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## **Broadcasting and Telecom Notice of Consultation CRTC 2011-344**

### **Fact-Finding Exercise on the Over-the-Top Programming Services in the Canadian Broadcasting System**

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## INTRODUCTION

CIPPIC would like to thank the Commission for the opportunity to take part in this important fact-finding proceeding and to provide its perspective on the implications of video streaming or “over-the-top” (OTT) services in the Canadian broadcasting system.

The growing availability of online ‘OTT’ video content may one day pose challenges for the Canadian Broadcasting regulatory regime as it currently exists today. The existing regime is based on premises such as broadband scarcity that are, on a fundamental level, inapplicable to the online context. It is for this very reason that existing regulatory measures should be applied to the online environment, if at all, only with the greatest of care taken to ensure that the drivers of Internet innovation, online customer choice and empowerment, and global interconnectedness are not stifled.<sup>1</sup>

Certainly, in the absence of demonstrable need, the Commission’s existing exemption with respect to the application of the *Broadcasting Act* to new media broadcasting should be retained. No such need is evident. Nor is it evident that, in an environment where

It is important to keep in mind that the development of OTT services, both foreign and domestic, has been largely spurred by consumer demand. Regulation should not be imposed in a manner that will unduly inhibit the continued growth of this emerging market, particularly if doing so will raise costs for consumers and restrict their access to content online.

Equally important, the Internet must remain an open and robust information system, whose very design will continue to foster innovation and allow Canadian creative industries to thrive in the global digital media economy.

Foreign OTT services do not threaten the competitiveness of the Canadian broadcasting industry. What is more, allowing OTT services to continue developing in the absence of regulation will help ensure a strong presence of Canadian content online both now and into the future.

Finally, the CRTC’s mandated flexible approach to regulation emphasizes the need to “not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians”. This remains crucial now more than ever, as our regulatory approach today will have lasting repercussions on the very nature of our broadcasting and telecommunications industries tomorrow.

## SUMMARY

The achievement of the policy objectives set out in the *Broadcasting Act*<sup>2</sup> will best served by maintaining the New Media Exemption Order<sup>3</sup> for OTT services, as it has not been shown

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<sup>1</sup> This requirement is currently reflected in s 5.(2)(f) of the *Broadcasting Act*, SC 1991, c 11.

<sup>2</sup> *Ibid.* at s 3.(1).

<sup>3</sup> Broadcasting Regulatory Policy 2009-329.

that subjecting these services to regulation will “contribute in a material manner to the implementation of the broadcasting policy”.<sup>4</sup>

While the emergence and growth of new media technology will undoubtedly continue to affect the nature of broadcasting in Canada, there is no evidence to suggest that OTT services currently pose a threat to the ability of traditional broadcast distribution undertakings (BDU) to fulfill their statutory obligations.

Rather, new media broadcasting undertakings have been employed in a complimentary and innovative manner, thereby driving the continued growth of Canadian creative industries. As such, the Commission’s determination that the policy objectives of the *Broadcasting Act* are best served through the New Media Exemption Order<sup>5</sup> is still valid and ought to be upheld.

Moreover, the New Media Exemption Order should not be amended or revoked in relation to OTT services in light of the CRTC’s mandated approach to regulatory policy.<sup>6</sup> In particular, regulation should be implemented in a flexible and coherent manner so as to “not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians”.<sup>7</sup>

Allowing OTT services and new media business models to continue developing in the absence of regulation is integral to the achievement of the policy objectives of the *Broadcasting Act*, the *Telecommunications Act* and the government’s broader digital policy strategy. In this sense, it is in the best interests of market competition, technological innovation, net neutrality and the general public to maintain the New Media Exemption Order for OTT services at this time.

## I. FOSTERING COLLABORATION IS KEY TO INTERNET DEVELOPMENT

Unlike telecommunications or broadcasting, the Internet has thrived under the assumption of global interconnection.<sup>8</sup> This feature of the Internet means that new goals and priorities for legislation dealing with Internet services have emerged, namely freedom of expression and wide access to the Internet among individuals are all essential to making the Internet work.<sup>9</sup> These have been widely recognized as the guiding forces of the web. Because of its inherently global nature, both in terms of the connection of devices that support its

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<sup>4</sup> *Supra* note 2 at s 9.(4).

<sup>5</sup> *Supra* note 4 at paras 22-24.

<sup>6</sup> *Supra* note 2 at ss 5.(1)-(2).

<sup>7</sup> *Ibid.* at s 5.(2)(f).

<sup>8</sup>This has been both a technological goal (interconnection) and has been, therefore, recognized as a political/legal goal for interconnection between individuals. See for example the statements of UNESCO on Internet governance such as United Nations Educational, Scientific and Cultural Organization (UNESCO), “UNESCO and Internet Governance,” *UNESCO’s activities in the area of Internet Governance*, online: <<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/wsis/Summary%20Report%20on%20UNESCO%27s%20participation%20in%20the%205th%20IGF%20cleaned.pdf>> at 2.

<sup>9</sup> For an example of the international scholarship on this issue, see: Tim Wu, “Network Neutrality, Broadband Discrimination,” (2003) 2 *Journal of Telecommunications and High Technology Law*, at 141.

existence as well as the content created, the Internet is not like other media platforms. The lack of scarcity for broadband platforms, as well as the low barriers to dissemination, only re-emphasize the differences between the telecommunication and broadcast versus Internet forms of media.

The international scope of online content providers (who produce text, imagery, audio, interactive and video content) make it unique in the way consumers may interact with one another and consume content, as well as produce it in their own right. This uniquely global nature of the Internet makes the policy oversight of traditional mediums as they appear on the Internet, such as online video, inherently untenable to regulate in the same manner as national telecommunications or broadcast industries.<sup>10</sup>

## **A. FOSTERING THE INNOVATION AGENDA**

The innovation of Canadians, and their contribution to the digital economy, has been emphasized by Industry Canada in their consultation paper, *Improving Canada's Digital Advantage*. In the report, Industry Canada states that: "As broadband networks spread around the world, digital media and the content are the advantage; they will be what attracts continued investment and talent, improves productivity, promotes prosperity in the digital economy and secures Canada's place in the digital world."<sup>11</sup> The ability of Canadians to access a free and open Internet both for content consumption as well as content creation, requires the accessibility of websites necessary to succeed in this environment. Regulation of OTT video providers will undermine this and may seriously disadvantage Canadian content distribution on the global Internet if, for example, it results in barriers to content-hosting platform migration to Canada from other jurisdictions.

