



**Part 1 Application by Coalition of Affected Stakeholders**

# **Regarding Disabling of On-Line Access to Piracy Sites**

**CRTC Reference No: 8663-A182-201800467**

**Intervention of OpenMedia and the Canadian Internet Policy & Public Interest clinic  
(CIPPIC)**

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## Executive summary.

1. The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) and OpenMedia are pleased to provide its intervention in opposition to this Part 1 Application seeking to establish a mechanism for identifying and blocking online resources alleged to be blatantly, overwhelmingly or structurally engaged in copyright infringement (henceforth “Proposal” or “Bell Proposal”).
2. The Proposal seeks an extra-ordinary and novel remedy that will have unintended consequences for online expression and innovation. It is antithetical to an open Internet, undermines norms of neutral connectivity which sit at the heart of the *Telecommunications Act*, is in direct conflict with copyright law and policy, and implicated free expression in a manner that cannot be classified as minimally intrusive. It should be rejected.
3. The proposal seeks to establish a remedial regime, essentially under the auspices of the Commission but with the participation of a non-profit entity operating as an initial screening mechanism, by which various online resources will classified as ‘blatantly, overwhelmingly or structurally engaged in copyright infringement’ and will be added to a block list. While presented as a regulatory regime designed to further a socially responsive communications network, the Proposal is in essence a remedial regime under which the Commission will be compelled to apply copyright law to a range of online services and issue remedies where it finds such wrongs. It is a punitive regime in essence, designed to punish those found to have infringed copyright law.
4. In establishing the basis for this remedial regime, the Applicants overstate the scope and economic impact of current online copyright infringing activities. While such activities are undoubtedly harmful, infringement rates appear to be dropping in Canada. Moreover, Canadians are amongst the most avid consumers of legitimate online content in the world, further suppressing the detrimental impact of online copyright infringement.
5. Further, the Applicants enjoy a significant range of remedies against copyright infringement, made available to them under the *Copyright Act*. These include tools and remedies that are both less intrusive of free expression and potentially more effective at addressing online copyright infringement—tools that were explicitly adopted by Parliament in its efforts to put in place a balanced and comprehensive

enforcement regime for copyright with clearly specified and curtailed roles for intermediaries such as ISPs.

6. The Applicants have not attempted to use these available remedies. Instead, the Applicants propose an extra-ordinary remedial regime by which the CRTC, an administrative tribunal with minimal expertise in adjudicating copyright claims, will become a primary mechanism for addressing online copyright infringement in Canada. Nor is it clear on what principled basis this regime will be limited to copyright infringement. If the *Telecommunications Act* is interpreted to include within its scope the capacity to adjudicate and remedy by blocking rights-infringing online content, it is not clear how the many other well documented online harms will be excluded from this regulator regime. Under such a regime, the Commission could well become the venue of first resort for a broad range of online harms and, in effect, an engine for the censorship of these.
7. This front-line role not only conflicts with the principles of neutral common carriage which the *Telecommunications Act* is intended to embody, but is also far distant from the core objectives embodied in the telecommunications policy objectives. The Act and its objectives have always been focused on connectivity not content. Yet the Applicants would have the Commission undertake a comprehensive adjudication role with respect to online content. As such, in addition to being undesirable, the proposed regime also falls outside the auspices the *Telecommunications Act* as well as of the Commissions' remit.

## Proposal Overview.

8. At the outset, it is important to recognize the unprecedented and exceptional nature of the remedy sought by the Applicants.<sup>1</sup> Its exceptional nature raises many concerns, and exacerbates many of the negative implications the proposed mechanism will have for copyright policy, net neutrality and freedom of expression. Before examining these negative implications, it is therefore helpful to recount the proposal in question and highlight some of its exceptional characteristics.

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<sup>1</sup> Application dated January 29, 2018, and is filed by Asian Television Network Limited (ATN) on behalf of a Coalition of 25 stakeholders, (henceforth the "Bell Proposal").

9. The essential features of the Proposal are as follows:

- The CRTC will mandate the creation of a non-profit organization with a multi-stakeholder governance structure;
- The non-profit organization will be responsible for conducting an initial assessment of allegations and, where it deems that a website should be blocked, to make its case to the Commission that the online resource in question is blatantly, overwhelmingly or structurally engaged in copyright infringement;
- The Commission will ultimately be responsible for determining whether a website meets the standard for infringement set out by the remedial regime proposed;
- The Commission will be responsible for issuing the only remedy available to it for any infringement it finds, namely, the issuing a blocking order to be implemented by all Canadian ISPs; and
- a further appeal to the Federal Court of Appeal in instances where an online resource wishes to challenge a blocking order issued against it.

It is not clear to what degree the Commission is anticipated to defer to the determinations of the non-profit entity the Proposals seeks to establish as an initial screening mechanism.

10. The rationale for the Proposal is, generally speaking, copyright infringement. The Applicants argue that Canadians are engaged in piracy in a manner that requires a response from the Commission. Yet the Applicants' own study of piracy rates, submitted in support of their Proposal, demonstrates a year over year decrease in piracy rates in Canada.<sup>2</sup>
11. More generally, while copyright infringement undoubtedly remains problematic, the Applicants significantly overstate both its scope in Canada and its impact.<sup>3</sup> We

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<sup>2</sup> Michael Geist, "The Case Against the Bell Coalition's Website Blocking Plan, Part 2: Weak Evidence on the State of Canadian Piracy", *MichaelGeist.ca*, February 13, 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-2-weak-evidence-state-canadian-piracy/>.

<sup>3</sup> Michael Geist, "The Case Against the Bell Coalition's Website Blocking Plan, Part 2: Weak Evidence on the State of Canadian Piracy", *MichaelGeist.ca*, February 13, 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-2-weak-evidence-state-canadian-piracy/>; Michael Geist, "The

specifically caution the Commission on extrapolating financial harms from piracy rates, as the Applicants do extensively. Many have noted the wide-ranging methodological flaws that frequently occur when such attempts are made.<sup>4</sup>

12. To remedy these inflated harms, the remedial regime the Applicants propose will have wide-ranging and unintended consequences for online innovation and expression. The regime is also undesirable from the perspective of the *Telecommunications Act*, and conflicts with copyright law and policy. Finally, the proposed remedial regime as a whole is inherently disproportionate in its impact on free expression, removing the prospect of minimally intrusive remedies and instead favouring heavy-handed website blocking. These concerns will be elaborated upon in the remainder of this submission.

