Norway, Finland, and Denmark. Some are administered by courts and others by administrative agencies like the CRTC.

¹ For example, the Open Internet Order in the United States was only in relation to "lawful" content: see e.g., 76 FR 59191 ("The rule protects only transmissions of lawful content"). See also Article 3, paragraph 1 of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

B. EXECUTIVE SUMMARY

2. Canada's telecommunications system must respond to the economic and social requirements of Canadian citizens and businesses, and must safeguard, enrich, and strengthen our social and economic fabric.² In some cases, that requires telecommunications service providers to participate in the solution to a problem they do not cause but which they are well placed to address.³

3. Internet piracy is a significant and growing threat to Canadian artists and the broader Canadian creative sector, Canadian broadcasters and legal distributors, and the Canadian economy. Last year there were at least *1.88 billion visits* made to piracy sites from Canada⁴ and Canadian productions were pirated globally hundreds of millions of times. This activity infringes the rights of Canadians who create, produce, invest in, and disseminate creative works, and makes it difficult if not impossible to build the successful business models that will meet the evolving demands of Canadians, support Canadian content production, and contribute to the Canadian economy.

4. In 2016, the Department of Canadian Heritage initiated a substantial consultation process to assess the status of Canadian content creators in a digital world. As that consultation heard:

There is a need to ensure that Canadian creators share in the financial rewards resulting from increased dissemination of cultural content via digital channels. Likewise there is a need to foster increased re-investments in order to promote the creation of Canadian digital cultural content. Doing so will help ensure the longer term financial viability of Canada's cultural content creators who may otherwise have to seek out other career paths in order to support themselves⁵

5. Piracy undercuts all of these objectives – it robs Canadian creators of the financial and other intangible benefits of the creation of cultural content and guarantees that they do not share in the rewards from its increasing dissemination. Investing in programming is already risky, and becomes increasingly unviable if even the rare hit cannot be effectively monetized because it is pirated online. As a result, piracy undermines the creation of cultural content and threatens the viability of Canada's cultural sector and therefore the expression of uniquely Canadian perspectives and identities. It also puts at risk the economic contribution of a film and television production sector that, in 2015-

² Telecommunications Act, sections 7(a) and 7(h).

³ For example, 911, emergency alerting, and VRS.

⁴ MUSO Report, attached as Exhibit 1.

⁵ What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, "Key Themes" at page 8.

2016, generated \$8.5 billion for the Canadian economy and contributed over 140,000 jobs.⁶

6. The harm to legitimate distributors such as licensed BDUs or over-the-top (“OTT”) digital services is also significant and often felt first and most directly. The experience of the relevant members of the coalition with their own customers suggests that households that engage with piracy sites and services (such as the use of illegal set-top-boxes) are many times more likely to cancel legal distribution services or not sign up for them in the first place. This results in the loss of potentially hundreds of millions of dollars in revenue for distributors that would otherwise support investment in modern telecommunications infrastructure in Canada, in the Canadian economy, and in the Canadian creative sector.⁷

7. This economic harm caused by piracy also results in millions of dollars in lost tax revenues for the government.

8. Nor is piracy a benefit to consumers. Consumers may pay for a piracy subscription or device only to be left without recourse when it does not work as promised. More importantly, piracy sites expose consumers to privacy risks, hacking, identify theft, and malware. That directly harms consumers and undermines consumer confidence in the communications system and digital marketplace. Piracy also increases costs for consumers that choose legal ways of accessing content, and as a result end up subsidizing it for those who choose to access content through piracy sites.

9. For these same reasons piracy also undermines innovation and the digital economy. New business models in this economy depend on the integrity of digital markets, including the ability to rely on copyright to determine the sites and services on which creative content is made available. Piracy makes those business models exceedingly difficult; successful innovation in the digital economy will take place in markets that effectively mitigate the impact of copyright theft.

10. Piracy is illegal under the *Copyright Act* and the *Radiocommunication Act*. In this application we refer to a specific aspect of the piracy problem – namely, the availability on the Internet of websites, applications, and services that make available, reproduce, communicate, distribute, decrypt, or decode copyrighted material (e.g., TV shows, movies, music, and video games) without the authorization of the copyright holder, or that are provided for the purpose of enabling, inducing, or facilitating such actions. In this application “**piracy**” refers to this range of activities, “**pirate operators**” refers to those who operate the

⁶ CMPA, *Profile 2016* at page 4.

⁷ Similarly, for the music industry piracy can result in cannibalizing of music purchases and also discourages subscription to legal streaming services particularly premium subscription services that allow users to store music they like for offline listening. These losses deprive the rightsholders of an important source of compensation.

websites, applications, and services (not the individuals that use them), and “**piracy sites**” refers to locations on the Internet at which one accesses the websites, applications, services that are blatantly, overwhelmingly, or structurally engaged in piracy.⁸

11. While there is no debate that piracy is illegal, the problem is not easily addressed because its borderless nature renders the tools currently available in Canada largely ineffective. That is because piracy relies on the anonymous and global nature of the Internet, which allows pirate operators to disguise their true identities and piracy sites to be accessible in Canada while operating out of jurisdictions in which it is impossible or impractical to take the enforcement measures required to protect the Canadian market.

12. If the pirate operators behind a piracy site can be identified, they may reside in one jurisdiction, use servers or websites registered in one or more other jurisdictions, and cause damage throughout the world. And even if slow and expensive traditional legal efforts can be undertaken successfully against these individuals, new pirate operators quickly emerge to provide access to the same pirated works.

13. Thus, the nature of online piracy means that if the Canadian creative sector is left to rely solely on conventional domestic legal remedies, it will be doomed to fail. A multi-pronged approach is required, and the relief sought in this application is a central aspect of that approach. It is impossible to effectively combat piracy in Canada in the digital age by pursuing pre-digital remedies against pirate operators.

14. The harm caused by piracy combined with its resilience in the face of traditional legal remedies and law enforcement strategies has led most of Canada’s closest international partners to recognize that all players in the piracy ecosystem have a role to play in combating it. This includes intermediaries such as ISPs, hosts, payments processors, search engines, domain name registrars, and advertising networks, all of whom can be well placed to contribute to addressing this important issue. The appropriate role of intermediaries in combating IP infringement in the global Internet environment has also been recently recognized in Canada, both in a report commissioned by the Department of Canadian Heritage last year and by the Supreme Court of Canada in the *Equustek* case.⁹

⁸ Accordingly, piracy sites could include not just a traditional website but also, for example, a location on the Internet dedicated to the delivery of an illegal piracy subscription service accessed directly from a server through an illicit streaming device.

