



February 19, 2009

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

Dear Mr. Morin,

Re: *Canadian broadcasting in new media, Broadcasting Public Notice CRTC (Notice of Consultation and Hearing), 2008-11 (Ottawa, 15 October 2008)*

The Canadian Conference of the Arts (CCA) is the oldest and most broadly based umbrella arts organization in Canada, encompassing all disciplines and walks of life, with a mission to foster informed debate about federal policy issues affecting the whole Canadian arts and culture sector, from individual creators to institutions and industries.

CCA has participated in many of the discussions related to New Media which have preceded this hearing. We have expressed our concerns for some time about the CRTC's decision to exempt some New Media broadcasting activities from having to contribute to achieving the objectives of Canadian broadcasting policy.

Given our strong concerns about the exemptions, we welcome the Commission's decision to proceed with this hearing.

We are, however, concerned about the timing of this proceeding. The CRTC has already announced that it will hold a 'traffic management' hearing with respect to the issue of throttling in July 2009, and that the deadline for submissions in that proceeding is February 16 – the day before this New Media hearing begins. As the Commission's press release about the traffic management hearing states, online video content is related to the way that telecommunications service providers operate their Internet networks:

The growing popularity of certain Internet applications, such as online video, can lead to network congestion. To deal with this congestion, some Internet service

providers (ISPs) are managing the flow of traffic on their networks or adopting new business models.¹

In fact, Notice of Consultation and Hearing 2008-11 specifically invites Canadians to provide it with evidence about traffic management matters:

Q.14. Are there practices that restrict or enhance the distribution of and access to Canadian broadcasting content delivered and accessed over the Internet and through mobile devices?

If so, describe the practices and the nature and extent of their effect.

Are measures necessary, and how would they be applied?

If traffic management issues matter to the New Media hearing, it is unclear why the CRTC is holding two separate hearings. We acknowledge that the House of Commons Standing Committee on Heritage has been keenly following the Commission's progress in this area² but that factor alone should not determine the Commission's scheduling.

By setting the submission deadline for the traffic management hearing for February 16, parties to this New Media hearing who want to make will have virtually no time to review information that may well be vital to the New Media hearing itself. Rather than enabling Canadians to comment on a well-informed and coherent basis about the important regulatory issues surrounding New Media and Canadians' ability to access New Media, the CRTC is splitting related issues and forcing interested parties to address strongly related issues twice. This is, to say the least, unusual, since the CRTC itself in

The CRTC has also said that it will hear the renewal applications of four of Canada's largest over-the-air television broadcasters in April 2009. The Commission has not announced when it will gazette the applications of these approximately seventy TV stations, but we assume this will happen in either January or February 2009, so as to allow Canadians time to review the applications and submit interventions in March, before the April hearing. We note in passing that we are still waiting for the Commission to deal with our requests for financial data about television broadcasting stations, so that we can provide the Commission with informed analysis and comment about the renewals. The result of the CRTC's scheduling of the New Media hearing in February is that parties who intervene in the renewal proceedings – whose decisions are vital to the audio-visual cultural sector – will have to allocate either more resources to the analysis of these applications, or divide the resources they have already allocated to New Media.

¹ CRTC, "CRTC denies CAIP application, but will examine Internet traffic management practices" News release (Ottawa, November 20, 2008).

² Standing Committee on Canadian Heritage, *Evidence*, 39th Parliament, 2nd sess. (Ottawa, 13 May 2008):

Hon. Hedy Fry: I think this should have been done a long time ago. We're really behind on this, so I was just wondering why you were taking so long. I hear your answers, and I would just urge you to do this sooner rather than later.

Mr. Konrad W. von Finckenstein: 1 I hear you, Mrs. Fry, and if we can do it earlier, we shall.

And, of course, the CRTC is also holding an important hearing in mid-January, on minority language communities' access to broadcasting services in their official language.

To avoid the impression that these deadlines may stymie, rather than stimulate informed debate, to enable interested parties to better understand the constraints under which telecommunications service providers are operating, and to give full force to the Commission's own commitment to transparency,³ we urge the CRTC to consider moving the New Media February hearing to July. This move would bring the Commission into compliance with the *Cabinet Directive on Streamlining Regulation*⁴ that stipulates that agencies like the CRTC must

Departments and agencies are responsible for identifying interested and affected parties, and for providing them with opportunities to take part in open, meaningful, and balanced consultations at all stages of the regulatory process.

When undertaking consultations, departments and agencies are to:

- ...
- set out the process and timelines in a clear manner so that affected parties can organize and provide input;

All that said, M. Morin, CCA requests the opportunity to appear before the Commission in the public hearing phase of this proceeding, to comment on the views expressed by others (which we look forward to reviewing), and to provide additional information as our members provide it to us.

CCA looks forward to reading the submissions of other parties. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,



Alain Pineau
National Director

³ CRTC, *A Competitive Balance for the Communications Industry*, submission to the Competition Policy Review Panel (Ottawa, 2007) at 2:...

As the communications landscape evolves with the rapid introduction of new technologies, it is increasingly apparent that **the regulatory and legislative regimes that govern the communications industries must be re-evaluated to ensure that regulation incorporates the critical values of fairness, transparency and flexibility** while recognizing the unique role that these industries play in our democracy....

⁴ (1 April 2007) < <http://www.regulation.gc.ca/directive/directive01-eng.asp>>.



