11 July 2008

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

*Filed by web-file and fax*

Dear Mr. Morin:

**Re: Broadcasting Public Notice CRTC 2008-44**

**I. Introduction**

1. Pursuant to Broadcasting Public Notice 2008-44 issued on 15 May 2008, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) submits that the following issues and questions should be addressed by the CRTC in the upcoming proceeding on Canadian broadcasting in new media. As requested by the Commission, CIPPIC has included the rationale for considering each of its proposed issues and questions. Generally, CIPPIC believes that addressing these issues and questions will help ensure that any conclusion the Commission reaches regarding the regulation of new media broadcasting fulfills the objectives of Canadian broadcasting policy as defined in s. 3 of the *Broadcasting Act*.

2. CIPPIC furthermore submits that the Commission must be alive to the danger of relying solely on the objectives of the *Broadcasting Act* to evaluate potential regulations on new media. As CIPPIC will note at various points in the following submission, it is imperative that any regulatory framework imposed on the delivery of broadcasting over the internet be concurrently tailored to respect the telecom policy objectives set out in the *Telecommunications Act*.

**II. The Following Issues and Questions Should Be Considered Under Section III:**

**Barriers to Accessing Canadian New Media Content**

*Issue #1: Agreements Between Content Providers and Internet Service Providers (ISPs) for Quality of Service or Prioritized Transit*
3. CIPPIC is concerned that some stakeholders are interested in managing internet traffic flows as a way to promote the policy objectives of the Broadcasting Act. Under this approach, ISPs would be permitted to earn revenue from traffic prioritization or quality of service agreements as a quid pro quo for their contribution to a fund for the development of high-quality Canadian new media programming. As the Commission’s Perspectives document acknowledges, the technology to facilitate such traffic differentiation is already being deployed in Canada’s physical internet infrastructure. The following questions are designed to explore whether regulatory approval of such an approach may in fact undermine the objectives of Canadian broadcasting policy. The Commission must be wary of, and inquire into, regulatory policies that would sacrifice the diversity of voices and audience empowerment currently facilitated by the internet in exchange for the funding of a limited amount of high-quality new media content.

Q.: Would such agreements result in certain types of Canadian content being favoured over others for reasons other than artistic and/or popular merit?

4. One risk of allowing ISPs to offer preferential treatment to certain traffic is that audience preferences will take shape around factors other than the artistic or entertainment value of a Canadian new media program. As consumers expect increasingly fast, on-demand access to content, content producers that can afford preferential treatment will likely secure their success against producers whose content will take longer to be delivered to its audience.

5. The distribution of broadcasting over the internet offers an open and more equitable alternative to the traditional broadcasting realm, where audience preferences about Canadian content are largely shaped by the production and investment decisions of a few powerful players. Allowing certain Canadian content producers preferential access to the internet user audience could recreate the centralized and elite-controlled broadcasting environment of the past. This result would remove many of the opportunities that the internet currently offers to small-scale Canadian content producers.

6. The Commission should examine whether tiered content delivery by ISPs would contribute to fulfilling the broadcasting policy objectives that a wide variety of programming is effectively available to Canadians (s. 3(i)) and that the broadcasting system encourage the dissemination of “a wide range of programming that reflects Canadian attitudes, opinions, ideas, values, and artistic creativity” (as in s. 3(1)(d)(ii)).

Q: Would such agreements inhibit the ability of Canadian content producers to distribute their product over the internet using innovative technological approaches or business models?

7. As recognized by the Commission’s Perspectives document, the internet’s openness has created a hotbed for innovation and has led to a flourishing of business models that monetize content packaging and distribution in novel ways. If certain applications or business models are favoured as a necessary result of traffic prioritization agreements,

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See paras. 220-230.
Canadian content producers may lose the freedom to experiment with innovative approaches to engaging with audiences.

8. The current approach to traffic management practiced by Bell Canada raises exactly this concern. Peer-to-peer technologies are one popular method to enable low-cost distribution of information, including programming, over the internet. As demonstrated by the filings in the Canadian Association of Internet Providers’ Part VII application to the Commission, many small companies have chosen to make distribution via this protocol an essential part of their business model.2

9. Organizations such as Google and the Canadian Advanced Technology Alliance have, in these same proceedings and elsewhere (in the case of Google), raised concerns about how discrimination between certain kinds of traffic could destabilize the innovation incubator that is our internet.3 Canadian content producers may find themselves unable to reach audiences in innovative ways if traffic prioritization technologies only permit certain modes of content delivery.

10. Asking the above question will help the Commission explore the relationship between technological openness and the Broadcasting Act’s objective that a diversity of Canadian voices be fostered by the broadcasting system (s. 3(1)(d)(ii)). It also addresses the policy objective of s. 3(1)(d)(iv), that our broadcasting environment “be readily adaptable to scientific and technological change.” Furthermore, considering this issue would provide the Commission with insight into whether such a policy would conflict with its mandate, under s. 5(2)(f), to ensure that the Canadian broadcasting system regulated in a flexible manner that “does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians.”

