

CANADIAN
CONFERENCE
OF THE ARTS

CONFÉRENCE
CANADIENNE
DES ARTS



Ottawa

July 10, 2008

Robert A. Morin
Secretary General
CRTC
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin,

Re: *Call for comments on the scope of a future proceeding on Canadian broadcasting in new media*, Broadcasting Public Notice CRTC 2008-44 Notice of consultation (Ottawa, 15 May 2008)

Please find attached the comments of the Canadian Conference of the Arts (CCA) with respect to the CRTC's New Media proceeding.

We welcome the opportunity to participate in this proceeding, and its subsequent phases.

Should you have any questions about CCA's comments, please do not hesitate to contact the undersigned.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Alain Pineau'.

Alain Pineau
National Director



Toll Free:

Ensuring that Canadian New Media Content Thrives

Comments by the Canadian Conference of the Arts

On

Call for comments on the scope of a future proceeding on Canadian broadcasting in new media, Broadcasting Public Notice CRTC 2008-44 Notice of consultation (Ottawa, 15 May 2008)

I Summary

- 1 The Canadian Conference of the Arts (CCA) is Canada's oldest and largest arts advocacy and cultural policy development organization. Our mandate is to be the national forum for the arts and cultural community in Canada, to provide research, analysis and consultations on public policies affecting the arts and the Canadian cultural institutions and industries, to foster informed debates on policy issues, and to seek to advance the cultural rights of Canadians.
- 2 CCA strongly supports the CRTC's decision to re-examine its New Media exemption orders and to consider implementation of a regulatory framework for internet-based means of distributing audio-visual content.
- 3 CCA submits that the CRTC should address 'New Media' just as it has 'Old Media': by ensuring that a sufficient quantity of high quality Canadian content is available to audiences. Unless content is created ***and*** is made available, it cannot be used.
- 4 It is CCA's firm conviction that ensuring the creation, promotion, distribution and accessibility of Canadian new media content requires appropriate financial and other incentives, backed by a strong regulatory framework whose objectives can and will be enforced under law.
- 5 The requirement for a clear, enforceable and enforced regulatory framework is clearly demonstrated by current barriers to access now being imposed by some Internet Service Providers (ISPs). News reports suggest that Canadian ISPs are already tampering with content online, purportedly by 'managing their networks', but in reality by restricting Canadians' access to new media content.
- 6 Given the CRTC's statement that it wants new, converged legislation and its statement that it will review Net Neutrality this September, CCA strongly supports the inclusion of Net Neutrality deliberations into the January 2009 proceeding. This will enable the Commission first to provide Parliament with a synopsis of Canadians' views about the importance and content of converged communications legislation, and second, to emphasize the importance of legislative provisions whose primary focus is on the public interest and the interests of the cultural sector.

II New Media

- 7 Given the positions it has taken consistently over the past two years, CCA can only welcome both the CRTC's decision to determine whether its "New Media" exemption orders remain appropriate or should be changed, and its invitation to the public to comment on the scope of the proceeding it will undertake to reach this determination.¹

¹ *Call for comments on the scope of a future proceeding on Canadian broadcasting in new media*, Broadcasting Public Notice CRTC 2008-44 Notice of consultation (Ottawa, 15 May 2008) at ¶24:

8 As the Commission is aware, CCA has raised strong concerns about the CRTC's "New Media" exemption orders for several years, in particular in its September 1, 2006 submission to the CRTC regarding our broadcasting system's future environment, which CCA entitled, "The Future Environment of Canada's Broadcasting System: Empty Pipes?".

9 Among other things, CCA's September 2006 submission noted that the test for exemption orders that Parliament set out in subsection 9(4) of the *Broadcasting Act, 1991* is based on the degree to which an exempted undertaking will or will not contribute materially to our broadcasting system:²

The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part **where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).**

[bold font added]

10 Despite this clear direction, the CRTC exemption order for mobile television and New Media services was based not on whether compliance with licensing and other requirements would further the implementation of the broadcasting policy, but rather on their substitutability for conventional broadcasting services, on whether New Media-based services would harm existing broadcasters,³ and on some notion that they must be permitted to develop free from regulatory "constraints."

11 CCA's therefore strongly supports the CRTC's New Media review, and its purpose: "to determine if the new media broadcasting environment is contributing sufficiently to the achievement of the broadcasting policy objectives of the *Broadcasting Act* and if it will continue to do so."⁴

12 CCA also welcomes the CRTC's initiative in asking parties to identify and rationalize "the issues and questions that, in their view, need to be discussed in the public proceeding."⁵ CCA is concerned, however, that the Commission may

"... the Commission intends to initiate a public proceeding to examine the new media broadcasting environment to determine whether the New Media Exemption Order and the Mobile Broadcasting Exemption Order continue to be appropriate or to what extent, if any, such orders need to be revised."