New Media?: Same Challenges.

Canadian broadcasting in new media,

Broadcasting Public Notice CRTC (Notice of Consultation and Hearing) 2008-11
(Ottawa, 15 October 2008)

Comments by the Canadian Conference of the Arts

(Ottawa, 5 December 2008)

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I Overview

- 1 CCA welcomes the CRTC's decision to re-examine the New Media broadcasting environment, and in particular its decision to re-consider the New Media exemption orders set out in 1999 and 2007.
- 2 CCA is the national forum for the arts and cultural community in Canada. It provides research, analysis and consultations on public policies affecting the arts and the Canadian cultural institutions and industries. We seek to foster informed public debate on policy issues and to advance the cultural rights of Canadians.
- 3 CCA opposed and continues to oppose the CRTC's New Media exemption orders as we believe that companies that benefit from the broadcasting system must contribute to Canada's broadcasting system within a coherent regulatory framework. By enabling their users to access broadcasting content online, and to attract subscribers in part by making such content available to their subscribers, Internet Service Providers (ISPs) are benefitting from the broadcasting system and should be regulated as part of this system.
- 4 CCA acknowledges the difficulties inherent in establishing regulatory frameworks to address new technologies. We do not believe that it is appropriate to regulate user-generated content any more than it would be appropriate to apply Canadian content requirements to ham radio operators. We do believe, however, that undertakings that engage in the business of providing audio-visual content to Canadians – whether over the air, through cable, through satellite or through the internet – choose to be part of our broadcasting system and should therefore be prepared to contribute to achieving the objectives for that system which Parliament has clearly set out in the *Broadcasting Act, 1991*.

II Challenges and approaches

- 5 The main challenges for Canadian audio-visual content creators have always been lack of funding and uncertain access to audiences.
- 6 We also note that Canada's cultural sector has been hit hard over the past year, not only by hundreds of layoffs by Canada's largest broadcasters, but by \$60 million dollars' worth of cuts to publicly-supported programs. Some of these program cancellations and reductions are summarized below:⁵

Program	Budget	
E-culture (Culture.ca and Canadian cultural Observatory, including Culturescope.ca)	\$ 4.36 million	"There are now other means for the cultural policy and research community to connect and exchange research."
Trade Routes Program	\$ 9 million	"... will continue to offer market entry support, in-market assistance and market research

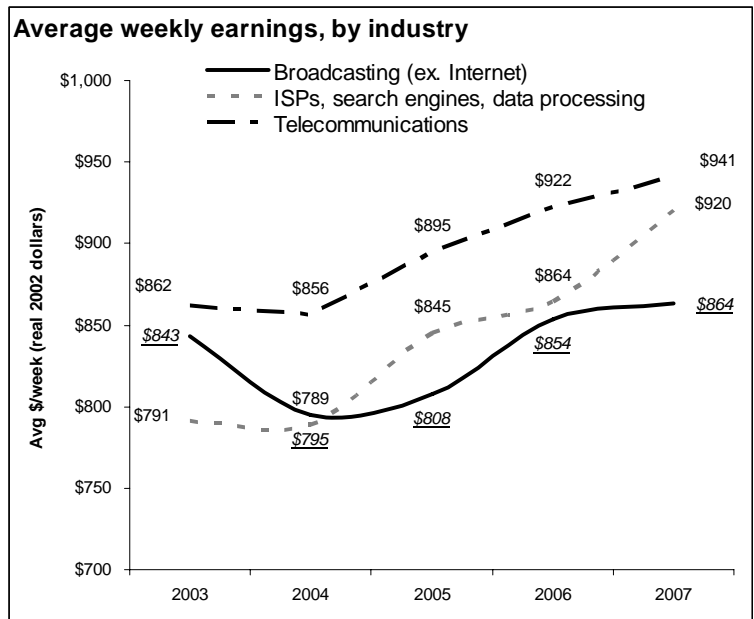
⁵ A more complete description is available on CCA's website, at: http://www.ccarts.ca/en/documents/ListofrecentcutsENG210808_000.pdf.

Program	Budget	
		services to its clients until ... March 31, 2010.... “
PromArt (Department of Foreign Affairs and International Trade)	\$ 4.7 million	“... concluded as of March 31, 2009”
National Training Program for the Film and Video sector	\$2.5 million	“... will not be extended beyond April 1 st , 2009”
Audio-visual Preservation Trust	\$ 150,000	
Canadian culture online (Research and Development Component)	\$ 5.64 million	<p>“... will not be extended beyond fiscal year 2008-2009.”</p> <p>“Also, the New Media R&D Initiative, a pilot program that ended in March 2008, will not be renewed. Through its investments of \$27.3 million, the federal government has helped build a strong foundation for innovation in the interactive media sector. These investments, combined with the industry’s success, make it possible for the industry to play a key role in interactive media research and development.”</p>
Canadian Memory Fund	\$ 11.57 million	<p>“... will not be extended beyond fiscal year 2008-2009. This program has clearly achieved its original objective to encourage federal agencies to digitize their collections and make them available online to Canadians. Developing Web sites and online documents containing digitized works is now common practice within these agencies.”</p>
Canadian Arts and Heritage Sustainability Program (Stabilization Project)	\$ 627,000	“... will not be extended beyond fiscal year 2008-2009. ...Since stabilization projects are established as an agent of long- term change, usually seven to ten years, applications to this component will no longer be accepted”
Canadian Arts and Heritage Sustainability Program (Capacity Building)	\$ 6.1 million reduced to \$ 4.3 million	“... will expire on March 31, 2010”
Canadian Arts and Heritage Sustainability Program (Endangered arts organizations)	\$ 500,000	
Canada music Fund (Canadian Music Memories Component)	\$ 150,000	
Northern Native Broadcast Access Program	\$ 2.1 millions	
Book Publishing Industry Development Program	\$ 1 million	
Canada Magazine Fund	\$ 500,000	