11. Finally, CIPPIC notes that the Commission is also under a separate statutory obligation in s. 7(g) of the Telecommunications Act to encourage innovation in the provision of telecommunications services. Posing this question to stakeholders would aid the Commission in understanding how Canada’s internet regulatory regime can best facilitate innovation and experimentation in telecommunications by new media broadcasters.

Q. Would these agreements create financial impediments to accessing audiences for Canadian content producers?

12. If ISPs were permitted to offer prioritized transit agreements to content producers, a new market would be created for preferential transit. Even if this market was limited to Canadian ISPs, it would attract potential buyers from around the world. Most Canadian and/or independent content producers do not have the financial resources to compete in a global market for quality of service guarantees.

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2 See the submissions of CIPPIC, Redwire, Per Vices Corporation, TCPub Média, and the University of Western Ontario. Filings can be found at <http://www.crtc.gc.ca/PartVII/eng/2008/8622/c51_200805153.htm>

3 Ibid.
13. The Commission should examine whether Canadian audiences would still consume a variety of independent and/or Canadian-produced new broadcasting content in an environment in which such content is not delivered as quickly as more heavily-financed content. In particular, financial barriers created by prioritized transit agreements raise the following concerns under the *Broadcasting Act*: first, a shift of Canadian viewers away from Canadian content due to its relatively slow speed and low prominence could create a broadcasting environment that does not safeguard, strengthen and enrich Canada’s socio-cultural fabric (as required by s. 3(1)(d)(i)) to the extent that it reasonably could; and, second, if favoured status is provided to those voices that can afford it then non-mainstream media and cultural expression, Canadian or otherwise, may find it more difficult to reach audiences, undermining the objective, contained in s. 3(1)(i) and its subsections, that the broadcasting system facilitate access to a comprehensive and geographically and politically diverse array of programming.

**Issue #2: Requiring Internet Service Providers to Contribute to a Canadian New Media Production Fund**

Q. Would such a requirement result in internet access becoming prohibitively expensive for a greater number of Canadians?

14. Canadians already pay some of the highest rates for internet access in the developed world. According to the OECD, Canadians’ average monthly subscription price of $59.76 ranks 19th out of 30 OECD countries\(^4\) and the average price Canadians pay in terms of Mbit/s, $28.14, ranks 27th among the same 30 countries (only Greece, Mexico and Turkey have higher prices).\(^5\)

15. If Canadians cannot afford to access the internet, the issue of whether the programming available through it expresses Canadian attitudes and artistic creativity, or that it provides a balance of information, enlightenment and entertainment, becomes moot. None of the *Broadcasting Act*’s objectives will be served if internet access becomes unduly expensive for an even greater portion of society. In light of ISPs’ threat to pass any new contribution requirements onto internet users and the rising price of essentials such as food and fuel, the Commission should inquire into whether treating ISPs as broadcasters would effectively prevent lower income Canadians from accessing the internet and thus undermining the goals of the *Broadcasting Act*.

16. Moreover, rising prices for internet access could seriously undermine the telecom policy objective that high quality telecommunications services are both reliable and affordable for all Canadians (s. 7(b) of the *Telecommunications Act*). Considering a plan for the financing of Canadian new media content production without taking into account how this plan affects other Canadian public policy goals could result in a less accessible

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\(^4\) OECD, Broadband average monthly subscription price, Oct. 2007, USD PPP, <http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html>.

\(^5\) OECD, Average broadband monthly price per advertised Mbit/s, USD PPP, October 2007, <http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html>. 
telecommunications system, in direct conflict with important statutory goals in the telecommunications context.

### III. Other Statutory Objectives to Be Considered in the Proceeding

**Issue: Regulating the Internet Without Due Regard for Protection of User Privacy**

Q. Would any proposals designed to meet the Broadcasting Act’s objectives have the perverse effect of undermining other statutory objectives?

17. The Commission’s Perspectives report discussed the potential advantages of Deep Packet Inspection (DPI), behaviourally targeted advertising, and digital watermarking technologies. CIPPIC acknowledges that these technologies are of interest to new media content producers for their potential ability to aid in online rights management and revenue creation.

18. However, these technologies also raise serious concerns of privacy for internet users. Examining them solely against the objectives of Canada’s Broadcasting Act could lead to outcomes that are fundamentally at odds with the Commission’s statutory obligation under s. 7(i) of the Telecommunications Act to establish policy that contributes to the protection of Canadians’ privacy.

### IV. Conclusion

19. All the implications of these policy proposals and the technologies that they rely upon should be examined before a new policy on internet broadcasting is adopted. Recognizing that net neutrality issues may soon be examined in the context of an industry-wide telecommunications proceeding, CIPPIC nonetheless submits that the broadcasting new media proceeding should be alive to important statutory and policy issues outside of the broadcasting context. To do otherwise would be to risk making policy recommendations that do not account for the full legal, social and political complexity of the new media broadcasting environment.

All of which is respectfully submitted,

*Original signed*    *Original signed*

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