Innovation may be affected by regulation in two ways: it may affect content platforms, or the type of content that is provided. In either case, regulation may affect how consumers use the Internet: if the platform is affected than new forms of content, collaboration or sharing may be prevented from being created as the platforms on which such content is hosted may decide to geoblock Canada to avoid heavy regulatory costs; likewise, content platform creators may be discouraged to innovate new online platforms.

The Commission, in assessing the role of new media within the broader telecommunications and broadcasting contexts should develop policies that enhance the

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<sup>10</sup> In its notice of consultation the Commission indicates that market conditions with regard to the type of content online is being reconsidered for the lifting of the new media exemption, see for example Broadcasting and Telecom Notice of Consultation CRTC 2011-344, *Fact-finding exercise on the over-the-top programming services in the Canadian broadcasting system*, May 25, 2011, online:

<<http://www.crtc.gc.ca/eng/archive/2011/2011-344.htm>> at para 5. The operational effect of exerting licensing on new media is licensing and regulation. Such licensing would create 'preferred' websites by the Commission as these OTT video providers would be complying with Canadian law and regulation, while non-licenced entities would not. The Commission should consider the effect of unlicensed OTT video websites: would they be blocked in Canada?

<sup>11</sup> Industry Canada, "Digital Media: Creating Canada's Digital Content Advantage," *Improving Canada's Digital Advantage: Strategies for Sustainable Prosperity* (Ottawa, ON: Public Works and Government Services Canada, 2010) at 24.

innovation agenda.<sup>12</sup> As CIPPIC will later discuss, Canadians as individual and professional producers of video content are actively participating in the digital-information sector. Limiting their access to online tools or websites that assist in their production of content through rigorous regulation will not only harm online innovation, but will have the counterproductive effect of inhibiting the development of this industry.

## **B. PUTTING USER GENERATED CONTENT IN ITS PROPER CONTEXT**

CIPPIC believes that the Commission's attempt to exclude individually created content from the scope of this fact-finding exercise does not reflect the reality of online content consumption. Excluding UGC from the scope of this proceeding will result in a factual record that is under-inclusive.

In BTNC CRTC 2011-344, the Commission notes that: "Programming' in this Notice refers to broadcasting programming and does not include material created by individual Canadians in a personal capacity."<sup>13</sup> Further in its last new media hearing, BTNC CRTC 2008-11, the Commission made clear: "Finally, the Commission is not concerned with user-generated broadcasting content. That is, the Commission does not seek to inquire into the content, quality or availability of material created by individual Canadians in a personal capacity."<sup>14</sup> Yet, the distinction drawn by the CRTC on UGC does not reflect the reality of many of today's OTT video platforms, who do not distinguish between professional versus personal content (e.g. YouTube & Vimeo).

In the past, the Commission has stated that UGC simply does not fall within the "intended scope" of the *Broadcasting Act*.<sup>15</sup> Although the Commission has not chosen to clarify beyond this statement why it has excluded UGC, when considering section 3 of the *Act* which declares some of the intents of broadcasting policy in Canada this decision by the Commission may be related to the nature of UGC itself - it is simply not professionally produced content as the *Act* assumes is the norm.<sup>16</sup> CIPPIC is concerned that the Commission's attempts to distinguish between UGC and non-UGC on OTT platforms will not be sustainable in the online environment. The distinction the Commission attempts to make between the role of performer and producers of UGC and their level of 'professional' or 'personal' role in creating and exhibiting a piece of video content is not reflective of the evolving online role of Canadian content creators. The danger of this is twofold: first, it ignores the potential harm that may flow to UGC content if online video delivery platforms are regulated under the *Broadcasting Act* in a manner that attempts, but ultimately fails, to exclude such platforms from its scope; second, it fails to account for the significant value of online UGC contributions to achieving *Broadcasting Act* policy objectives.

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<sup>12</sup> *Supra* note 2 at s 5.(2)(f).

<sup>13</sup> *Supra* note 13 see footnote (1).

<sup>14</sup> Broadcasting Notice of Public Hearing CRTC 2008-11, *Canadian broadcasting in new media*, October 15, 2008, online: <<http://www.crtc.gc.ca/eng/archive/2008/n2008-11.htm>> at para 23.

<sup>15</sup> CRTC, *The Future Environment Facing the Canadian Broadcasting System*, December 14, 2006, ISBN: 978-0-662-4906-6, online: <<http://www.crtc.gc.ca/eng/publications/reports/broadcast/rep061214.htm>> at para 353.

<sup>16</sup> *Supra* note 2 at s 3.(1)(a-s).

i. *Excluding UGC from OTT Regulation is Unsustainable*

The exclusion of UGC from the scope of CRTC new media regulatory deliberations is unstable for a number of reasons. First, while a consumer may initially create video content that they upload to a website for purely personal satisfaction, the monetization of that content through online advertisements, and the subsequent remuneration of the creator, suggest a transformation of the creator's role.<sup>17</sup> Second, in many instances, those working for professional production organizations may create original video content for UGC web platforms, that would not be caught by the CRTC's current definition. Finally, the increasing sophistication and broad distribution of significant amounts of online UGC make any attempt to distinguish such content from 'professional' content difficult.

Three tiers of performers have emerged that produce UGC and all of these creators have the opportunity to contribute to an online artistic community and the development of culture. These tiers include: performers who use UGC as a means of self expression; who develop income through the monetization of their self-created content; and who use UGC as an entry tool towards greater professionalizing.

In the first tier of performers, are those who create and share UGC purely as a means of self-expression. For example, the recent success of Chorus Niagara's Hallelujah flash mob video on YouTube presents a strong example of a group who created a video as a means of self expression with no direct commercial intent or aspiration.<sup>18</sup> The range of self expression found in these videos is vast: from humorous videos posted to a local newspaper's website that are wildly successful,<sup>19</sup> to the Calgary Zoo's recently posted video of its star gorilla.<sup>20</sup> It is the artistic value as well as the wide distribution of much of this Canadian content that makes it noteworthy and relevant.

In addition to this first tier, there are many who are able, with varying levels of success, to monetize UGC and other self-created video content. Included among these are performers such as Corey Vidal who created videos and posted them on YouTube has stated that he has

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<sup>17</sup> For a documented discussion of the evolving role of creators in UGC see Samuel E. Trosow, Jacqueline Burkell, Nick Dyer-Witthford, Pamela McKenzie, Michael B. McNally, Caroline Whippey and Lola Wong, *Mobilizing User-Generated Content for Canada's Digital Advantage*, Prepared for Social Sciences and Humanities Research Council of Canada, December 1, 2010, online: < <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1022&context=fimspub&sei-redir=1#search=%22http%3A%2F%2Fir.lib.uwo.ca%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1022%26context%3Dfimspub%22> >, [Trowsow et al.].