⁹ See Examination of the “follow-the-money” approach to copyright piracy reduction, Final Report prepared by Circum Network Inc. for Canadian Heritage (14 April 2016) (describing a global piracy ecosystem that includes hosts, ISPs, search engines, advertising networks, and payment processors, and recommending that rules regarding each of them be examined) and *Google Inc. v. Equustek Solutions*

15. While there is no single solution to the piracy problem and countries around the world have adopted a variety of new measures to combat the emerging threat, one particularly common and effective approach has been the implementation of rules to require ISPs to disable access to specified piracy sites for their customers:

- In 2001, the European Union issued a directive requiring all member states to make it possible to obtain a mandatory order against intermediaries whose services are used to infringe copyright.¹⁰
- In 2003, the United Kingdom, despite determining that an injunction against ISPs was already available at common law, introduced a specific regime to make the process for obtaining such orders faster, more efficient, and more certain for all parties. The regime has been in place for more than a decade and orders disabling access to piracy sites have been successful in reducing rates of piracy and increasing the rate at which customers purchase creative content legally.¹¹
- In 2006, France introduced a regime to require ISPs to disable access specified piracy sites and also require other intermediaries to remedy infringements to which they contribute.
- In all, more than 20 countries around the world including, in addition to the UK and France, Australia, South Korea, Norway, Denmark, Spain, and Portugal, have introduced specific regimes to make it possible for rightsholders to request that ISPs be required to disable access to specified piracy sites for their customers. These include both processes operated through the courts and administrative regimes.

16. Disabling access to specific piracy sites is a practical and effective tool in the fight against piracy because it engages the ISP networks that consumers must rely on to access piracy sites and because it can be effected entirely within the domestic legal and regulatory systems. At the same time, because the ISP's role is limited to disabling access to piracy sites as determined by the Commission, the system proposed does not offend any principles underpinning net neutrality.

17. In Canada, given its existing mandate and powers under the *Telecommunications Act*, the Commission is well-placed to address the need to engage ISPs in combating piracy in order to ensure that Canada's

Inc., 2017 SCC 34 (finding that Google, as an intermediary, could be required to take steps to combat the infringement of IP rights globally).

¹⁰ Directive 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

¹¹ Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior, Danaher *et al.*

telecommunications system safeguards and enriches Canada's economic and social fabric and responds to its economic and social needs.

18. Accordingly, in light of the significant threat to Canada's cultural, digital, and innovation economy posed by piracy, the problems with conventional enforcement, and the success of regimes in comparable jurisdictions, the coalition is asking the Commission to require ISPs to disable access for their residential and mobile customers to certain specified piracy sites identified from time to time by the Commission.

19. The Commission would identify these piracy sites after receiving a recommendation from a new independent organization established by the Commission (the "**Independent Piracy Review Agency**" or "**IPRA**"). The role of the IPRA would be to consider applications by rightsholders and other interested parties ("**applicants**") seeking to add a site to the list of piracy sites to which access must be disabled. It would review evidence submitted by the applicant, the websites, ISPs, and other interested parties, including in an oral hearing if appropriate, and would make recommendations to the Commission. The Commission would consider the evidence and these recommendations and, if approved, would require and authorize ISPs to disable access to these piracy sites.

20. The system proposed seeks to maximize transparency and incorporates extensive safeguards and checks and balances, including notice and an opportunity for the website, ISPs, and other interested parties to review any application submitted to and provide evidence and argument and participate in a hearing before the IPRA; review of all IPRA decisions in a transparent Commission process; the potential for further review of all Commission decisions through the established review and vary procedure; and oversight of the entire system by the Federal Court of Appeal, including potential appeals on questions of law or jurisdiction including constitutional questions, and the right to seek judicial review of the process and merits of the decision.

21. The Commission is empowered to implement this system pursuant to the following provisions of the *Telecommunications Act*, S.C. 1993, c. 38 (the "**Act**"):

- Sections 24 and 24.1, which allow the Commission to make participation in this system a condition of offering service as an ISP in Canada;
- Section 36, which empowers the Commission to approve the disabling of access to websites by an ISP; and
- Section 70(1)(a), which empowers the Commission to appoint the IPRA to inquire into and report to the Commission on the matter of identifying piracy sites.

22. Exercising regulatory authority under these provisions to implement this system would support the telecommunications policy objectives in section 7 of the Act and is consistent with previous Commission decisions regarding its jurisdiction.¹²

23. The coalition recommends that the IPRA be established as an independent not for profit corporation with the mandate to consider applications from applicants seeking to identify piracy sites. The IPRA would hear evidence from both the applicant and the alleged piracy site, as well as any ISPs that choose to participate in that particular process, and would conduct an oral hearing if necessary. Once the IPRA has completed its consideration of an application, it would submit a recommendation to the CRTC for approval. The IPRA would be designed to ensure procedural fairness while its specialized mandate would allow for a significantly more timely and efficient process than would be possible through applications made at first instance directly to the Commission.

24. As set out in section F, below, the coalition recommends that the details of the IPRA's organization and process be determined by the Commission in a follow-up proceeding based on a proposal to be developed in consultation with rightsholders, ISPs, and consumer advocacy and citizen groups.

25. In conjunction with the establishment of the IPRA, the coalition requests that in its decision on the current application the Commission impose on all ISPs a condition under sections 24 and 24.1 of the Act requiring that the ISP disable access to the list of piracy sites identified from time to time by the Commission (after receiving recommendations from the IPRA). The decision would also provide Commission approval under section 36 of the Act for the actions taken by ISPs to disable access to those sites.

26. If an applicant, website owner, ISP, or relevant member of the public objects to a Commission decision identifying a piracy site, any of them could seek a review of the decision under section 62 of the Act or could seek an appeal or judicial review in the Federal Court of Appeal.

27. The coalition undertakes to assume a leadership role in any further work required to establish IPRA and allow it to begin operating.

¹² In particular, the Commission has expressed the view that its approval is required in all instances prior to ISPs disabling access to content and that it would consider whether to approve based on the telecommunications policy objectives set out in its home statute, the *Telecommunications Act*: Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016), affirmed in Telecom Decision CRTC 2016-479.

C. BACKGROUND AND RATIONALE

(a) The Widespread Problem of Internet Piracy

28. Piracy is not a new problem but over time it has shifted from the bootlegging of physical media and theft of satellite signals to a decentralized network of anonymous and clandestine online operations, where piracy sites profit from charging users for unauthorized access to content and selling advertising associated with that content. The Internet has had a profoundly positive impact on Canadian society and individual Canadians but it also has exacerbated the piracy problem, making it easy for pirate operators to make their pirate sites available in Canadian homes.

29. The nature of online piracy itself is also changing, while the problem continues to grow overall. In particular, “peer-to-peer” file sharing (torrents, associated with sites such as The Pirate Bay) was until recently the most common means of accessing pirated content in Canada but has now been surpassed by streaming of pirated content. Today, up to 85% of Canadians’ engagements with online piracy are through such streaming sites.¹³ Piracy is also evolving in different forms in the music sector. Stream ripping is the new leading form of music piracy.¹⁴

30. Content is accessed on piracy sites through web browsers and, increasingly, through applications that can also be loaded on phones, tablets, and set-top-boxes. These applications provide a more user-friendly interface that provides instant access to thousands of illegal streams available from a variety of piracy sites to find the “best” stream. This makes accessing piracy sites easy and effective for even the least technologically sophisticated user, and increases the importance of solutions that do not require protracted litigation against every one of the sites involved.