### **The proposal cannot be justified under the *Telecommunications Act*.**

13. The Bell Proposal conflicts with net neutrality principles as articulated by this Commission through a number of decisions, and does nothing to further the telecommunications policy objectives. As presented, the remedy advanced by the Bell Proposal fundamentally misunderstands the scope and nature of the CRTC's regulatory regime, and as a result has no clear legal grounding in the *Telecommunication Act*.

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Case Against the Bell Coalition's Website Blocking Plan, Part 3: Piracy Having Little Impact on Thriving Digital Services and TV Production", *MichaelGeist.ca*, February 14, 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-3-piracy-little-impact-thriving-digital-services-tv-production/>.

<sup>4</sup> See United States, Government Accountability Office, "Observations on Efforts to Quantify the Economic Effect of Counterfeit and Pirated Goods", GAO-10-423, April 2010, <https://www.gao.gov/new.items/d10423.pdf>; and Michael Geist, "Gov't Committed Study Finds P2P Downloaders Buy More Music", *MichaelGeist.ca*, November 2, 2007, <http://www.michaelgeist.ca/2007/11/ic-p2p-download-study/>; and *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, paras 129-131: "It has been estimated that in 2002 sales of recorded music fell by almost 10 percent due to Internet-based file sharing, but this "estimate" is a matter of ongoing controversy. Some say Napster was a boon to the music recording industry."

**(a) Proposal Undermines Common Carriage & Net Neutrality.**

14. The Applicants argue that the proposal they advance does not implicate net neutrality or common carriage principles on the basis that only websites that are 'unlawful' will be blocked.<sup>5</sup> However, common carriage principles of neutrality have always been necessarily agnostic as to the legality of the content being transmitted. This legal agnosticism is at the core of common carriage neutrality.
15. The neutrality of common carriers has its historical basis in an obligation to treat content equally (that is, without discrimination) and a *corresponding* limitation on the liability of carriers for unlawful content that is communicated by a carrier's customers, but for which it only provides a conduit.<sup>6</sup> Indeed, many of the policy rationales regarding the neutrality of common carriers arise directly from the need to ensure such entities remain neutral in the face of any and all content.
16. Many members of the coalition advancing the current Application have explicitly recognized the agnostic nature of this neutrality. For example, in its testimony to the parliamentary committee tasked with reviewing the *Copyright Modernization Act* (Canada's most recent comprehensive reform of its copyright framework), Bell Canada testified in support of its neutral role as follows:

With respect to the way we view things, it's interesting when we hear that ISPs make money off piracy, because in fact the business of being an ISP is to make money on top-quality Internet service. By providing Internet service we're a common carrier, and as a common carrier we're neutral. That's decided by the Telecommunications Act.

We open the door to all kinds of things. We give you the ability to do whatever you like.

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<sup>5</sup> The Bell Proposal, para 75: "Net neutrality does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online."; The Bell Proposal, Appendix A, Brandon Kain, Legal Opinion provided to BCE Inc, Re: CRTC Jurisdiction to Impose a Piracy Blocking Regime, January 26, 2018, p 31: "Net neutrality may prevent ISPs from unilaterally interfering with legal online content, but does not restrict the CRTC from making orders to prevent the dissemination of unlawful content."

<sup>6</sup> For example, see: *Electric Despatch Co of Toronto v Bell Telephone Co of Canada* (1891), 20 SCR 83 (telephone company not liable for failing to prevent customer phone calls to plaintiff's competitors despite an exclusive contractual agreement's non-competition contractual obligation to avoid transmitting avoid transmitting messages to customers is not responsible for the contract-infringing phone calls of its customers).



You can check the weather, you can check a local business website, you can do downloading, as Mr. Del Mastro does, of legal content, of legal movies from wherever he gets them, possibly iTunes as well, which is legal content. But to make the assumption that ISPs have some kind of control over the Internet would be false. We can't control what goes on online, and we can't control what people do online. We're simply neutral.

... As an ISP, we're totally neutral. We offer a technology; it does many, many things. Unfortunately, there are people who use it to do bad things.<sup>7</sup>

Under Canadian law, the neutrality of ISPs has never been contingent on the legality of the content being transmitted over the networks they operate.<sup>8</sup>

17. The Commission's net neutrality framework has explicitly recognized in many contexts that the neutrality of ISPs is not contingent on the legality of the content these entities transmit. In Telecom Regulatory Policy CRTC 2009-657, the Commission held that sub-section 27(2) of the Telecommunications Act obligates ISPs to transmit content without discrimination, unless such discrimination can be justified on a compelling traffic-management basis.<sup>9</sup> The Commission further held that any ISP decision to block customer access to content would require prior CRTC approval under section 36 of the Act.<sup>10</sup> Both aspects of this decision were intended to create a framework for maintaining the neutrality of ISPs with respect to the content being transmitted by their customers in light of growing ISP incentives to slow down or even block certain types of traffic as a means of diminishing network

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<sup>7</sup> Testimony of Ms Tanya Woods, Counsel, Regulatory Law, Bell, CHUM Radio, Oral Testimony, Legislative Committee on Bill C-11, March 1, 2012, 41<sup>st</sup> Parl, 1<sup>st</sup> SESS, <http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/meeting-6/evidence>, at 0940.

<sup>8</sup> For example, in the defamation context, the Supreme Court of Canada has noted in passing that the actions of an ISP in merely facilitating rights infringing communications of others are "so passive that they should not be held to be publication." *Crookes v Newton*, 2011 SCC 47, paras 20-21; *Niemela v Malamas*, 2015 BCSC 1024. See also: *R v TELUS Communications Co*, 2013 SCC 16, para 41: "...this Court has recognized in other contexts that telecommunications service providers act merely as a third-party "conduit" for the transmission of private communications and ought to be able to provide services without having a legal effect on the nature (or, in this case, the protection) of these communications."