- 7 Our point is that, perhaps contrary to popular belief, the cultural sector simply does not enjoy stable, predictable support from the Canadian government. Moreover, as we have pointed out in the past, Canadians who work in the

cultural sector as a whole have not seen their incomes increasing at all – but rather falling in real terms. In our view, this reinforces the irony of our broadcasting system.

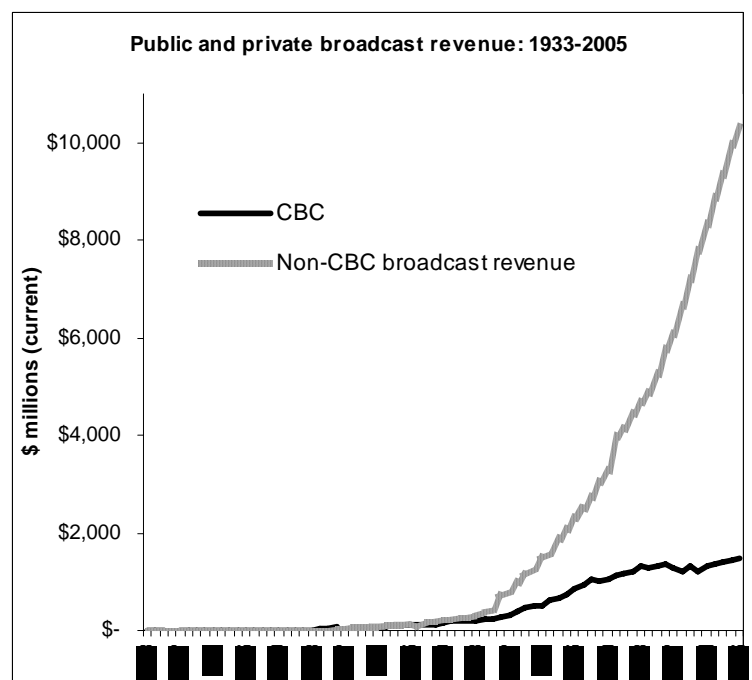
- 8 Canadians have had legislative and regulatory frameworks since the early 1930s whose underlying goal has been to enable Canada's audio-visual cultural sector to prosper so as to generate domestically-produced entertaining, enlightening and informative programming. Yet almost a century after broadcasting began in this country, the only sure thing that Canada's broadcasting workers know is that their average incomes can go down in real terms, rather than increase. In effect, they help to subsidize their own employment.



- 9 CCA is well aware that the economic slowdown of the past year will affect every broadcasting undertaking in the country because of slower growth in advertising or subscriptions. To some extent such changes are included in the risks that private companies undertaken when they enter any economic sector.

- 10 Yet as we have argued previously, it seems to us that the purpose of regulation has focussed less on the public's interest in high-quality Canadian programming, than on maximizing private broadcasters' bottom lines. When the economy and broadcasters' profits grew, the CRTC deregulated to encourage broadcasters to invest in Canadian programming. When the economy and broadcasters' profits declined, the CRTC deregulated to give broadcasters more flexibility to invest in Canadian programming.

- 11 When it became clear that deregulation had improved profits by reducing administrative costs, but not Canadian programming expenditures, the Commission focussed on creating mega-broadcasters that would be capable of investing in



Canadian content. Nevertheless, for the past several years Canadian television broadcasters have spent more on foreign content, than on the content created and produced in Canada by Canadians.

- 12 We think it is clearly time to realize that most Canadian broadcasters provide Canadians with Canadian content because regulations and conditions of licence make this a legal requirement. We have lived through enough deregulation and consolidation of ownership to see its result: and the only question we have for the Commission, is when Canadians will finally see Parliament's objectives for our broadcasting system achieved? When will the Commission place Canadians' interest in well-funded Canadian programming that fills up more than half of the evening television schedule (for example) ahead of the normal ups and downs of broadcasting businesses?
- 13 We think the CRTC can and should use this proceeding – even if it were combined with the traffic management proceeding in July, as we have suggested in our covering letter – to provide the cultural sector with the economic stability that it needs to prosper. In our view, the main role of the CRTC in regulating New Media is to provide a framework in which the Canadian cultural sector can thrive and provide Canadians with more opportunities to hear and see themselves, their stories and their country.
- 14 Strong and direct action by the CRTC is required because the challenge of funding high-quality Canadian audio-visual content is perennial. It is expensive for a nation with a small population to produce audio-visual content, because the costs of this production may not readily be recouped from domestic sales alone, as study after study has eventually concluded:

1929	Royal Commission on Radio Broadcasting, <i>Report</i> . (King's Printer: 1929). Broadcasting [Aird Commission]
1936	Royal Commission appointed to investigate activities of the Canadian Performing Rights Society Limited and similar societies
1938	Select Standing Committee's review of the Policies of the CBC, with special reference to revenues, expenditures and development
1951	Royal Commission on National Development in the Arts, Letters and Sciences, <i>Report</i> . (King's Printer: Ottawa, 1951) [Massey Commission]
1951	Special Committee on Radio Broadcasting
1954	Royal Commission on Patents, Copyright, Trade marks and Industrial Design, <i>Report on Copyright</i> (Queen's Printer: Ottawa, 1957)
1957	Royal Commission on Broadcasting, <i>Report</i> (Queen's Printer: Ottawa, 1957) [Fowler Commission]
1960	Glassco: Royal Commission on Government Organization
1965	Advisory Committee on Broadcasting <i>Report</i> (Queen's Printer: Ottawa, 1965) [Fowler 2]
1966	<i>Canada, White Paper on Broadcasting</i>

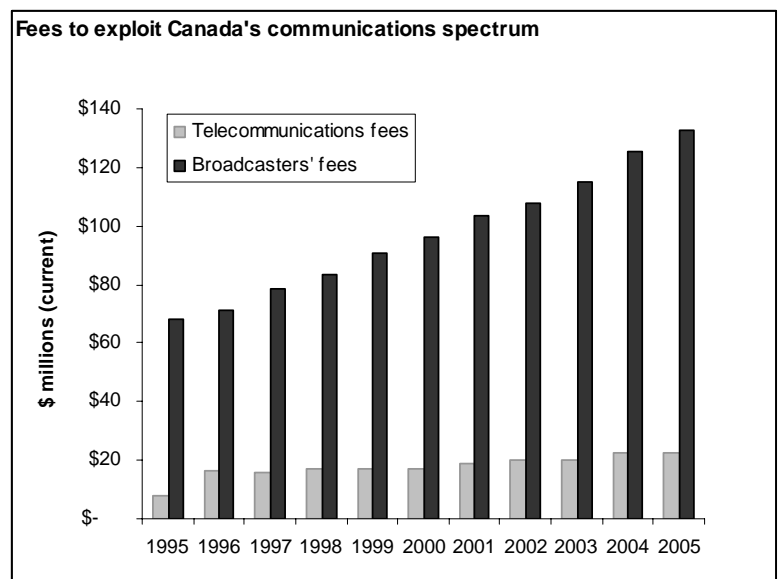
- 1970 Special Senate Committee on Mass Media, *Report*. (Information Canada: Ottawa, 1970) [Davey Committee]
- 1971 Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa, 1971)
- 1973 Department of Communications, *Proposals for a Communications Policy for Canada* (Green Paper) (Ottawa, March 1973)
- 1979 Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty *Report* (Minister of Supply and Services Canada: Ottawa, 1979) [Clyne Committee]
- 1981 Kent Commission: Royal Commission on Newspapers
- 1982 Federal Cultural Policy Review Committee, *Report* (Ottawa, 1982) [Applebaum-Hébert]
- 1983 Department of Communications: *Towards a New National Broadcasting Policy*
Department of Communications: *Building for the Future: Towards a Distinctive CBC*
- 1984/85 Federal-Provincial Committee on the Future of French-language Television
Nielsen report: *Federal Task Force on Program Review* (recommendations on culture and communications)
- 1984 Departments of Communications and Consumer and Corporate Affairs, *From Gutenberg to Telidon – A White Paper on Copyright* (Supply and Services Canada: Ottawa, 1984)
- 1985 Canada, Standing Committee on Communications and Culture, Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators* (Ottawa: October 1985)
- 1985/86 Caplan-Sauvageau: *Task Force on Broadcasting Policy*
Federal Provincial Committee on the Future of French-language television - report
- 1987 House of Commons Standing Committee on Communications and Culture: *Sixth Report*
- 1990/91 Girard-Peters Task Force: *Report on the Economic Status of Television*
- 1993 Federal working group to "review the CBC's funding situation"
- 1994/95 Parliamentary Standing Committee report on the "role of the CBC" and potential sources of new revenues for the Corporation
Working Group on Canadian Programming and Private Television: *Report on the Future of Canadian Programming and the Role of Private Television: Keeping Canada on the Information Highway*
- 1995 Standing Committee on Canadian Heritage: *The Future of the Canadian Broadcasting Corporation in the Multi-Channel Universe*

- 1996 Mandate Review Committee, *Making Our Voices Heard: Canadian Broadcasting and Film for the 21st Century* (Minister of Supply and Services Canada: Hull, 1996) [Juneau Committee]
- 2000 Canadian Heritage, Corporate Review Branch, *Report of the Review of the Canadian Television Fund* (Canadian Heritage: Ottawa, March 2000)
- 2003 Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*(Communication Canada: Ottawa, 2003)
- 2003 Trina McQueen, *Dramatic Choices: A report on Canadian English-language drama* (Ottawa: May 2003) [McQueen Report]
- Guy Fournier, *What About Tomorrow? A report on Canadian French-language drama* (Ottawa: May 2003)
- 2006 Standing Senate Committee on Transport and Communications, *Final Report on the Canadian News Media* Vols 1 and 2 (June 2006)
- 2008 Eli M. Noam, *TV or Not TV: Three Screens, One Regulation?* (Columbia University: 11 July 2008).