<sup>18</sup> Pat Hewitt, "Ontario choir that set up flash mob in mall sets YouTube record for hits," *Canadian Press* (24 December 2010), online: < <http://www.570news.com/news/national/article/161709--ontario-choir-that-set-up-flash-mob-in-mall-sets-youtube-record-for-hits> >.

<sup>19</sup> "Baby Emerson latest Canadian YouTube sensation," *Globe and Mail* (March 18, 2011), online: < <http://www.theglobeandmail.com/news/technology/digital-culture/social-networking/baby-emerson-latest-canadian-youtube-sensation/article1947553/> >.

<sup>20</sup> Tony Seskus, "Seskus: Calgary gorilla's 'breakdancing' video goes viral," *Calgary Herald* (June 22, 2011), online: < <http://www.calgaryherald.com/travel/Seskus+Calgary+gorilla+breakdancing+video+goes+viral/4983994/story.html> >.

made all of his income from advertising associated with his OTT videos.<sup>21</sup> None of his production on YouTube has occurred in a professional category as the Commission might define it, yet Mr. Vidal is able to regularly produce content, has a strong online viewing audience and generates an income from his works.

A final and rapidly growing tier includes those who begin their careers through active use of UGC and transition, to some extent, to a purer 'professionalism' that is indistinguishable from other accepted forms of broadcast content. One example of this is Canadian music artist Justin Bieber.<sup>22</sup> From his early use of YouTube to post non-professionally produced video of his singing and busking, to his current status as an international performer and top selling artist in 2010,<sup>23</sup> Justin Bieber is an example of the crossover from user generated to professional content emerging through OTT video models.

The existence of these varying tiers of online UGC creation and distribution will make it difficult, in CIPPIC's view, to sustain distinctions between 'professional' and 'independent' content regulation in the online context, where any individual can be a broadcaster. Perhaps more importantly, the distinction between UGC *platforms* and those dedicated to more 'professional' content may be impossible already. Vimeo, for example, is home to a broad selection of professional music videos and YouTube is host to regularly airing 'webisodes' of sitcoms such as *The Guild*.<sup>24</sup> It will be difficult to exclude online video delivery platforms of this nature from any principled regulatory definition of 'OTT'.

#### *ii. UGC Contributions to Canadian Content*

By ignoring UGC, the Commission also ignores the benefits these video producers give to the creation of Canadian content. Because UGC has widened participation in the creation of video programming, a new set of artists is emerging in Canada. These artists are using the tools available to them online to create awareness of their music and video production skills through such websites as YouTube. Far from rejecting, or bypassing, the traditional broadcast model in favour of OTT video production, they are instead using websites which host UGC video to enhance their exposure to a wider audience. Over time, as the monetization and professionalization of UGC continues, more UGC artists are likely to transition to full participation in more traditional arts of the broadcast medium. Canadians, through UGC, are seeking to create content and participate in an online and, often, international community,<sup>25</sup> and consequentially enhance the amount of Canadian content available in Canada and abroad

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<sup>21</sup> Raman Nijar, "Corey's story: How to make a living on YouTube," *CBC News* (online) (May 24, 2011), online: <<http://www.cbc.ca/news/technology/story/2011/05/23/f-corey-vidal-youtube-videos.html> >

<sup>22</sup> Trowsow et al., *supra* note 23 at 2.

<sup>23</sup> Billboard in 2010 listed Bieber as the number 8 top selling artist in the US, see: "Top Artists Music Charts 2010," *Billboard Magazine* (2010) online: < <http://www.billboard.com/charts-year-end/top-artists?year=2010#/charts-year-end/top-artists?year=2010> >

<sup>24</sup> [http://en.wikipedia.org/wiki/The\\_Guild](http://en.wikipedia.org/wiki/The_Guild)

<sup>25</sup> Trowsow et al., *supra* note 23, at 6-7, also Adam Arvidsson, "The Ethical Economy of Consumer Coproduction," (2008) *Journal of Macromarketing*, 28 at 326.

Because of the potential of the UGC platform to contribute to the development of Canadian artists, it has become an important part of the broadcasting ecosystem of creation and exhibition. By neglecting this segment of the market in discussions of online video content, the Commission is overlooking an important incubator for emerging Canadian talent which should be accounted for in any assessment of whether the Commission's new media exemption should be rescinded in favour of regulating online video streaming content platforms. Further, as it will be difficult to distinguish such content/platforms from other types of OTT, the residual impact OTT content may have on UGC should be accounted in any examination of regulatory options.

### **C. NOT REVISITING ISP LEVIES**

In re-opening the discussion of the New Media Exemption Order, the CRTC may also be tempted to consider if the new model for OTT video has changed the role of the ISP. Continued treatment of ISPs as neutral common carriers is essential to maintaining the conditions necessary for online innovation to continue to flourish and, further, is consistent with the Federal Court of Appeal's decision in *Canadian Radio-television and Telecommunications Commission (Re.)*, as well as with the *Telecommunications Act* itself.

In *Re: CRTC*, the Federal Court of Appeal stated that: "Because ISPs' sole involvement is to provide the mode of transmission, they have no control or input over the content made available to Internet users by content producers and as a result, they are unable to take any steps to promote the policy described in the *Broadcasting Act* or its supporting provisions. Only those who 'transmit' the program can contribute to the policy objectives."<sup>26</sup>

Further, the *Telecommunications Act* section 4 explicitly states that the Act does not apply "in respect of broadcasting by a broadcasting undertaking."<sup>27</sup> Therefore determining that the ISPs either by transmission of services, or the provision of online video content through affiliate company websites transform their service provisions to be subject to *Broadcasting Act* regulations would seem to be contradictory. If ISPs, in their capacity as carriers of Internet communications, were to be reclassified as Broadcasters subject to the *Broadcasting Act*, it is not clear how this would impact on the Commission's continued ability to regulate these ISPs under the *Telecommunications Act*.

## **II. ONLINE VIDEO AND THE BROADCASTING ACT OBJECTIVES**

Some stakeholders in the Canadian broadcasting industry have raised concerns about the impact of OTT services on the achievement of the *Broadcasting Act's* policy objectives.<sup>28</sup> In particular, traditional television BDUs are wary that, in the near term, the increased use of certain foreign OTT services, namely subscription based video on demand (SVOD) and advertisement-based video on demand, may result in a substantial shift away from existing

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<sup>26</sup> *Canadian Radio-television and Telecommunications Commission (Re.)*, 2010 FCA 178, at para 50.