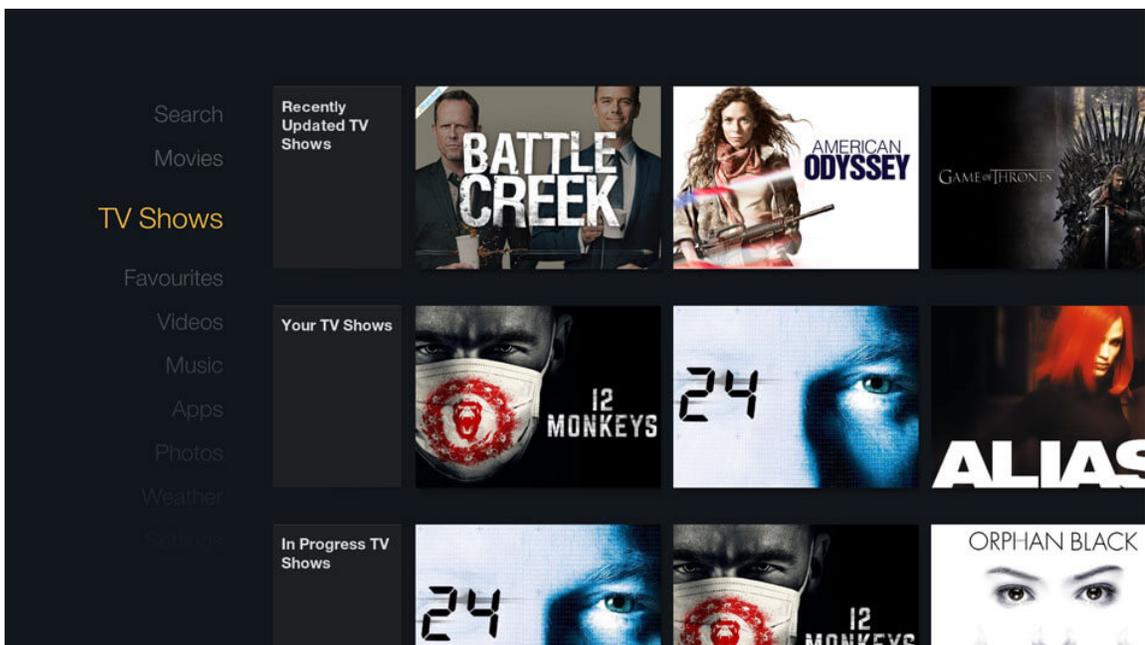
KODI – Select Live Canadian TV Channels

¹³ MUSO Report.

¹⁴ IFPI, Global Music report 2017, p.37.



KODI – On-Demand Library



31. The illicit and online nature of piracy means that it is difficult to track and quantify, but there is compelling evidence that the phenomenon is huge and growing:

- As reported in the MUSO study at Exhibit 1, Canadians made *1.88 billion visits to piracy sites* in 2016.

- As reported in a recent Sandvine study, approximately 7% of North American households (which would be approximately *1 million households in Canada*) use illegal piracy add-ons within the KODI media centre to access content from major piracy sites (which could be addressed through the regime proposed in this application).¹⁵
- As reported in another recent Sandvine study, approximately 7% of North American households (which would again be approximately *1 million households in Canada*) use illegal subscription piracy services.¹⁶
- As reported in a study by MovieLabs, *375 million pirated movies and TV shows were downloaded illegally in Canada* in 2016 using the BitTorrent P2P protocol. This excludes other P2P protocols, downloading directly from cyberlockers rather than peer-to-peer, and all piracy that took place through streaming sites (believed to be up to 85% of piracy engagements). In total, 99% of files available on BitTorrent have been found to be infringing.¹⁷
- Because of its illicit and underground character, it is impossible to determine the full extent of the financial harm from this volume of piracy, which impacts rightsholders,¹⁸ distributors, exhibitors, and their legal partners and customers (let alone non-financial harms such as to licensing and windowing strategies, brand and reputational impacts from unauthorized uses, the destruction of legitimate commercial relationships, and the spread of malware and high-risk advertising). Nevertheless, even estimates that do not capture this full spectrum of harms suggest that globally piracy sites have generated approximately \$227 million in advertising revenue alone¹⁹ and that piracy had an estimated commercial value (in this case of movie piracy alone, excluding television) in 2015 of \$160 billion.²⁰

32. Canadian content is not immune from this trend. Canadian content is widely pirated. Certain coalition members track piracy of shows with which they are involved. Together, the Canadian productions of these coalition members were downloaded hundreds of millions of times last year and were streamed from millions of unique URLs:

¹⁵ Sandvine, Global Internet Phenomena Spotlight: The "Fully-Loaded" Kodi Ecosystem, May 2017 (approximately 10% of Canadian households have an active KODI device and at least 71% of those actively use a piracy add-on).

¹⁶ Sandvine, Global Internet Phenomena Spotlight: Subscription Television Piracy, November 2017.

¹⁷ 2016 BitTorrent Movie and TV Downloads, MovieLabs P2P Monitoring; Felten, E., Census of Files Available via BitTorrent, Princeton Center for Information Technology Policy, January 2010.

¹⁸ Rightsholders can include content creators, distributors and exporters, and broadcasters, among others.

¹⁹ Media Link/Digital Citizens Alliance, Good Money Gone Bad: A Report on the Profitability of Ad-Supported Content Theft, February 2014.

²⁰ Frontier Economics, *The Economic Impact of Counterfeiting and Piracy*, February 2017.

(b) The Harm Caused by Internet Piracy

33. Piracy causes significant harm to Canada's social and economic fabric, including the broader Canadian economy, the telecommunications system, the cultural sector, the broadcasting system, and consumers.

34. Cultural industries employ 630,000 or ~4% of Canadians and contribute \$55B or ~3% to Canada's GDP.²¹ Within this industry, according to the CMPA's 2016 Profile, film and television production accounted for 140,000 FTE jobs, \$8.5B in GDP, and \$3.3B in export value²² – and that does not include the thousands of jobs and billions of dollars in economic value contributed by the other activities of broadcasters, broadcast distribution undertakings ("BDUs"), movie distributors, cinemas, retailers, and others impacted by piracy. Left unchecked, piracy will dramatically erode the contribution of these companies and their employees to Canada's digital and creative economies.

35. It does so by denying rightsholders the right to control the quality and integrity of their works, when and how they are viewed, and the compensation they are entitled to seek in the market for the hard work, creativity, expertise, and resources they have invested in their works. This negatively affects their earnings and profitability, leading to reduced employment and fewer opportunities for writers, producers, composers, performers, costume designers, and other content creators to make their living producing content. By denying content creators fair compensation for their work, piracy also reduces the ability of content creators and other rightsholders to develop, produce, and disseminate new content, undermining Canada's social fabric.