15 Almost all of these studies address the same problem: the inadequate and poorly-financed level of original Canadian audio-visual programming available to Canadians. Generally speaking, they conclude that without adequate amounts of well-financed original Canadian programming, Parliament's objectives for Canada's broadcasting system are not being met, and cannot be met.

16 In the CCA's view, those who profit from their use of Canadian resources such as the broadcast spectrum or taxpayers' subsidization of broadband, must also bear some responsibility for financing Canadian programming.

17 CCA has previously suggested that an efficient mechanism for funding audio-visual content would be to increase the size of the telecommunications licence fee paid for the right to exploit and profit from the communications spectrum owned by Canadians as a natural resource. Over the past decade, broadcasters have paid roughly ten times the amount paid by telecommunications companies, even though telecommunications companies' revenues (and apparent benefits from use of the spectrum) have



substantially exceeded those of broadcasters. In 2005, for instance, the broadcast sector's total revenues amounted to \$11.8 billion, while telecommunication companies' revenues were roughly three times larger – at \$34.5 billion.⁶

- 18 Another mechanism would be the levy proposed by lawyer Peter Grant earlier this year, in which ISPs would remit 3% of their Internet income to a New Media Broadcast Fund. CCA also supports this proposal.
- 19 Whatever the purpose and outcome of this proceeding, the CCA believes that one fundamental objective must override all else: Canadian content. Our answers to the CRTC's questions are primarily directed towards this goal, and are set out below.

III New Media – new regulation

1 INTERPRETATION OF “NEW MEDIA BROADCASTING”

Q.1. Does the Commission's interpretation of broadcasting in new media continue to be correct and are the proposed clarifications, in the paragraphs above, of this interpretation appropriate, complete and comprehensive?

If not, how should the Commission's interpretation change?

- 20 CCA agrees with the Commission in a number of areas:
- it is essential to frame discussions about regulating New Media with a clear definition of new media broadcasting
 - New Media broadcasting does not include user-generated content
 - what constitutes broadcasting is not affected by mode of transmission
 - New Media broadcasting include undertakings that provide broadcasting services delivered and/or accessed over the Internet, and services that are received through mobile devices using point-to-point technology.
- 21 We have some concerns about the idea that Internet services or Internet-delivered services that consist “predominantly” of alphanumeric text fall outside the Commission's jurisdiction. Would a newspaper undertaking that makes audio-visual content available in its online publication be excluded from the CRTC's jurisdiction because, for example, the size of the audio-visual frame is less than one-half of a user's screen? What if a broadcaster now licensed to provide ‘conventional’ television or radio services launches websites that include content it has broadcast, is broadcasting or will broadcast on its conventional services, within a presentation is predominantly text?

⁶ CRTC, *Statistical and Financial Summaries*, (by broadcast sector); CRTC, *Monitoring Report: Status of Competition in Canadian Telecommunications Markets Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (July 2006) at i.

- 22 We do not believe that simple frame manipulation should enable undertakings to avoid regulation when such undertakings are in fact generating or providing broadcast content. As a result, the CRTC's determination to exercise jurisdiction based on the idea that a screen is or is not predominantly text may no longer be appropriate. What should matter is whether a New Media content provider is or is not providing audio-visual content at all. We hasten to add that we do not want the CRTC to begin regulating Internet sites posted by users that happen to include video, audio or audio-video footage of basement parties or political satires – the CRTC should exempt user-generated content from regulation, and focus its scarce resources on content generated by undertakings that seek to benefit from Canada's communications spectrum.

2 NEW MEDIA BROADCASTING CONTENT

Q.2. Given that the Commission has clearly articulated that it is not concerned with user-generated broadcasting content, to what type of broadcasting content in new media should the Commission pay particular attention?

For example, should the Commission draw a distinction between professional versus non-professional content, or content aimed at commercial versus non-commercial use?

If so, how should the terms be defined?

- 23 CCA agrees that the CRTC should not focus its attention and resources on monitoring and regulating user-generated content, but on professionally-produced audio-visual content that is essentially indistinguishable from the programming that Canadians now access on television or radio.
- 24 Insofar as definitions are concerned, however, defining content in terms of professionalism would in our view be extremely difficult, and an exercise in subjectivity that may open the Commission to legal challenge.
- 25 Since the *Act* enables the Commission to license people or companies, we believe the Commission must focus on the people or companies that want to make it their business – for profit or not – to provide audio-visual programming content using conventional means or the Internet. Businesses can be more readily identified, if only because those who are serious about undertaking New Media broadcasting endeavours are likely to incorporate to protect their assets. In the event that a New Media
- 26 Some types of content are also easily identifiable as the New Media broadcasting content to which a New Media regulatory framework should apply. The CBC offers some examples:⁷

For the 2008 Beijing Olympic Summer Games, we launched the most robust Olympic Games web sites in Canadian history. Our sites featured 13 broadband video streams with thousands of hours of live and on-demand event coverage (the first time Canadians could watch the

⁷ Hubert Lacroix, President, CBC "COMMENTARY: Conventional broadcasters still relevant in this day and age" *Cartt.ca* (4 December 2008).

Olympic Games live on their computer screens and, I'm sorry, at the office during working hours!). We also streamed video for Bell Mobility cell phone subscribers. Via this partnership with Bell, live streaming video and on-demand highlight packages of CBC and Radio-Canada Olympic Games coverage were delivered throughout the day to Bell Mobility subscribers.