<sup>9</sup> Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet Service Providers*, CRTC File No 8646-C12-200815400, October 21, 2009. Extended to wireless service providers in Telecom Decision CRTC 2010-445, *Modification to forbearance framework for mobile wireless data services*, CRTC File No 8663-C12-201000653, June 30, 2010.

<sup>10</sup> Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet Service Providers*, CRTC File No 8646-C12-200815400, October 21, 2009.

loads.<sup>11</sup> The proceeding in question related primarily to ISP practices in relation to their customers' peer-to-peer file-sharing activities.<sup>12</sup> This same activity involves interaction with many of the same websites the Bell Proposals posits as indicative that a website is blatantly, overwhelmingly or structurally engaged in copyright infringement.

18. The Commission's framework for differential pricing, adopted in Telecom Regulatory Policy CRTC 2017-104, the Commission indicated the lack of content-agnosticism as a central indicia in rendering a given differential pricing practice unjustly discriminatory under section 27(2) of the Act.<sup>13</sup> The Commission did not exempt discrimination on the basis of the lawfulness of the content from this determination, despite the fact that the legality of differentiated services was a central consideration in the proceeding which led to the regulatory policy in question.<sup>14</sup>
19. Finally, in Telecom Decision CRTC 2016-479, the Commission confirmed that section 36 of the Act prohibits common carriers from blocking access to specific websites without prior approval by the Commission. Specifically, the Commission noted that "compliance with other legal or judicial requirements—whether municipal, provincial, or foreign—would not, in and of itself, justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval

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<sup>11</sup> Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet Service Providers*, CRTC File No 8646-C12-200815400, October 21, 2009, paras 4-7.

<sup>12</sup> Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet Service Providers*, CRTC File No 8646-C12-200815400, October 21, 2009, paras 6 and 123-127.

<sup>13</sup> Telecom Regulatory Policy CRTC 2017-104, *Framework for assessing the differential pricing practices of Internet Service Providers*, CRTC File Nos: 8661-P8-201510199, 8622-V42-201510735 & 1011-NOC2016-0192, April 20, 2017.

<sup>14</sup> For example, see Quebecor Media, Reply, Part 1 Applications from the Public Interest Advocacy Centre and from Vaxination Informatique regarding Unlimited Music Service, RTC File Nos: 8661-P8-201510199, 8622-V42-201510735, January 27, 2016, paras 22-24: "Another issue that has drawn the attention of those who allege that Videotron is arbitrarily restricting the scope of Unlimited Music is the use of the qualifiers 'legal' or 'reputable' to describe which music streaming providers are eligible to participate in the service. ... it was never Videotron's intention to use these qualifiers to exclude any music streaming provider ... we will remove the qualifiers 'legal' and 'reputable' from the eligibility descriptions found on Videotron's Unlimited Music website and support materials."

under the Act.”<sup>15</sup> In doing so, the Commission confirmed that blocking content deemed unlawful *can* affect the neutrality of Canadian common carriers, holding that this interpretation “properly reflects the legislative history of section 36, Canadian principles of statutory interpretation, and relevant jurisprudence.”<sup>16</sup>

20. In sum, the allegation that unlawful content falls outside common carriage net neutrality principles or otherwise fails to engage the provisions of the provisions of the *Telecommunications Act* which seek to ensure neutral treatment of content by telecommunications service providers simply has no grounding in Canadian law or principle. CIPPIC and OpenMedia would argue that website blocking is a heavy-handed remedy, than can easily undermine online innovation and the telecommunications policy objectives. The CRTC should permit such blocking by regulated common carriers under s 36 only under exceptional circumstances.<sup>17</sup>
21. However, this proceeding does not engage the conditions under which s36 approval for website blocking should occur. The Bell Proposal does not ask the Commission to approve a judicially issued website-blocking injunction. Indeed, as no such injunction has been sought from or issued by any Canadian court, any section 36 approval premature and lacking in factual foundation.<sup>18</sup> The Proposal calls on the Commission to undertake a law and fact-finding power with respect to copyright infringement and to issue extra-ordinary remedies in the form of website-blocking orders. Neither the adoption of a determination authority in relation to the legality of content nor the remedy sought by the Applicants falls within the CRTC’s jurisdiction, as allotted to it by Parliament.

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<sup>15</sup> Telecom Decision CRTC 2016-479, *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act*, CRTC File No 863-P8-20167186, December 9, 2016, paras 7 and 21.

<sup>16</sup> Telecom Decision CRTC 2016-479, *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act*, CRTC File No 863-P8-20167186, December 9, 2016, para 18.

<sup>17</sup> Even judicially issued content-removal injunctions are recognized as extra-ordinary remedies that can implicate freedom of expression. See for example: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, paras 45-48 (content removal orders in general can implicated freedom of expression and a state’s core values); *Equustek Solutions Inc v Jack*, 2018 BCSC 329; *Niemela v Malamas*, 2015 BCSC 2014; and Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet Service Providers*, CRTC File No 8646-C12-200815400, October 21, 2009.

<sup>18</sup> Telecom Decision CRTC 2016-479, *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act*, CRTC File No 863-P8-20167186, December 9, 2016.