² Canadian Conference of the Arts, *The Future Environment of Canada's Broadcasting System: Empty Pipes?*, Submission regarding Broadcasting Public Notice CRTC 2006-72 (Ottawa, 1 September 2006) at ¶¶78-84. CCA's submission can be found at http://www.ccarts.ca/en/documents/CCA_CRTC2006_72_010906.pdf

³ CRTC, *Regulatory framework for mobile television broadcasting services*, Broadcasting Public Notice CRTC 2006-47 (Ottawa, 12 April 2006):

48. ... Whether or not these services are delivered and accessed over the Internet, the Commission remains of the view, for the reasons detailed above pertaining to the similarities between new media and mobile television broadcasting, that such mobile television broadcasting services are unlikely to become substitutes for conventional broadcasting services or to interfere with the abilities of conventional broadcasters to meet their obligations under the Act.

⁴ *Call for comments on the scope of a future proceeding on Canadian broadcasting in new media*, Broadcasting Public Notice CRTC 2008-44 Notice of consultation (Ottawa, 15 May 2008).

⁵ *Ibid.*, introductory statement and at ¶26.

have already determined its course of action in this proceeding, at least with respect to the implementation of regulations for New Media.

13 While CCA agrees that it would be entirely inappropriate to simply transfer one set of regulations for one class of licensee to any other class of licensee, CCA also considers that it would be inappropriate to foreclose all discussions based on regulation for this reason. After all, the only substantive powers that Parliament has granted to the CRTC lie in its authority to establish classes of licensee, to enact regulations for these classes, impose conditions on licences, and to enforce these regulations and conditions of licence.

14 And, if the past twenty years have taught us anything in the broadcasting sector, moral suasion and incentives have not achieved their stated objectives as successfully as regulation.

A CCA comments on CRTC's questions

1. Scope of new media proceeding⁶

15 The CRTC has asked for comments on the scope of its New Media proceeding.

16 CCA submits that CRTC should address 'New Media' just as it has 'Old Media.' Unlike the CRTC's cable policy proceeding in the early 1970s, however, **the scope of this proceeding cannot be limited primarily to audio-visual content, but must address audio content as well.** To put it another way, Canadian music cannot be made the poor cousin to what is often seen as the more glamorous world of television content.

17 What is under discussion in this proceeding is not so much a brand new medium – as when television was introduced in the early 1950s to an environment whose only other mass broadcast medium was radio – but rather a new form of distribution. The fact that a distributor uses or does not use wires to transmit audio-visual content is, in our view, irrelevant; once companies provide the means to distribute such content, they should be subject to Parliament's objectives for our broadcasting system. The challenge then, as it was when the CRTC first developed its cable television policy, is to ensure there is a sufficient quantity of high quality Canadian content available to audiences' eyes and ears, whether this content is distributed by land-based wired carriers such as cable BDUs, or by mobile (wireless) carriers. For, the simple fact is that unless content is created and made available, it cannot be distributed and consumed. (This, in fact, was the central point of the CCA's 1 September 2006 submission on new technology, *Empty Pipes*.)

18 It is CCA's firm conviction that ensuring the creation, promotion and distribution of Canadian content, whether by 'old' media or 'new' media, requires appropriate financial and other incentives, as well as a strong regulatory framework that can rely, if necessary, on sanctions set out by Parliament in Canada's broadcasting legislation. We cannot simply dismiss all regulations out of hand, purely for the

⁶ *Ibid.*

sake of marketplace-based theory that has not worked in the past century of Canadian broadcasting.

2. Incentives for new media broadcasting content

19 The Commission has asked whether incentives or regulatory measures are required for the creation and promotion of Canadian new media broadcasting content.⁷

20 CCA submits that we need both.

21 We also need incentives and regulations to ensure distribution of that content, as (distribution is the flip side of ensuring access. Without regulatory enforcement, incentives simply do not achieve their intended goals.

3. Barriers to accessing Canadian new media broadcasting content

22 The Commission has asked if there are any barriers to accessing Canadian new media broadcasting content.⁸

23 Barriers currently exist – because in the absence of regulations, policies, ‘rules’ or even guidelines, to ensure the distribution, and hence the accessibility, of content, ISPs have been and remain free to ‘manage’ internet traffic as they wish. Traffic shaping that limits certain or all subscribers’ access to identifiable applications is a *de facto* barrier to access.

24 Moreover, important barriers to accessing Canadian new media broadcasting content exist because of the lack of supply, promotion and distribution of such content.

4. Other policy objectives: network neutrality and convergence

25 The Commission has asked what other broadcasting policy objectives should be considered within the scope of the proceeding.⁹

26 Barriers to provision (Net Neutrality) exist, despite CRTC’s apparent view expressed early in 2008 that ISPs do not currently influence content:

The new media providers, especially Internet service providers, are common carriers. They have no influence over content, they simply carry the electronic signals from a website to the user. They are prohibited under the law from discriminating or influencing content, unless we allow them to...¹⁰

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Standing Committee on Canadian Heritage, *Evidence*, online: cmte.parl.gc.ca, No. 30 (Ottawa, 13 May 2008) <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx? Source Id=240473&Lang=1&PARLSES=392&JNT=0&COM=13180>>.