* Here are some numbers: CBC Sports' Olympics site generated more than 46 million total page views over the course of 16 days, and averaged more than two million page views each day as Canadians viewed a total of 3.229 million live streams and 1.7 million on-demand streams of Games coverage.

* Here's another example: during the recent federal election, talk about an integrated, multi-platform coverage online, audiences could stream live video and radio; they could get from us national, regional and riding-level results from an interactive map; they could debate the issues in chat groups; they could ask questions directly to political leaders; and they could follow the live blogs of trusted analysts and experts.

* Susan Ormiston, the web-savvy journalist behind the popular and innovative Ormiston Online, monitored Internet blogs, chat rooms and Twitter, and invited viewers to comment via e-mail and Web cams. Again, some numbers: CBC.ca's Canada Votes 2008 web site captured just under four million page views on election day and over 80 hours of on-demand streams were available on election night alone. At Radio-Canada, the site sustained the third heaviest traffic days in the history of Radio-Canada.ca. Not too shabby!

* A third example our program, Canada's Next Great Prime Minister. CBC became the first broadcaster in Canada to cast a program via submissions online at YouTube. More than 500 videos were uploaded and ultimately 10 semi-finalists for the program were chosen from these submissions.

* We're giving our audiences more digital options in many other ways as well. In partnership with RIM and Lypsos, CBC Web Signals and Radio-Canada allow BlackBerry and cell phone users to receive bulletins and instant updates of breaking news broadcast by CBC News and the information services of Radio-Canada. We also have a number of SMS news alert services.

* And, of course, our everyday ".ca" services are nothing to "sneeze at" either! CBC.ca remains the most popular destination for news on the Web, with 3,450 unique visitors; almost 3.5 million Canadians visited CBC.ca from home in November 2007. And, in the same month, over 1.6 million Canadians visited Radio-Canada.ca from home.

So we're giving audiences more content in more formats than ever before and, as you can see, they're responding positively and in impressive numbers.

For instance, here is an impressive statistic that tells us just how thirsty audiences are for new media programming and services: podcasts of CBC/Radio-Canada continue to be popular with audiences of all ages this year, on average 1.9 million CBC podcasts have been downloaded every month. The English-language music service, CBC Radio 3, is one of the top podcasts worldwide, with over 3.5 million downloaded to date this year alone.

In fact, our content is resonating with audiences across all of our services from radio and television to the Internet, podcasting, streaming video, and satellite radio. In other words, despite the ever-wider range of media choices, more and more Canadians are choosing CBC/Radio-Canada.

Since June 1, 2007, CBC.ca has added 5,700 video clips, and we have served 6.2 million streams.

I'd like to point out that we've had some very interesting surprises in this electronic revolution.

Here is one: CBC/Radio-Canada has been a pioneer in offering our content to mostly younger audiences through podcasts. Audiences download more than a million of our podcasts every month — and which ones do you think are the most popular? Music and entertainment programs, right? That's what we expected. But we were wrong. Most of the popular podcasts are news, information and science programs — programs like Ideas, Quirks and Quarks, As It Happens, Christiane Charette, and Les années lumière.

These are programs with high-quality, thinking substance programs that offer in-depth analysis of Canadian stories and issues and yet they are also engaging and entertaining.

So again, it all comes back to content audiences are choosing high-quality Canadian content, from a source they know and trust.

And what is it that they get from that content that they won't get anywhere else?

They get the opportunity to learn from, comprehend and connect with one another. They are exposed to diverse Canadian viewpoints and a wide range of informed opinions everyday. And they watch and listen to stories made by and for Canadians.

In other words, our content helps audiences understand and participate in what it means to be Canadian.

It's a unifying force that helps counter the risk of regional and cultural differences becoming social fragmentation and isolation.

And by giving us a way to learn about and from one another, it enriches our democratic and cultural life. It is, in fact, essential.

But here's the hard reality: as in other broadcast media markets, only a small percentage of Canadian digital programming can survive in competition with a sea of foreign content. So what's the best way to create a space for Canadian culture to thrive online?

I submit that the best and most efficient way is to help CBC/Radio-Canada leverage, in the digital realm, our high-profile brand and the trust we've earned from audiences for over 70 years. CBC/Radio-Canada attracts people through its brand promise and connects those people who share a common interest namely, Canadian culture and programming by allowing them to comment, share, recommend, view, etc.

We've already established our leadership in new media and we're fully committed to continuing this innovation. This is an important part of the current broadcasting reality and, of course, the way of the future.

...

Let me finish with three quick references to how we're continually reaching out to new audiences in new ways.

A few weeks ago, Radio-Canada launched its new music service, Radio-Canada Musique, and its new Internet site which brings together all sorts of musical initiatives, concerts, programs, award-winners, and related online shopping.

This September, CBC launched four CBC Radio 2 broadband-only streams featuring: classical, Canadian composers, jazz, and Canadian songwriters.

Just a few weeks ago, we announced that, pending CRTC approval, we're partnering with the young-adult news, current affairs and lifestyle channel, Current TV, to launch Current Canada — a cross-platform company uniquely focused on engaging young Canadians through participatory and interactive content on TV and the Web. Nearly a third of Current Canada programming will be created by the viewers — the only Canadian network that will be produced and programmed in collaboration with its audience.