36. The effects on other legitimate participants in the ecosystem are the same. Rightsholders deal with partners operating all manner of legitimate distribution models, including theatres, conventional and speciality television stations and the BDUs that distribute them, over the top services like Netflix or CraveTV, and online and bricks-and-mortar retailers. Piracy diverts potential customers away from these legitimate channels in favour of illegal services that do not negotiate or pay to acquire rights nor comply with licensing rules. Indeed, in Australia the impact of piracy on Ten Network was described by its co-chief executive as being in the hundreds of millions of dollars and a direct cause of the potential bankruptcy of the network.²³

37. Piracy also continues to erode the contribution of Canada's cultural sector to the country's social fabric and democratic life. The Canadian creative sector is already under pressure in its efforts to flourish in the digital age and can scarcely absorb increasing losses at the hands of those who seek to appropriate their

²¹ Canadian Heritage, *Creative Canada: Policy Framework* (2017), at page 7.

²² This includes \$2.64B in foreign location and service production that contributes 54,900 jobs.

²³ <https://torrentfreak.com/pirates-cost-australias-ten-network-hundreds-of-millions-of-dollars-170616/>

works. As noted above, a consultation undertaken by the department of Canadian Heritage (the “**Heritage Consultation**”) heard that:

*There is a need to ensure that Canadian creators share in the financial rewards resulting from increased dissemination of cultural content via digital channels. Likewise, there is a need to foster increased re-investments in order to promote the creation of Canadian digital cultural content. Doing so will help ensure the longer term financial viability of Canada’s cultural content creators who may otherwise have to seek out other career paths in order to support themselves.*²⁴

38. The importance of funding to Canadian content creators was further emphasized in the Heritage Consultation:

*There is a need for increased funding as well as the creation of funding models that are more adaptable. A level field for private sector competition was desired by participants, across platforms, production models, content types and different players within the cultural sector value chain, particularly within the discussion of new digital platforms (like Netflix, Facebook, Amazon and Spotify).*²⁵

39. While adapting funding models to the digital age is a complicated challenge, an essential step will be to ensure rightsholders can appropriately monetize their content in a digital marketplace, which requires strong measures to stop the drain that piracy causes on an industry already under stress. Ensuring that Canadian content creators and distributors are actually paid for the work they produce and distribute (regardless of its distribution platform), rather than that work being appropriated by pirate operators and the pirate sites they operate, is an important and obvious step towards reinforcing the financial viability of the sector that can be achieved without requiring additional access to scarce government (or other) funding.²⁶ As the Heritage Consultation recognized, “*much of the needed change discussed involves collaboration between the Department of Canadian Heritage, other government departments, provinces and territories, as well as the public and private sectors*”.²⁷ The initiative we are proposing would be an excellent example of such broad-based collaboration.

²⁴ What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, “Key Themes” pg 8.

²⁵ What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, “Key Themes” pg 9.

²⁶ This is particularly important because, as the study recognized: “*There is general recognition that increasing the tax burden on foreign and/or Canadian enterprises to fund creative development is likely to have a direct impact on Canadian consumer. They were worried this would result in limiting affordability and access to high-speed Internet connections.*” What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, (Heritage Consultation) “Key Themes” p 10.

²⁷ Heritage Study, p 10.

40. The harm caused by piracy is not just abstract but real, and it affects real projects. To take just one specific example, veteran Canadian film producer Don Carmody describes the piracy of his film *Goon* as like nothing he had experienced in four decades of filmmaking. He estimates that the film lost at least \$1 million of potential box-office sales in Canada to piracy and likely millions of more in subsequent DVD or download sales.²⁸

41. As well as the creative sector, piracy directly harms the legitimate Canadian broadcasting system. Broadcasters make significant investments in their own programming and programming they develop jointly with independent producers. In exchange, broadcasters receive copyright in that programming, which they then monetize through a combination of traditional television channels and new OTT platforms in which they are also investing. These investments are extremely risky for both the producer and the broadcaster, as it is impossible to predict in advance what will be a hit or even which projects will break even. When a work is successful, it must pay for itself and for all the less successful productions in which investments had to be made to find that one hit. If hits can't be broadly monetized, broadcasters and producers will become increasingly reluctant to make the investments necessary to produce them.²⁹

42. Legitimate BDUs face a similar impact as Canadians turn to piracy sites instead of legitimate subscriptions to obtain access to creative content. 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.

43. The impact on the broadcasting system is already being felt. Lawful television subscriptions are declining in Canada. According to CRTC data, cable, satellite, and IPTV BDUs in Canada collectively have lost subscribers every year since 2012, losing more than 400,000 total over that time despite the number of occupied private dwellings increasing by approximately 700,000 during the same period.³⁰ While it is impossible to determine precisely how many of these 1.1 million households are lost subscribers due to piracy, the experience of relevant members of the coalition with their customers confirms that consumers who engage with piracy sites are many times more likely to cancel legal services or never subscribe to them in the first place than are those that do not engage with piracy sites.

²⁸ "Battling Bit Torrent: Can the movie studios beat online piracy?" (<http://www.canadianbusiness.com/technology-news/battling-bit-torrent>)

²⁹ A similar situation prevails in the music industry, which is also a risky business. The inability to generate adequate incomes will affect risk-taking and will result in a less diversified music offering.

³⁰ Statistics Canada, *Dwelling counts, for Canada, provinces and territories, 2016 and 2011 censuses – 100% data*, available at: <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm?Lang=Eng&T=108&S=50&O=A>

44. The average television subscriber in Canada likely accounts for between \$50 and \$80 in monthly revenue to a legal BDU.³¹ If 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 annually. There would be additional revenue losses from subscribers that do not cancel their subscriptions entirely but do reduce the size of their subscriptions by eliminating channels they can easily replace with piracy (such as those showing scripted programming and movies).

45. This estimate is broadly consistent with figures reported by Sandvine in a recent *Global Internet Phenomena* report in which it found that subscription piracy services alone result in an estimated annual financial loss to the industry in North America of US\$4.2 billion. If approximately one tenth of those losses are attributable to the Canadian market, the impact here would be approximately \$500 million.

46. This economic harm has an additional impact on government finances, resulting in millions of dollars in lost revenues from sales and corporate taxes that would be paid by legitimate participants in the cultural economy.

47. Moreover, because Canadian BDUs contribute 5% of their revenue directly to Canadian production funds this is a direct loss of between \$11 million and \$25 million or more every year. 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.³²

48. Piracy also harms consumers, exposing them to serious privacy, hacking, identify theft, and malware risks, all of which directly harm Canadians, their ability to use the communications system, and their confidence in the communications system and digital marketplace. These risks have been well-documented:

- 1 out of every 3 piracy sites contains malware.³³

³¹ See Scotiabank, *Converging Networks* (2015), estimating that each television service subscriber represented approximately \$53.36 to \$77.67 in monthly revenues (\$640.32 to \$932.04 in yearly revenues) for Canadian BDUs; according to the CRTC's most recent financial reports the total revenue for all BDUs is approximately \$65 per subscriber per month.