<sup>27</sup> *Telecommunications Act*, SC 1993, c 38 s 4.

<sup>28</sup> See e.g. Online Broadcasters' Working Group, Letter to CRTC (1 April 2011)

(and regulated) broadcasting services towards these new, currently unregulated online sources.<sup>29</sup>

There is currently no evidence that such a shift is occurring in Canada. Indeed, evidence from other jurisdictions where online video availability has progressed far beyond the Canadian market suggests that, far from undercutting traditional services, online video delivery has been complimentary.

Far from justification for revisiting the new media exemption order, the current evidentiary record suggests that regulating OTT would not “contribute in a material manner”<sup>30</sup> to the implementation of broadcasting policy objectives and may, in fact, detract from those objectives.

### **A. NO SUBSTANTIAL CORD CUTTING/SHAVING**

Past concerns advanced by traditional broadcasters has been founded on the fear that the emergence of OTT services will have a negative impact on traditional subscription models.<sup>31</sup> As Peter Miller puts it in his report *Developments in the Canadian Program Rights Market 2011*, the “Canadian broadcaster/BDU sector is [not] interested in a \$70 cable bill turning into a \$10 OTT bill.”<sup>32</sup> Indeed, this fear of “cord cutting” (replacement of PayTV subscription) or “cord shaving” (reduction of PayTV subscription) is prevalent in most industry reports and media coverage of OTT services.<sup>33</sup>

Empirical data strongly suggests, however, that such practices have not materialized. A US report from March 2011 found that only 0.3% of consumers indicated that they had dropped a multi-channel video service in the past year as a result of using OTT services.<sup>34</sup> The report went on to conclude that the emergence of OTT services, such as Netflix and Hulu, “isn’t creating a significant trend in consumers ‘cutting the cord’ to multi-channel video services.”<sup>35</sup> Similarly, a Canadian report from March 2011 shows that, with regards to

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<sup>29</sup> See e.g. Kenneth Engelhart’s comments for Rogers before the Standing Committee on Canadian Heritage, *Impacts of Private Television Ownership Changes and the Move Toward New Viewing Platforms* (Ottawa: March 2011) at 3, online: <[http://publications.gc.ca/collections/collection\\_2011/parl/XC61-403-1-1-03-eng.pdf](http://publications.gc.ca/collections/collection_2011/parl/XC61-403-1-1-03-eng.pdf)>.

<sup>30</sup> *Supra* note 2 at s 9.(4).

<sup>31</sup> See e.g. Shaw Communications’ comments before the Standing Committee on Canadian Heritage, *Impacts of Private Television Ownership Changes and the Move Toward New Viewing Platforms* (Ottawa: March 2011) at 5, online: <[http://publications.gc.ca/collections/collection\\_2011/parl/XC61-403-1-1-03-eng.pdf](http://publications.gc.ca/collections/collection_2011/parl/XC61-403-1-1-03-eng.pdf)>.

<sup>32</sup> Peter Miller, *Developments in the Canadian Program Rights Market 2011* (Ottawa: Canadian Radio-television and Telecommunications Commission, 2011) at 11 [Miller].

<sup>33</sup> See e.g. Miller, *supra* note 43 at 3. See also “Netflix Streaming Overtakes Surfing as Biggest Driver of Web Traffic” *The Globe and Mail* (17 May 2011) online:

<<http://www.theglobeandmail.com/news/technology/tech-news/netflix-streaming-overtakes-surfing-as-biggest-driver-of-web-traffic/article2024630/>>.

<sup>34</sup> Leichtman Research Group, Research Notes, “LRG Research Notes 1Q 2011” (29 March 2011) online: [http://www.leichtmanresearch.com/research/notes03\\_2011.pdf](http://www.leichtmanresearch.com/research/notes03_2011.pdf) at 3 [LRG report].

<sup>35</sup> *Ibid.* at 4.

Netflix in particular, only 3% of users did not also subscribe to a TV provider.<sup>36</sup> Even of these 3%, many may never have been cable subscribers to begin with.

Most notably, such studies from the U.S., where subscription services such as Netflix have been available for a significant period of time, affirm that “Netflix’s success to date has not come significantly at the expense of multi-channel video subscriptions, nor does the popularity of Netflix portend an imminent downturn for multi-channel video providers.”<sup>37</sup> In fact, the data indicated that Netflix users were actually less likely than others consumers to switch video providers.<sup>38</sup> Indeed, as elaborated below, access to online video content manifests in a complimentary manner – adding *new* viewing hours as customers watch video on multiple and portable devices in addition to (or ‘on top of’) their existing ‘at home’ viewing time.<sup>39</sup> In this respect, over-the-top services have not detracted substantially from traditional broadcasting media.

Although other reports have indicated higher levels of cord cutting amongst younger demographics<sup>40</sup>, such trends must be understood in the broader context of consumers. Cord cutting may be more prevalent among younger consumers as a result of higher adoption rates of new technologies and subscription models, whereas older consumers continue to prefer traditional subscription models to television broadcasting.<sup>41</sup>

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<sup>36</sup> Media Technology Monitor, Press Release, "Internet TV is Changing: The Rise of Netflix." (2 June 2011) online: <http://www.mtm-otm.ca/files/Reports/mini/2011-05-Netflix-PressRelease.pdf>, quoted in "Internet TV used by 1 in 10 Canadians" *CBC News* (3 June 2011) online: <http://www.cbc.ca/news/technology/story/2011/06/03/technology-internet-tv.html>.

<sup>37</sup> *LRG report*, *supra* note 45 at 2.

<sup>38</sup> *Ibid.* at 3: "9% of multi-channel video subscribers are likely to switch in the next six months, compared to 10% in the past three years – 6% of Netflix Watch Instantly users are likely to switch video providers."

<sup>39</sup> Nielsen, *The Cross-Platform Report: Quarter 1, 2011* (15 June 2011) online: [http://blog.nielsen.com/nielsenwire/online\\_mobile/cross-platform-report-americans-watching-more-tv-mobile-and-web-video/](http://blog.nielsen.com/nielsenwire/online_mobile/cross-platform-report-americans-watching-more-tv-mobile-and-web-video/).