Through initiatives like these, and many others, we're ensuring that CBC/Radio-Canada remains vibrant and relevant, and that as many Canadians as possible have access to digital content that expresses and promotes Canadian culture and identity. And our online offering is not limited to national coverage. A complete array of regional web sites from coast-to-coast-to-coast are available, ensuring Canadians have access to content that matters to them from their community. All of this because I strongly feel that you simply can't be a true national public broadcaster unless you are strongly rooted in the regions.

(underlining added)

- 27 Rather than attempting to define what is or is not “professionally-produced” content, we believe that the CRTC should exercise its licensing authority over undertakings that set out their intention to provide audio-visual content over the air or through other technological means. In brief, just as the Canada Revenue Agency has often distinguished between endeavours pursued as hobbies and those undertaken for business purposes, CCA believes the CRTC should distinguish between audio-visual content produced for largely personal reasons, and that produced or disseminated for largely business reasons.
- 28 The traditional conception of ‘business’ – “anything that occupies the time and attention and labour of a man for the purpose of profit”⁸ – is no longer generally accepted as the sole determination of whether a business exists.⁹ Even if it were, a definition of New Media broadcasting based on profit alone would exclude community broadcasters (including community broadcasters with relationships with other profit-oriented broadcasters). Non-profit broadcasting must also be considered because the Commission has developed regulatory

⁸ See e.g., *Smith v. Anderson* (1880), 15 Ch. D. 247 (C.A.) at p. 258; *Terminal Dock and Warehouse Co. v. M.N.R.*, [1968] 2 Ex. C.R. 78, aff'd 68 D.T.C. 5316 (S.C.C.)

⁹ *Stewart v. Canada*, 2002 SCC 46 (CanLII).

- frameworks for community broadcasters in conventional media, and may well wish to apply similar criteria to New Media ‘community broadcasters’.
- 29 Other indicators may be more useful for the CRTC to define regulated New Media broadcasting content. In the case of restaurants, for example, criteria to distinguish between a restaurant run for business or as a hobby include the number of guests that may be seated, the hours of operation and the income generated from providing food to guests.¹⁰
- 30 In our view, the CRTC could rely on a number of factors to determine whether an undertaking is engaging in New Media broadcasting, including
- a. The undertaking’s express course of action – *i.e.*, the establishment of a website with audio-visual content that solicits or accepts subscriber or advertising income above a threshold amount
 - b. Whether the undertaking uses more than a specified minimum level of bandwidth
 - c. Whether the undertaking disseminates more than a specified minimum level of hours of audio-visual content (whether original, repurposed or simply looped content)
 - d. Whether the undertaking must or foresees that at some point it must declare income derived from Internet activities for income tax purposes
 - e. Whether the undertaking seeks to deduct expenses related to broadcasting from taxable income derived from Internet activities
 - f. Whether the undertaking forms contracts or partnerships with telecommunications service providers or ISPs to ensure access to audiences
 - g. Whether the undertaking applies for (not whether it receives) government funding to support its broadcasting activities
 - h. Hours of audio-visual content made available (whether original or repurposed from other audio-visual undertakings), and
 - i. Scheduling of audio-visual content (*i.e.*, announced intentions to broadcast specific content at specific times).
- 31 We note that in terms of income or revenue, the CRTC could set a minimum threshold for regulating New Media broadcasting undertakings. The CBC extract noted earlier provides additional ideas, related to numbers of video clips, streams served, podcasts, and number of performers or types of performing content (“musical initiatives, concerts, programs, award-winners, and related online

¹⁰ See *e.g. Sirois v. M.N.R.*, 88 D.T.C. 1114 (T.C.C.).

- shopping”). As it has in the case of small BDUs, the CRTC could simply exempt New Media broadcasters from regulation if, hypothetically, their annual income were unlikely to exceed a specified minimum level, if the total hours of New Media broadcasting content they offered fell beneath a specified level, or if the thousands of hours an undertaking streamed happened to be of the daily activities of a single user.¹¹
- 32 We have not proposed using indicators such as number of website visits or other form of audience measures, because Parliament did not refer to audience popularity in its definition of broadcasting. Rather, Parliament looked at the activity of broadcasting itself. In any event, if an undertaking intends to generate revenues that the CRTC could assess for the purposes of determining whether it could contribute to achieving Parliament’s broadcasting objectives, that undertaking will presumably be seeking to attract high ‘audience’ numbers, or a more limited number of subscribers willing to pay to access that content.
- 33 By applying factors such as those listed above, CCA believes the Commission would only regulate entities that either incorporate to provide audio-visual content online, or that are already incorporated to provide audio-visual content and are now also making this content available through the internet. By focussing on the business character of licensable undertakings, we believe the Commission would avoid the difficulties inherent in trying to determine whether a particular user’s 10 minute-weekly audio-visual blog should be regulated.
- 34 To summarize, user-generated content in our view is typically content that is not pursued for profit, but primarily for personal reasons. Regulated New Media broadcasting content should be defined based on factors that are generally applied to business-oriented undertakings, and should exclude user-generated content.

3 CHANGES IN NEW MEDIA BUSINESS MODELS

Q.3. How has broadcasting in new media and the corresponding business models evolved since the issuance of the exemption orders for new media broadcasting undertakings and mobile television broadcasting undertakings?