³² The 2017 Communications Monitoring Report reveals that Canadian BDUs paid \$3.034 billion in affiliation fees to Canadian discretionary services in the previous year, representing approximately 35% of all BDU revenues. Accordingly, a reduction in BDU revenues of between \$220 million and \$500 million would be associated with a reduction of affiliation payments to Canadian programmers of between \$77 million and \$175 million annually.

³³ Digital Citizens Alliance / Risk IQ, *Digital Bait: How content theft sites and malware are exploited by cybercriminals to hack into internet users' computers and personal data*.

- 45% of the malware on these sites is delivered through so-called “drive-by downloads” that invisibly download to the user’s computer, without requiring them to click on a link.³⁴
- Consumers are 28 times more likely to get malware from a content theft site than on similarly visited mainstream websites or licensed content providers.³⁵
- 7% of the websites distributing unauthorized content have associations with known cybercrime organizations.³⁶
- 89% of ads targeting Canadians on rogue websites are high-risk advertisements, of which 44% were in the malware category, 18% were scams, and 30% were from the sex industry.³⁷

49. Indeed, just this fall The Pirate Bay began hijacking users’ computers without notice to mine cryptocurrency. Also last year Exodus, one of the most widely used piracy add-ons for illicit streaming devices, introduced malware that turned its users’ computers into a botnet for a DDOS attack. Overall, it is believed that pirate sites earn more than \$70 million a year from the installation of malware on users’ devices.³⁸

50. Piracy is manifestly unfair to Canadians who continue to access content by legal means. As some individuals stop paying for creative content, an ever shrinking base of legitimate subscribers is forced to pay for the development of content which is stolen by an ever increasing group of pirate operators and their customers. In this way, honest customers and broadcasters pay higher prices in order to subsidize the entire piracy ecosystem.

51. Piracy sites and the services they support also obviously do not comply with consumer protection rules or the Commission’s social policies (from closed captioning to emergency alerting), and frustrated consumers will find themselves without recourse when they rely on and even pay for a service that turns out not to work as expected.

52. Internet piracy represents a dramatic and growing threat to the Canadian creative and broadcasting sectors and the Canadian economy as a whole, impacting all industry players, and diluting the economic value produced by the sector. Piracy also means that less Canadian creative content will be made and

³⁴ Ibid

³⁵ Ibid.

³⁶ McAfee, *Music and Movies: Entertainment Versus Online Risk: Avoiding the risks associated with online music, videos and movies.*

³⁷ Dr. Paul Watters, *The Prevalence of High- Risk and Mainstream Advertisements Targeting Canadians on Rogue Websites.*

³⁸ Digital Citizens Alliance / Risk IQ, *Digital Bait: How content theft sites and malware are exploited by cybercriminals to hack into internet users’ computers and personal data.*

enjoyed. Uniquely Canadian stories may never be told and content that reflects the diverse cultural identity of Canadians will be lost. As Canadians, we are all harmed by piracy.

(c) **The Difficulty of Combating Internet Piracy**

53. Piracy is, by its nature, often resistant to conventional domestic legal action.

54. The nature of online communication means that pirate operators can frequently conduct their activities with total anonymity. Pirate operators can communicate with one another, and with their customers, online using false names and providing no identifying information. Thus, identifying and obtaining relief against the real individuals operating piracy sites can be exceptionally difficult.

55. Even when these pirate operators can be identified, they are often located in jurisdictions where conventional legal action may not be a viable option, due to the limitations of the legal system or disproportionate costs. One of the salutary effects of the Internet has been to make the world smaller, allowing individuals to communicate and collaborate with friends and colleagues around the world. The corollary of that enormous potential is that an individual can appropriate Canadian content, sell access to that content to Canadians, and cause significant harm to all manner of Canadian artists and businesses without ever setting foot in the country. Even when pirate operators are located in jurisdictions with robust and fair legal systems, the cost to Canadians in the creative sector and broadcasting system of conducting international litigation is often disproportionate.

56. Even when pirate operators can be identified, and even when they are physically located in jurisdictions where legal action is a viable option, piracy operations demonstrate great resilience. When a website is shut down it can be recreated quickly by other members of the piracy community under a different name or in a different jurisdiction. This is because the cost of setting up a piracy operation is relatively low – all it requires is a computer, an internet connection, and a moderate level of technical skill – and such operations can be set up quickly. In conventional litigation, addressing the recreated site may require an entirely new investigation and litigation process, which is expensive, time-consuming, and inefficient. In the kind of system proposed here and in place in other countries, the recreated piracy site can be addressed efficiently through an appropriate variance of the original decision to specify the new location.

57. Finally, even when actions are successfully brought against pirate operators, the pirate operators typically lack the financial ability to compensate their victims, precisely because they sell access to stolen content at prices far below legitimate market rates. This is reflected in the fact that even though pirate operators earn an astonishing \$227 million in annual advertising revenue, the

commercial value of digital piracy of film alone (i.e., excluding television, which likely accounts for more than half of all piracy³⁹) is well over 50 times that amount or approximately \$160 billion.⁴⁰ Therefore, victims of piracy can never obtain reasonable compensation for the damage they suffer, emphasizing the importance of preventative measures.

58. Thus, the nature of online piracy means that if the Canadian creative sector is left to rely solely on conventional domestic legal remedies, it will be doomed to fail. A multi-pronged approach is required, and the relief sought in this application is a central aspect of that approach.

(d) International Anti-Piracy Efforts

59. The challenges of combating piracy on the Internet are not unique to Canada, and many of Canada's closest international partners have adopted regimes that provide for the mandatory disabling of access to certain identified piracy sites.

60. A foundational component of this international effort is the European Union's copyright directive, which directs member states to have regimes allowing rightsholders to obtain mandatory relief against intermediaries, including requiring ISPs to disable access to piracy sites:

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightsholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5...

Article 8 - Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightsholders whose interests are affected by an infringing activity carried

³⁹ Based on the 2016 BitTorrent Movie and TV Downloads, MovieLabs P2P Monitoring, which found that the majority of P2P downloads in Canada were of TV shows.

⁴⁰ Frontier Economics, *The Economic Impact of Counterfeiting and Piracy*, February 2017.

out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.⁴¹

61. Significantly, the EU has also recognized that it is important that these injunctions be available in a timely fashion:

(22) It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.

(23) Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States.⁴² [emphasis added]

62. The EU Directive has been widely implemented into the laws of various EU member states. Since 2010, it has been relied upon in 17 countries across the EU and resulted in final orders issued against more than 2,000 copyright infringing sites.

63. Notably, the United Kingdom introduced its regime in 2003 and has disabled access to sites including The Pirate Bay and First Row Sports.⁴³ France implemented its own regime in 2006 and has disabled access to several notorious sites including Allostreaming and The Pirate Bay. Outside the EU, Australia implemented its regime in 2015 and in December 2016 required ISPs to

⁴¹ Directive 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, Article 8.