<sup>40</sup> See e.g. Credit Suisse, Media Release, "An Uncertain Time for Big Media: Downgrade to Underweight" (September 16, 2010): "Analysts there found that 37 percent of Netflix subscribers aged 25 to 34 substitute Netflix for pay television. Almost 30 percent of users between 18 and 24 are using Netflix's streaming service instead of cable or satellite. The Credit Suisse survey was of about 250 Netflix subscribers." Quoted in FierceOnline Video, online: <http://www.fierceonlinevideo.com/story/1-3-young-netflix-subscribers-cut-cord-pay-tv/2010-09-16>. See also The Diffusion Group, online: <http://tdgresearch.com/blogs/press-releases/archive/2011/06/09/tdg-proclivity-to-downgrade-paytv-services-increasing-among-netflix-streamers.aspx>. "In general, the percentage of Netflix Streamers to varying degrees likely to downgrade their PayTV service increased from 16% in 2010 to 32% in 2011."

<sup>41</sup> See e.g. Techvibes, "The Mobile Revolution in Canada [Infographic]" online: <http://www.techvibes.com/blog/saturday-the-mobile-revolution-in-canada-infographic-2011-06-05> "One in three Canadians own a smartphone. Half of Canadians aged 18 to 34 own a smartphone." Techvibes also noted that Canadians are still using their phones primarily for texting, taking photos and using apps. See also comScore, Media Release, "The Online Video Nation in Canada" (26 April 2011): online: [http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/The\\_Online\\_Video\\_Nation\\_in\\_Canada](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/The_Online_Video_Nation_in_Canada) "Data indicates growing trend among younger demographics, 45% of all videos consumed in Canada by viewers under age of 35."

While trends in consumer behaviour do indicate an increasing use of OTT services to access programming across all demographics,<sup>42</sup> adoption rates amongst younger consumers in the United States should not be taken as reflective of a paradigm shift in aggregate consumer trends for PayTV subscriptions in Canada. Indeed, there are a number of factors that will make it less likely for adoption of video streaming services to take hold to the same extent in Canada as it has in the US.

US consumers, for example, generally benefit from unlimited broadband plans, or very high data caps, that do not place the same financial disincentives on the use of OTT services as in the Canadian market.<sup>43</sup> Indeed, Miller's report notes that usage based billing (UBB) pricing schemes have constrained the development of OTT services and traditional broadcasters have maintained "a distinct and separate marketplace for Canadian program rights [...] based on a number of competitive and structural advantages."<sup>44</sup>

Although OTT service providers like Netflix have responded to such constraints by lowering the default video quality of its programming,<sup>45</sup> this is not an ideal long-term solution and puts such providers at a competitive disadvantage against other forms of delivery.

## **B. THE OPEN INTERNET SUPPORTS CANADIAN CONTENT**

In light of the vast array of Canadian content currently available online via OTT services, there is no indication of a market shortage for domestic programming that warrants regulatory intervention. As such, there is no evidence to suggest that revoking the New Media Exemption Order for OTT services would contribute to the policy objectives of the *Act* in a material manner.

During the CRTC's previous consultation in 2009, many parties highlighted the extent to which OTT services already support Canadian content even in the absence of formal regulation.<sup>46</sup> The Commission's determination that "many new media broadcasting undertakings are currently developing innovative and creative approaches to promote Canadian content on new media platforms"<sup>47</sup> remains valid today and ought to be upheld.

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<sup>42</sup> See e.g. comScore, Media Release, "The Online Video Nation in Canada" (26 April 2011) online: <[http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/The\\_Online\\_Video\\_Nation\\_in\\_Canada](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/The_Online_Video_Nation_in_Canada)> comScore noted a 37% increase in the number of online video views from during Sept 2010 – March 2011. 'Video views' includes both content video & in-stream advertising. In March 2011, 90% of all Canadians Internet users viewed at least one video online.

<sup>43</sup> "Netflix confronting Canadian Challenges" *The Globe and Mail* (4 February 2011) online: <<http://www.theglobeandmail.com/news/technology/tech-news/netflix-confronting-canadian-challenges/article1866312/>>.

<sup>44</sup> Miller, *supra* note 43 at 16. In particular: "Usage-based billing and low bandwidth caps that discourage use of OTT as a replacement for BDU service."

<sup>45</sup> Netflix Blog, Media Release, "Netflix Lowers Data Usage by 2/3 for Members in Canada" (28 March 2011) online: <<http://blog.netflix.com/2011/03/netflix-lowers-data-usage-by-23-for.html>>.

<sup>46</sup> See e.g. Google's submission to CRTC consultation 2008-11 (5 December 2008) at paras 9, 19-36. As discussed in Section 1, user-generated content is integral to an assessment of Canadian content online.

<sup>47</sup> *Supra* note 4 at para 48.

In particular, the CBC has taken an active role in promoting Canadian content online, such that in June 2011 cbc.ca “remains the top ranked Canadian media content site today.”<sup>48</sup> The CBC also supports Canadian creative industries through the financing of independent online productions and grants for new authors to write for online platforms.<sup>49</sup>

Several submissions from BTNC CRTC 2008-11 indicated how online distributions platforms represent a unique opportunity to promote and disseminate Canadian programming to a wider audience than ever before.<sup>50</sup> Rather than impose content regulations on these platforms, the CRTC should foster their continued development by providing incentives for the production of Canadian programming that utilize online distribution models.<sup>51</sup>

In addition, OTT platforms such as YouTube provide a forum for interactive content, allowing consumers to take on an active role in relation to the programming made available to them. In this sense, OTT platforms represent a unique opportunity to engage with younger demographics who are the future leaders of Canadian creative industries.

Another industry concern pointed to by Miller’s report is the fear that OTT services will allow foreign content providers to bypass the Canadian broadcasting system, thereby reducing the revenues of Canadian broadcasters who contribute to the production and dissemination of Canadian programming.<sup>52</sup> Based on data from the Canadian Media Fund’s most recent annual report, however, “funding for all streams was 14% higher than in 2008–2009 and 23% higher than the average of the preceding four years.”<sup>53</sup>

Thus, industry evidence does not suggest that the use of OTT services has resulted in reduced subscription rates or decreased profit margins for traditional broadcasters, nor are OTT services having a negative impact on private sector funding for Canadian programming.

Conversely, regulating OTT services would likely put barriers in the way of achieving broadcasting policy objectives. Some foreign OTT platforms may simply opt to forgo licensing program rights in the Canadian market rather than submit to excessive content regulations in order to provide programming if, as noted above, such regulation acts as a

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<sup>48</sup> Deloitte, Report, “The Economic Impact of the CBC/Radio-Canada” (8 June 2011) online: <<http://www.cbc.radio-canada.ca/about/Economic-Impact-Deloitte.pdf>> at 89.