**(b) Proposal Falls Outside the *Telecommunications Act*.**

22. While the *Telecommunications Act* grants the Commission broad discretion to achieve its equally broadly framed telecommunications objectives, this does not extend to an effective co-opting of any and all other areas of the law. Yet that is precisely what the Applicants propose. If the Applicants' proposal is accepted, the Commission would regularly be called upon to issue determinations of fact and law on copyright matters in order to determine that impugned websites or resources are, in fact, blatantly, overwhelmingly or structurally engaged in copyright infringement.
23. In addition, the Commission will have established a regulatory framework by which many other online harms will be brought to it in search of a website blocking remedy. There are online resources and websites that can be characterized as 'blatantly, overwhelmingly or structurally engaged' in publication of hate speech,<sup>19</sup> trademark infringement,<sup>20</sup> violation of trade secret protections,<sup>21</sup> defamatory publication,<sup>22</sup> online harassment,<sup>23</sup> release of confidential information,<sup>24</sup> or any of a range of other online harms in addition to the copyright infringement outlined by the Applicants.<sup>25</sup> There is no principled basis by which the Commission can distinguish applications for blocking such websites from those related to copyright infringement. All of these legal wrongs can equally be said to "cause[] significant harm to Canada's social and economic fabric".<sup>26</sup> If the Bell Proposal is accepted, the Commission will not only be called upon to issue determinations of fact and law in relation to copyright law, but is also likely to be called upon to address each

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<sup>19</sup> Telecom Commission Letter, CRTC File No 8622-P49-200610510, August 24, 2006, <https://crtc.gc.ca/eng/archive/2006/lt060824.htm>.

<sup>20</sup> *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors*, [2016] EWCA Civ 658.

<sup>21</sup> *Equustek Solutions Inc v Jack*, 2014 BCSC 1063.

<sup>22</sup> *Canadian National Railway Company v Google Inc*, 2010 ONSC 3121; *Niemela v Malamas*, 2015 BCSC 2014.

<sup>23</sup> *Bagwalla v Ronin*, 2017 ONSC 6693 (Div Ct); *R v Fox*, 2017 BCSC 2361.

<sup>24</sup> *United Airlines Inc v Cooperstock*, 2016 QCCS 4645.

<sup>25</sup> Swiss Institute of Comparative Law, "Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content", *Council of Europe*, December 20, 2015, <<https://edoc.coe.int/en/internet/7289-pdf-comparative-study-on-blocking-filtering-and-take-down-of-illegal-internet-content-.html>>.

<sup>26</sup> Bell Proposal, para 33.

of these areas of legal wrongs.

24. The *Telecommunications Act* and the policy objectives that sit at its heart are broad and encompass consideration of wide-ranging social benefits.<sup>27</sup> However, these social benefits are related to connectivity, not to content. There is, in fact, a deep division between content and connectivity embedded in the overall scheme of statutes of which the *Telecommunications Act* forms one component. This broad scheme grants the Commission authority to regulate connectivity under the *Telecommunications Act* and content under the *Broadcasting Act*,<sup>28</sup> and is consistent with the division between content and connectivity that is more broadly inherent in the concept of common carriage.<sup>29</sup> In calling on the CRTC to undertake extensive determinations of fact and law in relation to content, the Proposal extends well beyond the scope of the *Telecommunications Act*.
25. There are, as the Applicants note, some situations where the CRTC does in fact regularly issue determination of fact and law in relation to content. The Applicants specifically point to the Commission's role in relation to unsolicited communications as indicative.<sup>30</sup> However, the Commission is expressly granted a specific legislative regime with respect to unsolicited communications through discrete sections of the *Telecommunications Act* and through SC 2010, c 23 (Canada's Anti-Spam & Spyware Legislation).<sup>31</sup> The CRTC "is specifically empowered" to make determinations of fact in law in relation to the types of content articulated in these fields.<sup>32</sup> It is not so empowered in relation to other content.<sup>33</sup> The *Telecommunications Act* simply does not grant the Commission any generalized inherent jurisdiction to make determinations of fact and law in relation

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<sup>27</sup> *Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40.

<sup>28</sup> *Reference Re Broadcasting Act*, 2012 SCC 4.

<sup>29</sup> *Electric Despatch Co of Toronto v Bell Telephone Co of Canada* (1891), 20 SCR 83; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45; *Bell Mobility v Klass*, 2016 FCA 185.

<sup>30</sup> Bell Proposal, Appendix A, pp 22-23.

<sup>31</sup> See SC 2010, c 23 (CASL) generally, as well as section 41 *et seq* of the *Telecommunications Act* SC 1993, c 38.

<sup>32</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, para 26.

<sup>33</sup> *Reference Re Broadcasting Act*, 2012 SCC 4.

to the legality of content.

26. The lack of this jurisdiction is fatal to the Applicants' proposal. The Proposal only seeks to block access to online resources that are blatantly, overwhelmingly or structurally engaged in copyright infringement. As discussed below (and acknowledged in the Applicants' Proposal), the *Copyright Act* has adopted an explicit mechanism and set of criteria precisely for identifying websites that are blatantly, overwhelmingly or structurally engaged in copyright infringement. Labeling an online resource as such therefore requires a finding of fact and law pursuant to the *Copyright Act*.<sup>34</sup> Absent such a finding, no website can be blocked. Yet under Canadian law, only the judiciary possesses the inherent jurisdiction to label a website as 'blatantly, overwhelmingly or structurally engaged in copyright infringement.'
27. Equally problematic is the remedy sought by the Applicants. In essence, the Proposal would establish a framework by which the Applicants can seek blocking orders, issued to all Canadian carriers, as a remedy against websites found to have infringed copyright in the structural manner described by the Proposal. Remedial regimes of this sort require an express grant of power to the tribunal in question or must be implied by strict necessity.<sup>35</sup> While section 24 of the *Telecommunications Act* provides the Commission with wide latitude to impose conditions onto common carriers as a condition of providing telecommunications services in Canada, it does not extend to an express grant of this sort.<sup>36</sup> Nor can such an implication be found in the policy objectives.<sup>37</sup> Whereas the aim of the

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<sup>34</sup> *Copyright Act*, RSC 1985, c C-42, sub-sections 27 (2.3) & (2.4).

<sup>35</sup> *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626, paras 16 and 24: "In my opinion, the standard for finding an implied power in the existing jurisprudence is actually much more stringent. An injunctive power has only been implied where that power is actually necessary for the administration of the terms of the legislation; coherence, logicity, or desirability are not sufficient."

<sup>36</sup> *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626, paras 16 and 24: "policy factors may be helpful in gleaning Parliament's intention as to whether there has been a statutory grant, they cannot be determinative."; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, paras 30-31.

<sup>37</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, paras 27-31.