⁴² European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, recitals 22-23.

⁴³ Copyright and Related Rights Regulations 2003, SI 2003/2498; see *Copyright, Designs and Patents Act 1988*, s 97A [United Kingdom]. *Twentieth Century Fox Film Corporation et al v British Telecommunications PLC*, [2011] EWHC 1981 (Ch); *Football Association Premier League Ltd. v British Telecommunications PLC*, [2017] EWHC 480 (Ch).

disable access to sites including The Pirate Bay, Torrentz, TorrentHound, and IsoHunt.⁴⁴

64. In total at least 20 countries, including most of Canada's closest partners, 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 established a regime to provide for disabling of access to piracy sites that is overseen by the Inspeção Geral Das Actividades Culturais).

65. Unsurprisingly, all of these regimes have processes in place to ensure procedural fairness and include mechanisms to compel compliance by ISPs. Clearly such a regime cannot be effective if any ISP can simply choose not to participate, as in that case individuals wishing to access illegal pirated content could simply migrate to the non-compliant ISPs, who would be gaining an unfair competitive advantage. Therefore, the regime proposed in this application requires participation and compliance by all Canadian ISPs.

(e) Effectiveness of the Proposed Regime

66. While there is no single solution to the problem of piracy, a regime that can require ISPs to disable access to piracy sites is a particularly important tool because it addresses many of the difficulties associated with combating online piracy that were described above. This tool is more resilient to the nature of online piracy because it can be used when pirate sites are based in foreign jurisdictions and quickly move their online or physical infrastructure. That is because the regime operates entirely through the providers of the relevant telecommunications services here in Canada.

67. This application therefore presents a Canadian solution to a global problem causing direct and measurable harm in Canada, that is carefully tailored to the current Canadian legal and regulatory environment but based on an internationally recognized and widely-adopted approach. Rather than asking the Canadian creative industry to act as the global piracy enforcement authority by trying to shut down piracy sites that operate in, and transmit content to, all manner of jurisdictions, the proposed regime focuses on access to that illegal content in Canada. If Canada disables access to a piracy site, the harm that site causes to Canadians is greatly reduced and it becomes far less important to track down the pirate operators operating the site anonymously from elsewhere in the world. Disabling access to piracy sites helps address the source of online piracy's resilience to conventional legal action – its predominantly online presence.

68. Such regimes have been widely adopted internationally because they have been proven to work:

⁴⁴ *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503.

- In November 2014 alone, the disabling of access to 53 piracy sites in the UK caused a 90% reduction in visits to the specified sites and a 22% decrease in total piracy for all users affected by the measure. It also resulted in an increase in visits to legal streaming services of between 6% and 10%.⁴⁵
- Previously, in 2013, the UK disabled access to 19 piracy sites, resulting in an increase in traffic to legitimate streaming services of 12%.⁴⁶
- In Portugal, disabling access to 66 of the 250 top piracy sites resulted in an approximately 70% reduction in usage of the blocked sites and a reduction of nearly 10% in usage in Portugal of the top 250 piracy sites overall, despite usage of those same 250 sites increasing approximately 31% globally during the same period.⁴⁷
- In Korea, disabling access to 62 piracy sites in 2015 resulted in an approximately 79% reduction in usage of the blocked sites and a reduction of approximately 15% in total piracy in Korea.⁴⁸
- A study released in August 2016 by the Information Technology & Innovation Foundation found that “where countries are using website blocking to fight digital piracy, the record shows it has been effective in driving users from illegal to legal sources of copyrighted material online.”⁴⁹

69. Regimes requiring ISPs to disable access to certain piracy sites have been judged a policy-making success by governments, regulators, and courts. For example, the Courts in the UK have confirmed that the implementation of these kinds of “orders has proceeded relatively smoothly and... they have proved to be effective.”⁵⁰ More recently, a UK court has confirmed that such order are “very effective” and that there is “no evidence of overblocking.”⁵¹

70. The effectiveness of these regimes is illustrated by The Pirate Bay. Astonishingly, the Pirate Bay is the 22nd most popular site in Canada according to Alexa rankings – more popular than any newspaper and more popular than the CBC. It is precisely the kind of hardcore piracy site that these regimes were designed to address, and indeed access to The Pirate Bay has been widely

⁴⁵ Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior, Danaher *et al.*, April 2016.

⁴⁶ The Effect of Piracy Website Blocking on Consumer Behaviour, Danaher *et al.*, November 2015.

⁴⁷ INCOPRO, Site blocking efficacy in Portugal September 2015 to October 2016 (May 2017).

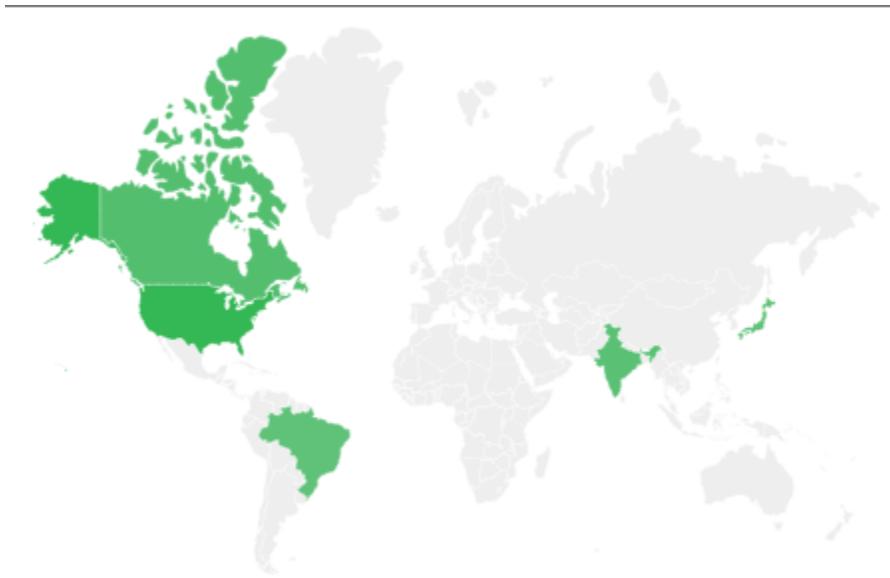
⁴⁸ Motion Picture Association, *Impact of Site Blocking in South Korea* (2016).

⁴⁹ ITIF, *How Website Blocking Is Curbing Digital Piracy Without “Breaking the Internet”* (August 2016).

⁵⁰ *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658 (06 July 2016) at para. 20. *Cartier* was cited with approval by both the majority and dissenting judgments of the Supreme Court in *Equustek*.