<sup>49</sup> *Ibid.*

<sup>50</sup> See e.g. Apple’s submission to CRTC consultation 2008-11(9 December 2008) at paras 16-17.

<sup>51</sup> See e.g. Eli Noam, “TV or Not TV: Three Screens, One Regulation?” (July 11, 2008) online:

<<http://crtc.gc.ca/eng/media/noam2008.htm>> at 50: “To create content that is otherwise unavailable it must use positive mechanisms of creation rather than negative ones of exclusion. To do so, it needs to establish arrangements and institutions of funding, production, and distribution for the favored type of content [...] For Canada, import restrictions and domestic quotas will not work for Internet TV or mobile TV.”

<sup>52</sup> *Miller, supra* note 43 at 2. Despite such fears Miller, goes on to note that: “the Canadian program rights market currently shows many signs of good health. As we have seen, Canadian multiplatform rights to foreign and domestic content are for the most part not only being made available to Canadian broadcasters, but are also being successfully acquired by them.”

<sup>53</sup> Canadian Media Fund, Annual Report, “2009-2010 Annual Report” online: <[http://www.cmf-fmc.ca/annual-report/pdf/ctf\\_ar\\_0910\\_complete\\_d.pdf](http://www.cmf-fmc.ca/annual-report/pdf/ctf_ar_0910_complete_d.pdf)>.

deterrent to migration of online services. Canadian creators should be embracing these new online mediums as a means of creating and disseminating content instead of attempting to burden online innovation and services with added costs and regulations.

### **C. OTT IS COMPLIMENTARY TO TRADITIONAL BROADCASTING**

OTT services are also routinely being employed by BDUs in a complimentary manner to their traditional broadcasting activities.<sup>54</sup> As noted by the CRTC in 2009-329, “broadcasters have the tools to adapt to the challenges posed by technological change and the motivation to incorporate new platforms and formats into their business models.”<sup>55</sup> What is more, the CRTC found that rather than hinder the ability of BDUs to meet their regulatory obligations, OTT services have contributed to the achievement of the broadcasting policy objectives.<sup>56</sup> Further, evidence from other jurisdictions suggests that the services provided by advertising or subscription supported video streaming services do not significantly detract from traditional viewing hours.

Miller’s report highlights the variety of ways in which traditional BDUs have utilized OTT services to their advantage.<sup>57</sup> In particular, Canadian broadcaster have been able to secure exclusive rights to “advertising supported video on demand” (AdVOD), allowing consumers to ‘catch-up’ on programming from the previous 2-4 weeks.<sup>58</sup> Recent data suggests that such strategies have enabled BDUs to not only maintain their market share, but secure a dominant position in the distribution of online video in the Canadian market.<sup>59</sup>

Public broadcasters, most notably the CBC, have also responded to the rise of OTT services by making much of their programming content available online, some of it exclusively online.<sup>60</sup> A recent study indicates that the CBC provides over 200 hours of Canadian content online via third party OTT services, including Netflix and iTunes.<sup>61</sup>

Even pure competitive online video delivery services such as YouTube, Netflix and Hulu have been found to be complimentary. Indeed, market surveys indicate that cross platform viewers watch more programming than those who only rely on traditional broadcasting media such as TVs to access content.<sup>62</sup> A recent report by Nielsen highlights this shift in the

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<sup>54</sup> See e.g. CBC’s submission to CRTC 2008-11 (9December 2008): “The emergence and success of new media broadcasting is directly proportional to the health and success of traditional broadcast media. Why? Because new media broadcasting doesn’t seem to be a replacement for traditional broadcasting; it is more of an extension of the attributes and overall value of traditional broadcasting.”

<sup>55</sup> *Supra* note 4 at para 22.

<sup>56</sup> *Ibid.* at para 23.

<sup>57</sup> *Miller, supra* note 43 at 6-7.

<sup>58</sup> *Ibid.*

<sup>59</sup> See e.g. “Bell Media Established as Canadian Online Video Powerhouse as April comScore Numbers Released” online: <<http://www.newswire.ca/en/releases/archive/May2011/31/c9120.html>>, wherein BellMedia ranked second in the top five companies by videos viewed, and third for time spent watching video online, during April 2011. Data based on comScore’s Video Metrix (April 2011).

<sup>60</sup> *Supra* note 59 at 89.

<sup>61</sup> *Ibid.* at 90.

<sup>62</sup> comScore, “Blurring the Landscape: How TV is Merging Digital and Traditional Media” (17 June 2010) online:

viewership of content among Americans. In the United States, where services for OTT video are more prevalent and established in the market, there has been minimal reduction of time spent watching traditional television broadcasts.<sup>63</sup>

The report also points out that the content that viewers are watching, whether on TV or in an online format, is largely the same - mainstream, professionally produced network and cable programs - but the medium of viewership is changing.<sup>64</sup> When measuring year-over-year changes in viewing habits from January-March 2010 and 2011, US viewers increased their use of traditional TV by 0.8%, while their use of OTT video access increased by 13.2%.<sup>65</sup> Thus, recent data suggests that the main reasons consumers are adopting OTT services (convenience and accessibility) are supplemental to traditional viewing habits for television programming.<sup>66</sup>

Thus, there is little justification for rescinding the exemption order at this point. Indeed, recent reports indicate increased profits for all of the large ownership groups in the broadcasting sector, indicating that sources for Canadian media funding remain vibrant.<sup>67</sup>

In particular, the CRTC's most recent findings indicate that revenues from "conventional television and pay and specialty services achieved a combined profit before interest and taxes (PBIT) margin of 15.9% representing an increase from 2009's combined PBIT margin of 12%."<sup>68</sup>

Moreover, recent trends in the vertical integration of Canadian ISPs and BDUs indicate that these companies will continue to retain a dominant share in the near future.<sup>69</sup> Many commentators, including the CRTC, have noted that OTT services do not pose a threat to traditional broadcasters in light of their vertical integration with ISPs.<sup>70</sup>

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<[http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2010/Blurring\\_the\\_Landscape\\_How\\_TV\\_is\\_Merging\\_Digital\\_and\\_Traditional\\_Media](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2010/Blurring_the_Landscape_How_TV_is_Merging_Digital_and_Traditional_Media)>.