*Broadcasting Act* is 'cultural enrichment',<sup>38</sup> and the aim of the *Copyright Act* is to balance the need to secure just compensation and incentive for creators of works with the need to facilitate public dissemination and use of those works,<sup>39</sup> the aim of the *Telecommunications Act* is primarily in relation to connectivity, not the provision of remedies for perceived illegality in connected content.<sup>40</sup>

**(c) The Proposal is Antithetical to Telecommunications Policy.**

28. Finally, even if the Bell Proposal were to fall within the auspices of the *Telecommunications Act*, it would be undesirable from the perspective of the policy objectives. As noted above, the policy objectives in the *Telecommunications Act* relate to connectivity, and long-abiding principles of common carriage favour neutrality and equal treatment of downstream content. This neutrality sits at the heart of the open Internet and the wide-ranging innovation it enables. Many innovative websites and services operate in legally grey areas for significant portions of time. Sites such as YouTube,<sup>41</sup> Veoh,<sup>42</sup> and Grooveshark,<sup>43</sup> operated under legal grey areas for extended periods of time before their ultimate legality was determined. Legal uncertainty also led PayPal to block payment services to a number of Canadian VPN providers under the mistaken presumption that such services violate Canadian copyright laws by allowing users to access Netflix content intended for different geographic regions.<sup>44</sup> Hasty and premature disruption of innovative and important services through an expedited website blocking regime such as that proposed by the Applicants can foreseeably lead to a loss of

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<sup>38</sup> Reference re *Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68.

<sup>39</sup> *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34.

<sup>40</sup> Reference Re *Broadcasting Act*, 2012 SCC 4; *Bell Mobility v Klass*, 2016 FCA 185.

<sup>41</sup> "Google Grabs Videos and Legal Uncertainty", *Financial Times*, October 11, 2006, <<http://www.ft.com/cms/s/0/6493ee4c-58c4-11db-b70f-0000779e2340.html>>.

<sup>42</sup> John Blevins, "Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms", (2013) 34 *Cardozo L Rev* 1821, <<http://www.cardozolawreview.com/content/34-5/BLEVINS.34.5.pdf>>, p. 1831.

<sup>43</sup> Gus Liben, "Controversial Streaming Site Grooveshark is Still the Best Thing Out There", *Business Insider*, August 28, 2013, <<http://www.businessinsider.com/grooveshark-is-the-best-streaming-site-2013-8>>.

<sup>44</sup> CBC News, "PayPal Cuts Off Payments to UnoTelly Netflix-Unblocking Service", *CBC News*, February 5, 2016, <http://www.cbc.ca/news/technology/unotelly-paypal-1.3435740>.

innovation and privacy.<sup>45</sup>

29. The links between neutrality of content and innovation are particularly underscored in the context of the Bell Proposal. As elaborated further below, the *Copyright Act* provides a specialized regime that requires particular familiarity and expertise.<sup>46</sup> The Commission has no such expertise. Moreover, the CRTC's findings are guided by the telecommunications policy objectives, not by the balance inherent in the *Copyright Act*.<sup>47</sup> This can be anticipated to distort findings of legality with respect to implicated online services and blocking of access to said services. While appeals of such determinations to the Federal Court of Appeal will not attract deference in the way that other CRTC decisions do,<sup>48</sup> the Federal Court of Appeal is not a fact-finding court, nor is it a court of first instance. Moreover, the Proposal envisions blocking orders that will take effect once the CRTC has ruled, meaning that many sites might be detrimentally impacted prior to the initiation of an appeal to the Federal Court of Appeal.
30. The *Telecommunications Act*, with its inherent focus on connectivity, innovation and neutral carriage of content, should generally operate to *encourage* undiscriminating connectivity, not to discourage or categorically prevent it. This presumption towards neutral connectivity should remain intact regardless of the legality of the content being accessed, and should only be disturbed in exceptional circumstances.<sup>49</sup> Requiring website blocking on the basis of the legality of the underlying content is therefore inconsistent with the purpose and objectives of the

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<sup>45</sup> Telecom Regulatory Policy CRTC 2017-104, *Framework for assessing the differential pricing practices of Internet service providers*, CRTC File Nos: 8661-P8-201510199, 8622-V42-201510735 & 1011-NOC2016-0192, April 20, 2017, para 78: "The Commission recognizes that VPNs are a legitimate tool to protect sensitive information, as recommended by security firms. While the Commission does not find differential pricing practices to have a direct negative impact on privacy per se, it is concerned that their adoption could discourage the use of VPNs and thus compromise the privacy and/or security of consumers."

<sup>46</sup> *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, para 15.

<sup>47</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, para 67.

<sup>48</sup> *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35.

<sup>49</sup> Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet Service Providers*, CRTC File No 8646-C12-200815400, October 21, 2009.



Act.

31. This does not leave rights holders without a remedy. However, the appropriate place to find any such a remedy is in the *Copyright Act*, which is specifically designed to balance the rights of creators and individual users (as explored in the following section). The *Telecommunications Act* by contrast should remain focused on facilitating neutral connectivity, in line with the telecommunications policy objectives that animate it and the principles of common carriage that it encodes.

### **The proposal strongly undermines and conflicts with copyright policy.**

32. The Applicants seek to justify their proposal on the basis that it does not directly conflict with any obligations imposed by the *Copyright Act*.<sup>50</sup> However, this sentiment ignores both the history of the current regime for ISP conduct embedded in the *Copyright Act* and the fundamental nature of copyright law itself. To begin with, the Proposal interferes with a carefully crafted and calibrated regime for ISP conduct adopted in the *Copyright Act* and, as a result, it substantially undermines copyright policy. Further, importing copyright considerations into the *Telecommunications Act* will distort the inherent balance that the Supreme Court of Canada has said must sit at the centre of copyright law. Finally, the Applicants' implied formula for labeling an online resource as one blatantly, overwhelmingly or structurally engaged in copyright infringement conflicts with the *Copyright Act's* carefully calibrated 'enabler' regime, which is specifically designed to identify online resources of the type in question.
33. Bill C-11, the *Copyright Modernization Act*, was the result of extensive multi-year outreach and consultation in Canada and became law in 2012. The Bill sought to strike a careful balance between the interests of creators and those of individuals seeking to use and disseminate works, as is the overriding objective of copyright policy. The appropriate role for ISPs in facilitating copyright enforcement was a central component of this consultation, as well as of the parliamentary debates that accompanied Bill C-11. ISP-based website blocking of the precise type contemplated by the Proposal was specifically and explicitly requested by some of the Applicants in the consultations that generated Bill C-11 and in its parliamentary