⁵¹ *Union Des Associations Européennes De Football v British Telecommunications Plc & Ors* [2017] EWHC 3414 (Ch).

disabled in countries where such a regime is in place. As a result, visitors to the site come disproportionately from Canada and the United States. The figure below depicts the geographic distribution of traffic to The Pirate Bay:



Alexa visualization of traffic to The Pirate Bay

D. THE PROPOSAL

71. The Commission is best positioned to introduce such an effective regime in Canada. The Commission can impose a condition on offering service under sections 24 and 24.1 of the Act, and has already indicated that it has the exclusive mandate, under section 36 of the Act, to authorize activity such as disabling access to certain websites in support of the telecommunications policy objectives.⁵² As a practical matter, the Commission is also well-positioned to evaluate the dramatic impact of piracy on the broadcasting system it oversees.

72. With its specialized expertise and mandate, the Commission has an opportunity to introduce in Canada a regime that can help ensure the telecommunications system continues to be used to contribute to the social and economic fabric of Canada, and provide rightsholders in Canada with a tool widely available in other parts of the world. By creating a process that relies on an application to the specialized IPRA body and ultimate decision by the Commission, as described below, it is possible to create an efficient, effective, transparent, and practical regime tailored to Canada's existing legal and regulatory framework.

⁵² Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016), affirmed in Telecom Decision CRTC 2016-479.

73. Attached as Appendix A to this application is an opinion prepared by McCarthy Tétrault LLP confirming the Commission's jurisdiction to implement the proposed regime and that the regime does not raise free speech issues under the Charter and complies with the Commission's common law duties of procedural fairness.

(a) The Role of IPRA

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

75. The IPRA would be independent and would consider applications based on the evidence presented. It would only recommend adding a website to the list of piracy sites if the evidence presented establishes that it is blatantly, overwhelmingly, or structurally engaged in piracy.

(b) The Role of the ISP

76. In accordance with the principles of net neutrality and in particular the principle that ISPs themselves function and will continue to function as common carriers, under the coalition's proposal ISPs would not be required to monitor piracy nor could they unilaterally determine which websites are added to the list of piracy sites. Instead, the role of ISPs would be restricted to implementing a legal requirement to prevent access to piracy sites, which are already unlawful, as directed by and identified by the Commission (on the recommendation of the IPRA).⁵³ Net neutrality does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online.⁵⁴

(c) Establishment of the IPRA

77. The coalition propose that the IPRA be formed as a not for profit corporation pursuant to the *Canada Not-for-profit Corporations Act* (the "**NFP Act**")⁵⁵ and be overseen by a Board of Directors. The corporate and

⁵³ The Supreme Court of Canada has confirmed that such a regime has no impact on the neutrality of an intermediary such as an ISP: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 49.

⁵⁴ For example, the Open Internet Order in the United States was only in relation to "lawful" content: see e.g., 76 FR 59191 ("The rule protects only transmissions of lawful content"). See also Article 3, paragraph 1 of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

⁵⁵ S.C. 2009, c. 23.

organizational structure should be based to a large degree upon the structure of the Commissioner of Complaints for Telecommunications Services Inc. (“**CCTS**”).

78. The IPRA’s corporate structure would be similar to that of many not-for-profit corporations, and would consist of Members (under the NFP Act, not-for-profit corporations are required to have members), an unpaid Board of Directors, and a small number of part-time staff with relevant experience who would be responsible for receiving and reviewing applications and making recommendations.

79. The IPRA’s independence would be reflected in the fact that its Board of Directors would be nominated by its Members, rightsholders, ISPs, and consumer advocacy and citizen groups, with no single stakeholder group having a controlling position. The Board of Directors would be responsible for financial oversight and for ensuring that the IPRA has appropriable policies, procedures, and staff in place but would have no involvement whatsoever in evaluating applications to identify particular sites as piracy sites. Instead, acting pursuant to the policies and procedures, the staff would be responsible for all decisions regarding piracy sites and related recommendations to the Commission.

80. The IPRA’s Members would consist of its Directors in order to comply with the requirements of the NFP Act and at the same time ensure as efficient and streamlined a structure as possible. This is also consistent with the governance structures of the CCTS.

81. It is expected that the IPRA, which would not require significant resources, would become self-funding through a reasonable application fee charged to applicants that seek to have a site designated as a piracy site. The fee would effectively cover the costs to the IPRA of the staff time required to review the application and make the recommendation to the Commission.

82. 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.

83. 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 IRPA and support its initial operations.

(d) Evaluation Criteria

84. 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 proposed criteria that would also be considered in the follow-up proceeding held by the Commission.

85. While there would be flexibility in developing criteria, both the experience in other jurisdictions and related factors in the *Copyright Act* provide a good template. Based in part on these precedents, the coalition believes the following criteria could be used in connection with determining whether a location on the internet is blatantly, overwhelmingly, or structurally engaged in piracy:

- a) The extent, impact, and flagrancy of the website's piracy activities;
- b) The disregard for copyright demonstrated by the website's owners, pirate operators, or users;
- c) Whether the website is expressly or implicitly marketed or promoted in connection with potential infringing uses;
- d) The significance of any non-infringing uses, compared to the infringing uses;
- e) The effectiveness of any measures taken by the website to prevent infringements;
- f) Any other relevant finding against the website, related websites, or the website's owners in Canada or any other jurisdiction by a court or administrative tribunal; and
- g) Any efforts by the website's owners or members to evade legal action.

(e) **IPRA Timelines and Process**

86. The IPRA's procedures would be designed to guarantee a fair process while remaining efficient, proportional, transparent, and expeditious. The coalition recommends that the Commission direct IPRA to establish a procedure consistent with the following principles:

- a) **Commencing an Application:** An applicant can commence the process by filing an application with IPRA, identifying a piracy site and including evidence regarding the site's activities and relevant to the evaluation criteria.
- b) **Service:** Service would be accomplished electronically by serving all ISPs using the email address currently on file with the Commission and by attempting to serve the website owner at the contact email address provided on the website (if any) as well as via a "WHOIS" lookup, and if necessary through any additional measures required by the IPRA. Accordingly, the website and ISPs would have notice of and access to the application and evidence.

- c) **Response:** If a website owner or ISP objects to the application she or he would have 15 days to serve a notice of intent to respond on the IPRA and the applicant. If such a notice is served, the person objecting would have 15 additional days to provide evidence in response. If no response is made to the application, the IPRA would still be required to consider whether the evidence in the application is sufficient to determine that the site is a piracy site.
- d) **Potential Oral Hearing:** If it considers it necessary, the IPRA would have the discretion to hold an oral hearing by teleconference within 15 days of receiving the response.
- e) **IPRA Recommendation:** The IPRA would consider the evidence and representations of the applicant, website owner, and ISPs, and, based on the criteria, decide whether to recommend to the Commission that it add the website to the list of piracy sites.

(f) CRTC Decision & Review

87. The IPRA would submit its recommended additions to the list of piracy sites to the Commission for consideration and approval, and the Commission would consider whether or not to follow the recommendation after conducting a review. If the Commission accepted an IPRA recommendation to identify an additional piracy site, it would provide reasons to the site operator and issue a decision varying the list of piracy sites. The CRTC could then quickly or automatically extend the site blocking requirement to additional locations on the Internet to which the same piracy site is located in order to prevent pirate operators from undermining its decision.