<sup>63</sup> Nielsen, *The Cross-Platform Report: Quarter 1, 2011* (15 June 2011) online:

<[http://blog.nielsen.com/nielsenwire/online\\_mobile/cross-platform-report-americans-watching-more-tv-mobile-and-web-video/](http://blog.nielsen.com/nielsenwire/online_mobile/cross-platform-report-americans-watching-more-tv-mobile-and-web-video/)>.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> comScore, "The Online Video Nation in Canada" (26 April 2011) online:

<[http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/The\\_Online\\_Video\\_Nation\\_in\\_Canada](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/The_Online_Video_Nation_in_Canada)>  
Main factors for watching online were time-shifting (missed episode on TV) & convenience (i.e. accessibility), NOT to skip advertisements.

<sup>67</sup> CRTC, News Release, "CRTC releases 2010 financial results for Canadian television services." (June 2, 2011) online: <<http://crtc.gc.ca/eng/com100/2011/r110602.htm>>.

<sup>68</sup> *Ibid.*

<sup>69</sup> See e.g. Mergent, Web Reports, "North America Telecommunications Sectors: A Company and Industry Analysis" (May 2011) online: <<http://webreports.mergent.com>> at 7-8.

<sup>70</sup> See e.g. Konrad von Finckenstein quoted in Marsha Lederman, "CRTC Chief Talks Legislation for Services such as Netflix" *The Globe and Mail* (13 June 2011) online: <<http://www.theglobeandmail.com/news/technology/tech-news/crtc-chief-talks-legislation-for-services-such-as-netflix/article2058618/>>.

Thus, OTT services themselves do not currently represent a threat to the viability of the Canadian broadcasting industry. For this reason alone, the new media exemption order should not be revisited at this point, if at all.

### III. THE BROADCAST ACT TO OTT VIDEO

In our above discussion of the nature of the Internet, CIPPIC identified some of the key principles underlining the freedom of the Internet, reiterated the Commission's statements on the importance of encouraging innovation through the Internet, and stated our opinion that regulation of the Internet can inhibit innovation. However, it is also important to consider the applicability of the current *Broadcasting Act* to online environments. In general a number of issues exist in applying an *Act* that was meant to specifically govern one medium (broadcast) to another (the Internet), with which the Commission must grapple if it decides, now or at some future point, to lift the New Media Exemption Order.

#### A. SPECTRUM & TIME SCARCITY

One of the key differences between regulating video as it appears on the Internet and broadcast programming is, of course, in the assumptions made under the *Act* about the nature of 'broadcast.' While the *Act* assumes a scarcity of spectrum as a guiding force to control the types and amount of content that should be made available, this scarcity simply does not exist on the Internet. Section 3(1)(b) of the *Broadcasting Act* defines the public nature of broadcasting as a system which is accessible to Canadians through radio waves.<sup>71</sup> Beyond the general inapplicability of this provision to the technology of the Internet, the section reveals a fundamental difference between the objectives of the *Act* to broadcast environments and to that of the Internet. While the *Act* was developed at a time to ensure access by Canadian broadcasters to the Canadian market through the allocation of a limited amount of spectrum, the abundance of online digital allocation make its application to OTT video incoherent.

In the twenty-first century it is no longer necessary to limit, or allocate, the use of space by video distributors, producers and artists for online video. This has meant a great expanse in the availability of content from Canadians, and from others around the world. Through the Internet, Canadians are able not only to receive this content but to actively participate as creators of video content. In this environment, equal access to the creation and provision of OTT video is available to Canadian corporations, Canadian individuals as well as non-Canadians.

As CIPPIC argues that OTT video is a complimentary service to traditional broadcast programming, an equally disconcerting issue for broadcasters seems to be a *perceived* reduction in time that individuals are spending watching television or listening to the radio. Likewise, the *Broadcasting Act* implicitly assumes that there are a scarce number of hours in a day in which to broadcast content. Instead, OTT video services have challenged this notion. Although Canadians are still limited to 24 hours in which to view content in a day, the availability of video content hours through mobile and computing devices means

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<sup>71</sup> *Supra* note 2 at s 3.(1)(b).

that content is more widely available to them, to view where and when they chose. This availability has changed the way Canadians view content whether on a mobile phone, laptop or tablet device and extended, not only the number of video hours that can be made readily accessible to them, but also the number of hours in which this video can be viewed.<sup>72</sup> It is questionable if, under such conditions, the same threats to Canadian and quality broadcasting can be sustained at all.

## **B. ONLINE VIDEO & THE BROADCASTING OBJECTIVES – AN ODD FIT**

There are a number of additional elements of the *Broadcasting Act* and its objectives that demonstrate how ill-suited it is to the online environment. The application of certain objectives, such as Canadian ownership requirements (section 3(1)(a)), use of radio frequencies by broadcasting elements (section 3(1)(b)) and quality programming (section 3(1)(g)) in particular range from antithetical to impossible when applied to the online context given current architectural design of the Internet.<sup>73</sup>

A number of policy objectives simply make no sense when applied to a global interconnected network, such as language requirements (section 3(1)(c)), educational programming requirements (section 3(1)(j)), and requirements for reasonable terms of carriage (section 3(1)(t)(iii)).<sup>74</sup> A brief examination of some of these inconsistencies highlights the extent to which the *Broadcasting Act* is ill-suited to online content regulation and underscores the need to retain the new media exemption.

### *i. Conflicts Between Specific Policy Objectives & The Open Internet*

As stated at the beginning of this submission, the Internet is a worldwide phenomena that has connected individuals to a variety of content available online. The Internet was created to ensure access for all users to all types of content regardless of their location in the world. Because of this early development, the Internet was created by a worldwide group of individuals who created connections and web pages hosting a variety of content - audio, visual, video and interactive content sites. This design is integral to the Internet, and aspects of the *Act* are rendered inapplicable to the medium because of it.

For example, section 3.(1)(b) discusses the equitable use of public spectrum in the delivery of English language and French language programming that constitutes a public service for Canadians.<sup>75</sup> As discussed at the beginning of this document, the Internet is inherently international that allows users internationally to communicate and share content – isolating video content based on national identity is not consistent with the design of the medium. The Internet makes information abundant and widely available so that regulations enforcing the exclusivity of access are inapplicable.

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<sup>72</sup> Nielsen, *The Cross-Platform Report: Quarter 1, 2011* (15 June 2011) online: <[http://blog.nielsen.com/nielsenwire/online\\_mobile/cross-platform-report-americans-watching-more-tv-mobile-and-web-video/](http://blog.nielsen.com/nielsenwire/online_mobile/cross-platform-report-americans-watching-more-tv-mobile-and-web-video/)>.

<sup>73</sup> *Supra* note 2 at ss 3.(1)(a)(b)(g).

<sup>74</sup> *Supra* note 2 at ss. 3.(1)(c)(j)(t)(iii).

<sup>75</sup> *Supra* note 2, s 3.(1)(b).