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<sup>50</sup> Bell Proposal, Appendix A, p38.

review process.<sup>51</sup> The injunction regime for intermediaries formed a carefully calibrated and essential component of the overall enforcement role adopted by Bill C-11 for ISPs and other intermediaries.<sup>52</sup>

34. More generally, the *Copyright Act* is a careful balance between author's rights on the one hand, and *limits* on those rights on the other (often also referred to as users' rights).<sup>53</sup> The careful attention paid by Parliament to the enforcement role to be played by intermediaries such as ISPs generated a carefully calibrated balance between the rights of authors and users. The scope and availability of remedies such as the website blocking orders the Applicants seek in this proposal form an integral component of that overall balance.<sup>54</sup> Providing this mechanism through

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<sup>51</sup> See, for example, Ms Catharine Saxberg, Executive Director, Canadian Music Publishers Association, Oral Testimony, Legislative Committee on Bill C-11, March 6, 2012, 41<sup>st</sup> Parl, 1<sup>st</sup> SESS, <https://www.ourcommons.ca/Content/Committee/411/CC11/Evidence/EV5429125/CC11EV08-E.PDF>, at 0900:

ISPs take an active role in shaping the Internet traffic that flows through their systems. In fact, ISPs are aware of and regularly monitor how much traffic they carry and what transmissions are used for unauthorized transfer of files. The problem that rights holders face is that many of these sites are outside Canadian jurisdiction and therefore cannot be shut down at source. An example of this kind of site would be Pirate Bay. In the U.K., the high court ruled two weeks ago that Pirate Bay is an infringing site and injunctions for ISPs to block access will soon follow.

The kinds of amendments we are proposing are similar to what's being used against Pirate Bay in the U.K. Provisions like this are proving effective in other territories also.

The CMPA again has proposed amending language that would create a positive obligation for service providers to prevent the use of their services to infringe copyright by offshore sites. Should that wording not be acceptable to the committee, we have proposed a more limited version of the amending language, which would permit injunctions only for the purpose of requiring service providers to block access to the services that are primarily intended or ordinarily used for enabling acts of copyright infringement.

By contrast, compare Bell Proposal, Appendix A, pp 49-50.

<sup>52</sup> See, for example, Amendment G-8 and discussion thereof, at 1035: "The third set of changes proposed in the motion relate to, again, the safe harbour for information location tools. They relate to new conditions and factors with respect to determining the scope of permitted injunctions that are available against an information location tool pursuant to the safe harbour."

<sup>53</sup> *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, para 88.

<sup>54</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68; *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626.

the auspices of the *Telecommunications Act* would “upset the aim of the *Copyright Act*” by upsetting that careful balance and overriding deliberate choices made by Parliament.<sup>55</sup>

35. While there is certainly some room for overlap between the *Telecommunications Act* and the *Copyright Act*, particularly in relation to acts of connectivity, the Proposal extends further. As noted in the previous section, it calls on the Commission to undertake an adjudication role with respect to copyright law. The Applicants encourage the Commission to establish criteria by which online resources could be assessed to determine whether they are blatantly, overwhelmingly or structurally engaged in copyright infringement.<sup>56</sup> However, the manner in which such services can and should be identified was also given significant attention during the process that ultimately generated Bill C-11, which explicitly encoded a set of criteria for identifying services or other online resources that are provided “primarily for the purpose of enabling acts of copyright infringement.”<sup>57</sup> These provisions encoded into statutory law the doctrine of ‘authorization’, which the courts had to date refrained from applying to intermediaries such as ISPs.<sup>58</sup> The Proposal would seek to establish a new set of criteria, seemingly informed by, but not co-extensive with, those explicitly encoded by Parliament in the *Copyright Act*. This places the Applicants’ proposal in further conflict with the *Copyright Act*, as it would over-ride an explicit set of factors adopted by Parliament for the explicit purpose of identifying services primarily designed to enable copyright infringement.
36. To the extent that the selection and application of the criteria in question will be informed by the telecommunications policy objectives, there is a tangible concern that online resources will be inappropriately labeled as ‘blatantly, overwhelmingly or structurally engaged in copyright’ where they are merely providing a legitimate platform with significant non-infringing uses.<sup>59</sup> Such determinations are complex,

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<sup>55</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, paras 67 and 71-73.

<sup>56</sup> Bell Proposal, paras 84-85.

<sup>57</sup> *Copyright Act*, RSC 1985, c C-42, sub-sections 27 (2.3) & (2.4).

<sup>58</sup> *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45.

<sup>59</sup> *Copyright Act*, RSC 1985, c C-42, paragraph 27(2.4)(c).

and must be issued through the lens of the balance between authors' and users' rights which sits at the heart of Canada's copyright regime.<sup>60</sup> Yet the Commission is guided by the telecommunications policy objectives in all of its findings under the Act.<sup>61</sup> This can potentially lead to conflicting outcomes where sites are labeled to be blatant infringers of copyright by the CRTC acting through the lens of the telecommunications policy objectives, while the same sites are found to be non-infringing by an independent court applying Canada's *Copyright Act*. Notably, courts owe no deference to the CRTC on matters of copyright.<sup>62</sup>

37. The Proposal additionally distorts copyright policy by compelling a regulatory body (the CRTC) to assess online resources through the lens of a single and blunt enforcement tool—website blocking. Even an online service that is deemed to be blatantly, overwhelmingly or structurally engaged in copyright infringement may still have some legitimate features. Many online sites join content aggregation features with general online commentary, for example. A court adjudicating a copyright claim against such an online resource with the full enforcement toolkit provided by the *Copyright Act* at its disposal might choose the far-less intrusive remedy of enjoining an entity from carrying out the infringing activities while allowing it to retain its non-infringing activities.<sup>63</sup> However, the Commission will face a blunter, less nuanced choice: compel the entire resource to be blocked or allow the continued operation of a website it considers to be blatantly, overwhelmingly or structurally engaged in copyright infringement. Given that it is not uncommon for new and potentially innovative services to operate in grey legal areas with respect to copyright law for some time, assessing these sites through

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<sup>60</sup> *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, para 88; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68. For an example of the degree to which such determinations can raise complex questions of fact and law, see: *Bell Canada v Lackman*, 2017 FC 634, overturned in *Bell Canada v Lackman*, 2018 FCA 42.