88. The obligation and approval for ISPs to begin disabling access to the sites would only be triggered by the Commission's decision. The role and purpose of the IPRA would be to manage the workload imposed on the Commission and create a significantly more timely and efficient process for considering applications than would be possible for the Commission. The efficiency of the process is crucial, given the pace at which piracy can evolve online.

89. A person whose website has been identified as a piracy site or any other appropriate party that wishes to object to or amend the Commission's approval of additions to the list of piracy sites would do so by making an application under section 62 of the Act. Alternatively, that party could seek leave to appeal the Commission's decision or judicial review of the Commission's decision in the Federal Court of Appeal. It is anticipated that such instances would be rare, given that the IPRA would only recommend and the Commission would only add websites that are blatantly, overwhelmingly, or structurally operating for an illegal purpose. In practice this would mean almost exclusively hardcore piracy sites, the proprietors of which typically recognize the indefensible nature of their conduct and do not attempt to defend it in these types of forums.

90. If any party believed that a Commission decision raised legal, jurisdictional, or constitutional issues, or was otherwise unreasonable, it could raise them through an appeal or judicial review in the Federal Court of Appeal.

91. A Commission approval process based on IPRA recommendations and the record developed by the IPRA, combined with the possibility of a more expansive process open to the public pursuant to an application under section 62 of the Act or an appeal or judicial review in the Federal Court of Appeal, would appropriately balance the interests of affected parties by ensuring that the system is procedurally fair while at the same time ensuring that the system operates quickly enough to achieve its important objectives.

E. TELECOMMUNICATIONS POLICY CONSIDERATIONS

92. Section 36 of the Act provides that “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.” The Commission has considered the scope of section 36 in the 2009 internet traffic management practice (“ITMP”) proceeding and in a 2016 proceeding regarding section 12 of the Quebec *Budget Act*. In those proceedings two principles emerge. 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”.⁵⁶ 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.

93. Consistent with these principles, the coalition brings this application before the Commission. As described above, piracy is a major and urgent threat to Canada’s social and economic fabric, and its growing impact despite years and millions of dollars invested in traditional enforcements represents an exceptional circumstance that must be dealt with to protect the ability of Canada’s communications system to advance the objectives of the *Telecommunications Act*. In accordance with the Commission’s view of its mandate, the coalition believes the Commission is an appropriate, and certainly the most efficient, forum to deal with that threat.

(a) Respecting the Role of ISPs as Common Carriers

94. The establishment of IPRA as an independent third party with a mandate to recommend to the CRTC the piracy sites to which ISPs should be required to disable access ensures that ISPs continue to operate as neutral intermediaries

⁵⁶ *Telecom Regulatory Policy* 2009-657; Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016); Telecom Decision CRTC 2016-479.

and never to exercise any control over or influence the purpose or meaning of the content they carry. Instead, the ISP simply implements a Commission determination. Thus, the important telecommunications policy principle of separation of carriage and content is maintained.⁵⁷ Legally requiring ISPs not to provide access to websites that are unlawful does not involve the issues of common carriage obligations or net neutrality and both principles would remain fully respected.

(b) Fulfillment of Telecommunications Policy Objectives

95. Granting the order sought in this application under sections 24, 24.1, and 36 of the Act will fulfill a number of the telecommunications policy objectives set out in section 7 of the Act, specifically:

- (i) **Section 7(a)** calls for a telecommunications system “that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions”. Internet piracy represents a threat to the social and economic fabric of Canada. It threatens the profitability, viability and employment generated by Canadian creative and broadcasting industries. Similarly, piracy represents a threat to the social fabric of Canada by undermining the creation and legitimate dissemination of Canadian works (and other socially important works). It also harms consumers and undermines Canadian’s trust in, and therefore the development of, the digital economy.
- (ii) **Section 7(h)** calls for a telecommunications system that “responds to the economic and social requirements of users of telecommunications services”. Clearly the Canadian telecommunications system should encourage compliance with Canada’s laws, including laws with respect to the intellectual property communicated by telecommunications. Those laws exist to foster social and economic objectives important to Canadian society, including encouraging the creation and dissemination of creative works through the creation of a rights system (under the *Copyright Act* and related statutes) that fairly compensates content creators.
- (iii) **Section 7(i)** calls for a telecommunications system “to contribute to the protection of the privacy of persons.” 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. Disabling access to some of the most prominent ones will significantly contribute toward the protection of the privacy of Canadian Internet users.

96. This proposal allows relevant stakeholders to come together to address the increasingly serious threat to Canada’s economic and social fabric posed by

⁵⁷ As described in note 27, above, this has recently been confirmed by the Supreme Court.

Internet piracy which, given its online nature and the existing legislative and regulatory framework in Canada, is most effectively dealt with by means of the Commission's telecommunications policies.

F. Implementation

97. The coalition requests that in its decision on the current application, the Commission impose a condition under sections 24 and 24.1 of the Act on all companies offering Internet access service in Canada requiring them to disable access to locations on the Internet identified as piracy sites by the Commission from time to time. The list of sites could be maintained as an appendix to the decision on the current application, with the Commission amending the appendix each time a new site is added to the list.

98. The coalition also requests that the decision on the current application approve under section 36 of the Act the actions required to be taken by ISPs to comply with the condition.

99. Finally, the coalition requests that the members of the coalition that are Canadian carriers be directed to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop the proposed governance structure, constating documents, and evaluation criteria for the IPRA, as discussed above. These materials would form the basis of a further application to the Commission to consider and approve (with changes, if necessary) the detailed nature of the operations of the IPRA, similar to what was done in respect of the CCTS in Telecom Decision CRTC 2007-130.

100. As the proposed regime would not be operational until the follow-up proceeding is complete, the coalition recommends that the Commission direct the responsible carriers to file such a further application within three months of the Commission's decision on the current application.

G. CONCLUSION

101. This proposal advanced in this Application represents an effective, efficient, and moderate approach to advancing the economic and social objectives of the *Telecommunications Act*:

- It addresses the rapidly growing crisis of Internet piracy that threatens jobs and economic and cultural output in Canada's creative economy;
- It is carefully tailored to address only sites that are blatantly, overwhelmingly, or structurally engaged in piracy;
- It is a practical approach that reflects the modern realities of piracy, including the shift from downloading to streaming and the increasing ease with which content can be stolen, relocated and transmitted internationally;

- It ensures fairness and accountability through transparent decision-making following a robust evidentiary and hearing process, conducted by an independent administrative body with extensive experience making decisions in the public interest, and subject to judicial oversight.
- It preserves net neutrality in Canada by continuing to treat ISPs as common carriers who do not unilaterally disable access to piracy sites.

102. The coalition hopes that the Commission will approve this initiative and we look forward to working with the Commission and other stakeholders in implementing this important proposal.