- 27 Net Neutrality is the principle that all data must be treated equally, and that reasonable network management practices must not discriminate on the basis of application or content.
- 28 The fact that the Canadian Association of Internet Providers (CAIP) has filed a complaint about the negative effects of Bell Canada's 'traffic management' practices on CAIP members' subscribers clearly demonstrates the need for CRTC rules to ensure equal access under Net Neutrality principles.
- 29 While the CRTC has said it will hold a Net Neutrality proceeding this September, CCA submits that the Commission should instead incorporate the Network Neutrality issue into the January New Media proceeding as an integral part of the issues to be examined. CCA therefore strongly supports the inclusion of network neutrality provisions in this New Media proceeding.
- 30 In our view, the point is not for CRTC to sit back and react after the fact – but to take the lead Parliament has given to it and to regulate in Canadians' interest, and in the interest of Canada's cultural sector. The fact that we have a domestic music industry is due to CRTC's initiative in the 1970s to strengthen radio requirements for Canadian content. Thanks to this bold decision and despite doom-and-gloom predictions about the terrible consequences of such regulation for radio broadcasters, a viable and vibrant Canadian music industry developed over time, which has led not only to domestic but also to international recognition. Given the signs of vitality of Canadian creators in new media, today's CRTC can do the same for these new forms of content by adopting appropriate measures to supplement what a simple "hands off, let the market decide" strategy will never do for Canadian culture.
- 31 It is especially appropriate for the CRTC to seize the day now, since it has already made its interest in new communications legislation clear:

"Convergence

Last year I spoke to you about convergence, and it continues to be our main preoccupation. The technologies of broadcasting and telecommunications are converging, along with the New Media that offer broadcasting via the Internet and mobile devices. The industries are converging. Regulation must follow suit, and ultimately legislation. But that step will require all of us to develop a concept for converged legislation, and I have not yet seen any signs of such a concept emerging.

Future Direction

The Commission has undertaken a strategic review called *Future Direction*; it will guide us in adapting every aspect of the Commission's

.... we will hold a consultation on the matters to be dealt with in connection with this document. Does this document really describe the situation accurately, and if so what are the questions stemming from it? We are going to hold consultations during the summer and, at the end of the summer, we are going to issue a formal notice stating our questions for the hearing on the new media. This hearing will take place next January.

....

work to the new realities. Commission staff at every level and in every area has contributed to this review.

You will soon see one aspect of its work when we propose changes in our Rules of Procedure designed to streamline and harmonize them for the converged environment.

...

Conclusion

Convergence is a long-term issue that we all have to work on. I hope we can tackle it in our usual spirit of cooperation between industry and regulator.”¹¹

- 32 Even if Parliament does not introduce new, converged legislation that directs it to do so, CCA submits that the CRTC must act in the public's interest – and in particular, in the interest of the cultural sector, rather than in the financial interest of broadcasters whose repeated promises of more and higher-quality Canadian content in exchange for less regulation and more concentrated ownership simply have not been met.

III Conclusions

- 33 CCA looks forward to reviewing other parties' comments in this proceeding. We gather that this current proceeding will not employ several phases of reply and response, but if a second phase is envisaged, CCA reserves the right to reply to other submissions during that phase.
- 34 CCA also welcomes the opportunity to see this issue addressed in the coming licence renewals.
- 35 We would like to note in closing that just as the CRTC Chair wants to know the timetables for the rollout of the analog-to-digital transition,¹² CCA and its members also desire to learn from Canada's television broadcasters their timetable for the implementation of true, predominantly Canadian production and scheduling, and New Media issues

As I mentioned, on Thursday we are issuing our document on new media. We will then be hearing from the public as to the questions that should be asked as part of a full-scale hearing on new media.

Undoubtedly people will make reference to your committee report and suggest that one issue you have to address in this context is the CBC and neutrality of its broadcasting, or whatever the wording you were using. I'm sure we will then, in that context, decide this is how we're going to address it. Or perhaps we will say this is really something we should address in the context of the CBC licence renewal.¹³

¹¹ Konrad von Finckenstein, Q.C., *Speech*, Notes for an address to the 2008 Broadcasting Invitational Summit (Cambridge, Ontario: June 19, 2008).

¹² *Ibid.*

¹³ Standing Committee on Canadian Heritage, *Evidence*, online: cmte.parl.gc.ca, No. 30 (Ottawa, 13 May 2008) <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=240473&Lang=1&PARLSES=392&JNT=0&COM=13180>.

.... we will hold a consultation on the matters to be dealt with in connection with this document. Does this document really describe the situation accurately, and if so what are the questions

- 36 With that in mind – and understanding that the licence renewal proceedings for Canada’s conventional over-the-air television broadcasters are currently scheduled for Spring 2009, CCA urges the CRTC to invite the views of all stakeholders, rather than just of broadcasters or their industry association, about the questions that the Commission will set out in its licence renewal application forms. This would enable all stakeholders in Canada’s broadcasting sector to participate in the renewal proceedings with a clear understanding of licensees’ past commitments and performance and their plans for coming years.
- 37 Finally, with respect to the outcome of the CRTC’s New Media proceeding, CCA will support all measures by the Commission and other agencies of government that ensure financial support for, production of and distribution of New Media Canadian content.

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