<sup>61</sup> *Telecommunications Act*, SC 1993, c 38, s 47.

<sup>62</sup> *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, paras 14-15.

<sup>63</sup> *Bagwalla v Ronin*, 2017 ONSC 6693, para 34: "Given that the Websites and the hyperlinks when considered independently do not amount to defamation, the order of the motions judge to have all of the websites taken down was overbroad and constituted an unwarranted restraint on the Appellants' freedom of expression. In my view, the conflicting interests are adequately served by an order requiring the Appellants to delete from their Websites any hyperlink or other reference to the digital articles."

the more nuanced lens and with the more flexible toolkit provided by the *Copyright Act* is far preferable to doing so through the limited remedial regime contemplated by the Proposal.<sup>64</sup>

38. In summary, the Proposal will undermine copyright policy and directly over-ride parliament's specific and carefully thought out determinations. It will provide an extra-ordinary and expedited remedy that directly interferes with the carefully calibrated regime for intermediary rights enforcement put in place by parliament. It will also displace or distort the *Copyright Act's* carefully calibrated regime for identifying online services and platforms that provide services primarily for the purpose of enabling acts of copyright infringement. It will substitute a blunt remedy—website blocking—for the nuanced toolkit available under the *Copyright Act*. If adopted, the proposal will substantially conflict with established copyright policy.

### **The proposal strongly implicates freedom of expression.**

39. In defending their Proposal, the Applicants argue that freedom of expression as either minimally implicated by their proposal or not engaged at all.<sup>65</sup> While, as the Proposal notes, the general scheme of the *Copyright Act* is unlikely to infringe freedom of expression, the Applicants' proposed remedy certainly does.
40. First, the Applicants' claim that its proposed web blocking regime will have no impact on freedom of expression is unsustainable. Online resources need not be fully saturated by copyright-infringing materials to trigger the Applicants' proposed criteria.<sup>66</sup> It follows that at least some websites, platforms or services found to be 'blatantly, overwhelmingly or structurally engaged in copyright infringement' further to the Applicants' standard will still be sources of legitimate non-infringing content. Those using the impugned platform or service in question to disseminate this legitimate non-infringing content, as well as those seeking to receive this legitimate content. Moreover, in light of the importance of the Internet as a communicative platform, undermining its constituent parts (ie websites and

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<sup>64</sup> See discussion at para 28, above.

<sup>65</sup> Bell Proposal, Appendix A, pp 51-51.

<sup>66</sup> Bell Proposal, paras 84-85.

other digital services potentially implicated by the Applicants' proposal) should be done with caution.<sup>67</sup> In other jurisdictions, disconnection of even flagrant and repeated infringers from Internet access has been found to be an unjustifiable violation of the freedom of expression.<sup>68</sup>

41. Finally, as noted in the previous section, the Applicants advance a remedial regime with only one potential remedy—website blocking—effectively bypassing a range of more targeted and minimally intrusive options available to the judiciary under the *Copyright Act*.<sup>69</sup> These more tailored and minimally intrusive options could include, for example, compelling a website or service to disable infringing components while maintaining valid aspects of the websites (ie an attached blog post on the same domain).<sup>70</sup> There is an inherent disproportionality in adopting a remedial regime that can *only* remove entire online resources, to the exclusion of any other remedies. Similarly, the proposed remedial regime lacks remedies that might be less intrusive *and more effective*. In this regard, it is important to acknowledge that many have questioned the effectiveness of website blocking as a means of reducing copyright infringement.<sup>71</sup>
42. Second, in seeking to present the Proposal as minimally intrusive on freedom of expression, the Applicants seek to draw an analogy between CRTC restrictions on broadcasting content licensing and telecommunications content.<sup>72</sup> The analogy it

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<sup>67</sup> *Crookes v Newton*, 2011 SCC 47; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, para 40: "The capacity of the Internet to disseminate "works of the arts and intellect" is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place."

<sup>68</sup> Simon Chester, "What is HADOPI? and Why Does it Matter?", *Slaw.ca*, October 11, 2012, <http://www.slaw.ca/2012/10/11/what-is-hadopi-and-why-does-it-matter/>.

<sup>69</sup> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 (where discretion impact on freedom of expression it must be exercised in a proportionate and minimally intrusive manner).

<sup>70</sup> *Bagwalla v Ronin*, 2017 ONSC 6693; *United Airlines Inc v Cooperstock*, 2016 QCCS 4645.

<sup>71</sup> See for example Michael Geist, "The Case Against the Bell Coalition's Website Blocking Plan, Part 8: The ineffectiveness of Website Blocking", *MichaelGeist.ca*, February 22, 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-8-ineffectiveness-website-blocking/>.