Likewise attempting to ensure a “high standard” of programming, as laid out in section 3(1)(g) of the *Act* is inapplicable to online OTT video providers.<sup>76</sup> While the Internet is by no means free of speech regulation, attempting to impose a content quality and standard obligations on online content has been found to be problematic from a practical perspective and constitutionally suspect under free expression guarantees in other jurisdictions.<sup>77</sup> Assuring quality content standards will be particularly troubling for mixed UGC/professional content platforms.

The concept underlying Canadian ownership requirements is particularly problematic in the context of the world wide web, where interconnection between disparate and global entities is not only the reality, but in many ways the objectives. Canadian ownership requirements – a fundamental element of the *Broadcasting Act* – would not only be difficult to impose onto the online environment, but is not a rational objective in a global online environment. Foreign ownership requirements are currently encoded in section 3(1)(a) of the *Act* as well as in the Government’s *Direction to the CRTC (Ineligibility of Non-Canadians)*, which obligates the Commission to license no broadcaster that is a non-Canadian.<sup>78</sup>

Other policy objectives are equally problematic when analyzed in the online environment, such as language parity requirements and even the basic building block of Canadian regulation under the *Broadcasting Act* – the licensing regime itself. One of the greatest accomplishments of the Internet is to disaggregate content creation from gatekeepers such as ISPs, allowing for innovation without permission. With such a model in place, the barriers to developing and deploying innovative services are reduced to as close to zero as possible. Requiring some form of prior licensing regime undermines this completely and would have serious repercussions for online innovation.

### **C. CERTAIN POLICY OBJECTIVES IMPOSE UNREAOSNABLE PROCEDURAL REQUIREMENTS**

Beyond the licensing regime itself, the *Broadcasting Act* as currently applied will impose heavy procedural and administrative costs that will be difficult for many online video streaming services and platforms to meet.

#### *i. Financial Contributions to Canadian Content Development*

A key element of the current administration of regulating OTT video providers that challenges current policy is the financial support of Canadian broadcasting that should be undertaken. While traditional Canadian broadcasters financially support Canadian content creators through acquiring original programming, it is not clear how this would apply online. Most professionally produced online video is not an original production, and instead is already aired programming that is simply made available online. If the exemption order on new media were to be lifted, would OTT video websites be required to produce original Canadian content?

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<sup>76</sup> *Supra* note 2, s 3.(1)(g).

<sup>77</sup> See e.g. *Reno, Attorney General of the United States et al v American Civil Liberties Union et al*, 521 US 844.

<sup>78</sup> *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192, s 2.

While this model may make sense in traditional broadcast, the online environment where the dominant business model has yet to be established, does not guarantee an annual revenue stream adequate to support professionally-produced content. While larger corporations with subscription models or strong advertising revenue may be the exception, the nature of the Internet with small home-grown OTT video businesses and content providers may lack a revenue stream adequate to pay for, and produce, original Canadian content. This is particularly the case for those with websites containing OTT video that is UGC or of a personal or non-professional nature, where the intent of the artists may not be one of remuneration for production but instead self-expression.<sup>79</sup>

If instead the Commission were to determine that the nature of the Internet required OTT video providers to contribute to a fund which would support original Canadian productions, along the lines of the Canadian Media Fund model, still the small or negligible revenues of small websites make it next to impossible to set adequate contribution levels to fund professionally produced online video content.<sup>80</sup> In such cases, contribution requirements for the production of Canadian content may mean OTT video websites are forced to cease operations. This would be to the detriment of Canadian creative industries as a whole.

#### *ii. Other Administrative Issues for OTT Video Providers*

Other administrative burdens, particularly for platforms hosting UGC, relate to CRTC reporting requirements and include: determining how user generated content (UGC) should be assessed as Canadian or non-Canadian programming based on the current points scheme;<sup>81</sup> who can attest to Canadian Content such as whether those uploading UGC alone should attest to the national-origin of programming, or who instead may be able to determine the national-origin of a video; how accessibility obligations for those with physical disabilities for video content may be met among producers of UGC or independent artists and producers; how requirements of shared aspects with regard to English and French language programming should be met considering the diverse nature of programming available online;<sup>82</sup> and the regulation of advertising online.<sup>83</sup>

## **CONCLUSION**

Based on current market conditions, there is no apparent need to lift the exemption order for new media including OTT video providers. Currently this sector exhibits: no established and reliable business model across all platforms; OTT video is providing a complimentary and not a replacement service for BDUs; the fostering of innovation by artists and the development of new platforms for OTT video services; and the participation of emerging

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<sup>79</sup> OECD, *Participative web and user-created content: Web 2.0, wikis and social networking* (Paris: Organization for Economic Cooperation and Development, 2007). Online: <[www.sourceoecd.org/scienceIT/9789264037465](http://www.sourceoecd.org/scienceIT/9789264037465)>

<sup>80</sup> OECD, *supra* at note 101. Report discusses that there is not necessarily an intent by UGC producers to profit from the content they create. Also see Samuel E. Trosow et al, *supra* note 23, at 6.

<sup>81</sup> Canadian Content is regulated: *supra* note 98 at s 4

<sup>82</sup> *Supra* note 2 at ss 3.(1)(b)(c)(f)(k)(m)(iv)-(v)).

<sup>83</sup> Advertising is regulated: *supra* note 98 at s 11.

artists in new media who are contributing to the growth in Canadian video content. Further to these conditions, the dissemination of information by new media undertakings has become an important and highly utilized resource by all Canadians. This has been facilitated through an open Internet, where widely disseminated information has allowed innovative Canadian artists to participate in the digital industries. That the Canadian market currently exhibits these characteristics, with many successes by Canadians and with free and open access to content, does not bespeak of the need to regulate.

Interest in applying the *Broadcasting Act*, in its current form, to new media undertakings also falters because of the difficulty of applying the values and technological elements of the *Act* to the medium. The methods of administration of the *Act*, and related regulatory obligations, make the procedural elements of the Commission's oversight difficult to apply to the Internet (such as programming logs and financial contributions to professionally produced Canadian content). Regulation and licensing of new media in Canada also appears to conflict with international norms and treaties which Canada is obliged to follow.

CIPPIC asks that the Commission consider the difference between the medium of broadcast from that of the Internet - differences that range from the technological through to differences in time and spectrum scarcity - to new media undertakings. The current state of the market, as well as the impracticality of applying the *Act*, make maintaining the new media exemption order essential for the on-going participation and success of Canadians in this realm.

**\*\*\* END OF DOCUMENT \*\*\***