<sup>72</sup> Bell Proposal, Appendix A, pp 53-54.

draws is fundamentally false. To begin with, as noted above, the *Broadcasting Act* regulates broadcasting content and preconditions the broadcasting of said content on an explicit licensing regime with established conditions and standards.<sup>73</sup> The rationale for this a shortage in competing frequencies—broadcasting occurs over a scarce resource and, as a result, some content standards are imposed as a licensing condition.<sup>74</sup> By contrast, the online ecosystem of content to which it is a window operate under *no* such limitation, and as a result the *Telecommunications Act* imposes *no* comparable conditions on downstream content. It would be a significant imposition on freedom of expression in general if the *Telecommunications Act* were interpreted in a manner that permitted the CRTC to regulate any and all content on the Internet on the basis of the telecommunications policy objectives.<sup>75</sup>

43. Third, the Applicants present the regime they advance as a ‘regulatory regime’ comparable in nature to those which have imposed conditions on broadcasters under the *Broadcasting Act*. These types of regulatory licensing regimes can operate with broader latitude when impacting on freedom of expression given their regulatory, as opposed to adjudicative and punitive nature.<sup>76</sup> However, at its core, the Applicants propose an adjudicative regime by which online resources will be assessed on the basis of whether they infringe copyright in a blatant, overwhelming or structural manner. If they are so assessed, the CRTC will grant a remedy—a website blocking order. This fundamentally adjudicative and remedial mechanism cannot be reduced to a regulatory regime whereby the freedom of

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<sup>73</sup> *Genex Communications Inc v Canada (Attorney General)*, 2005 FCA 283, in general and paras 55 and 70 in particular.

<sup>74</sup> *Genex Communications Inc v Canada (Attorney General)*, 2005 FCA 283, para 70, 72: “Due to the shortage of frequencies and the importance of communications, the government intervened early on during the development of communications to give broadcasting systems the characteristics of both public property and an essential service. A procedure for supervising the use and allocation of this limited resource was therefore established in the collective interest. ...

This independent authority, the CRTC, was required by section 15 to regulate and supervise all aspects of the Canadian broadcasting system. Thus, in the performance of its duty of supervision and regulation, it was given exclusive power by Parliament to issue licences, to make regulations respecting standards of programs and advertising, to define the classes of persons who could be allowed to hold broadcasting licences and to prescribe the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs.”

<sup>75</sup> *ACLU v Reno*, (1997) 521 US 844 (Supreme Court of the United States).

<sup>76</sup> *Genex Communications Inc v Canada (Attorney General)*, 2005 FCA 283.

expression of downstream websites yields to the CRTC's regulations due to "the countervailing interests that the CRTC is required to balance under its enabling legislation."<sup>77</sup> This substantially distinguishes the proposed regime from those relied upon by the Applicant.<sup>78</sup>

44. This is not to say that the Commission lacks the expertise and procedural infrastructure to address freedom of expression issues. However, its expertise in this regard does not extend to adjudication of matters impacting freedom of expression outside its "scope of expertise."<sup>79</sup> The rationale for empowering administrative bodies to operate in a manner that impacts fundamental *Charter* rights is a recognition that administrative tribunals enjoy significant expertise that they can leverage to better assess *Charter* values in the context of the competing interests at play in their allotted regulatory field.<sup>80</sup> However, the essential nature of the Proposal as an adjudication and remedial regime for copyright wrongs removes the particular expressive conduct at issue here is far removed from the CRTC's core purpose and area of expertise.<sup>81</sup>
45. As noted above, where a Court has found a website to be in violation of copyright and has issued a blocking injunction, the Commission retains the capacity to assess whether the need to block such online resources is sufficiently exceptional to warrant authorization under section 36.<sup>82</sup> However, we reiterate that such a finding

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<sup>77</sup> Bell Proposal, Appendix A, p 54.

<sup>78</sup> *Genex Communications Inc v Canada (Attorney General)*, 2005 FCA 283, para 166: "A public hearing on the renewal of a licence and the procedure governing it takes place in an administrative and regulatory law context where the purpose of the exercise is not to determine for punitive purposes whether a licensee has committed one or more offences but to find out whether, in the public interest, and in compliance with Charter values and the implementation of broadcasting policy in Canada, it is appropriate to continue to provide a radio frequency to a licensee."

<sup>79</sup> *Doré v Barreau du Québec*, 2012 SCC 12, para 35.

<sup>80</sup> *Doré v Barreau du Québec*, 2012 SCC 12, paras 35 and 47: "An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values."

<sup>81</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68.

<sup>82</sup> Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet Service Providers*, CRTC File No 8646-C12-200815400, October 21, 2009.



would be premature, as no such order has been sought or issued.<sup>83</sup>

46. With respect to the current Application, however, the regime will implicate freedom of expression in a manner that falls outside the Commission's area of expertise. It will inherently favour disproportionate remedies for copyright infringement, in that the Commission lacks the full toolkit made available under the *Copyright Act*. Instead, by reducing available remedies to the most egregious option available, the Proposal is unlikely to lead to minimally intrusive impacts on freedom of expression. Its creation alone might constitute a disproportionate impact on freedom of expression and especially so since many other unexplored remedies are available to the Applicants through the auspices of the *Copyright Act*.

## Conclusion.

47. In conclusion, the Applicants advance an extra-ordinary remedial regime as a means of providing a simplified avenue to enforce their intellectual property rights. This regime is not only in direct conflict with the concept of an open and neutral Internet, undermining the very connectivity that the *Telecommunications Act* is intended to facilitate, but it also conflicts with the carefully calibrated balance between users' rights and authors' remedies that was adopted in the *Copyright Act* after careful consideration and long consultation by the legislature. There is also no principled basis for limiting this regime to copyright infringement. Many harms exist in the online world. Were the *Telecommunications Act* to encompass the capacity to find content unlawful on the basis of copyright law and compel its blocking, then it also would encompass the capacity to do so for other forms of adjudicated wrongs. In effect, the Act will be transformed into a wide-ranging instrument for online censorship of content, services and websites.
48. On the other hand, the Applicants have made no case for such an exceptional and potentially damaging regime. While online copyright infringement is undoubtedly a problematic practice, reports suggest that such activity is already reducing in Canada. It is further unnecessary, as the *Copyright Act* already offers the Applicants various remedies by which they might enforce their rights, including a regime specifically adopted to address websites and other services and platforms that are

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<sup>83</sup> Telecom Decision CRTC 2016-479, *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act*, CRTC File No 863-P8-20167186, December 9, 2016.

primarily designed to enable copyright infringement.

49. The Applicants' Proposal is therefore not only undesirable and antithetical to the open Internet that the *Telecommunications Act* should seek to advance, but also wholly unnecessary. It should be dismissed.

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