What role can broadcasting in new media be expected to play in the future, as part of the Canadian broadcasting system?

- 35 We believe that the CRTC has more information available to it with respect to changing business models than CCA.
- 36 As for the future role of New Media, we believe it is easy to predict that Canadians will continue to demand audio-visual content that informs, enlightens and entertains them through any form of distribution system available.

¹¹ We note that users who engage in illegal activities online already fall under the authority of the *Criminal Code*, and do not require CRTC regulation for the sole purpose of prohibiting those illegal activities.

- 37 The role that New Media broadcasters should play is set out in Canada's broadcasting legislation. CCA submits that apart from benefitting Canadians through the provision of new and original content, New Media broadcasting should provide Canadians with entertaining and informative content about their country, their neighbours and themselves, as well as ample opportunities to work in this sector to create or distribute such content.

4 RELEVANT PLAYERS

Q.4. Who are the relevant players in the creation and distribution of Canadian broadcasting content in the new media environment? How are they performing financially and how are they contributing to the creation and distribution of Canadian broadcasting content in new media today? What can be expected in the future?

- 38 Given the lack of data available about New Media broadcasters' financial capacity, and the lack of data about the New Media programming they produce, CCA has few comments to make in response to this question.
- 39 In our view, "what can be expected in the future" from regulated New Media broadcasting undertakings will depend almost entirely on the directions they receive from the CRTC. In the event that the CRTC pursues a laissez-faire approach, we anticipate comparatively little in the way of contributions to the Canadian broadcasting system. The experience of the past decade demonstrates that when the CRTC reduces regulatory requirements for Canadian programming, private broadcasters reduce their commitments to Canadian programming.

5 TRADITIONAL ADAPTATION

Q.5. How are traditional Canadian broadcasting undertakings adapting to new media and what is the impact on their business models?

- 40 Virtually every major broadcaster in Canada is making its programming content available online. But it is unclear what impact New Media broadcasting has on conventional broadcasters' business models, because the CRTC does not disclose financial or employment information about individual broadcasters. We have requested such data for more than a year, but the CRTC has declined to disclose it. In our view, the CRTC's question in this proceeding demonstrates the need for the Commission to make available such data for individual licensed undertakings.
- 41 For instance, if broadcasters that currently hold broadcasting licences move to online transmission – hypothetically – do their expenditures for transmission decline? If so, do these undertakings then have more money available to spend on Canadian programming? Since the CRTC has not made such data available, we simply do not know, and cannot provide the Commission with informed comment in response to this question.

6 **NEW MEDIA AVAILABILITY**

Q.6. What is the current availability of Canadian broadcasting content in new media?

Are there challenges related to business models with respect to the creation and distribution of Canadian broadcasting content in new media?

- 42 The CRTC has commissioned or helped to fund a number of excellent research reports. We have been impressed with the Canadian Internet Project's reports on *The Internet, Media and Emerging Technologies*,¹² research that we understand the Commission has helped to make possible. The 2007 report concluded that "Internet users, aside from spending an average of 17 hours per week online, spend 40% more media time watching pre-recorded movies, 80% more time playing video games, and 50% more time listening to music" compared to non-Internet users.¹³ Overall, it found that "Internet users tend to use conventional media [in a way] that is consistent with their demographic profiles and penchant for technology."¹⁴ While Internet users may reduce their time with television, it is because they "increasingly access moving images online".¹⁵
- 43 As CCA has said in the past,¹⁶ one major challenge confronting New Media content providers is access to audiences. Since the CRTC has put off its traffic management hearing until July, however, and submissions that might provide answers about the degree to which network neutrality (previously known as common carriage) provisions are being adhered to or disregarded, we simply lack the information to determine whether telecommunications service providers' decisions to throttle their subscribers' access to bandwidth has had a deleterious impact on New Media broadcasters' business models.

7 **DEMAND**

Q.7. What is the extent of consumer demands in Canada for broadcasting content in new media?

How is the broadcasting sector responding?

- 44 We cannot provide the Commission with more or better data than it now has, but in our view, it is clear that Canadians want to use – and should be allowed to use – on-demand technology to access New Media broadcasting content that entertains, informs and enlightens them. Our main concern with conventional broadcasters' response to consumer demands, is that in an unregulated environment, Canadian New Media content will again be casually dismissed as somehow too expensive to produce or make available – notwithstanding the cost savings that digital technology were originally supposed to yield.

¹² Charles Zamaria and Fred Fletcher, *Canada Online! The Internet, Media and Emerging Technologies: Uses, Attitudes, Trends and International Comparisons 2007* (Toronto, 2007).

¹³ *Ibid.*, at 121.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at 122.

¹⁶ *Supra* note 9.

- 45 Since we lack information about broadcasters' response to consumers' demands for New Media broadcasting, we believe the CRTC should introduce regulatory requirements for the New Media broadcasters it regulates (*i.e.*, excluding user-generated content), and in so doing require these undertakings to provide the Commission with annual data about their New Media activities. As CCA works with Statistics Canada on its collection of data related to the arts and culture in Canada, we would be pleased to work with the Commission on the design of a New Media data collection instrument.

8 *DEFINING CANADIAN NEW MEDIA BROADCASTING CONTENT*

Q.8. How should "Canadian content" be defined with respect to broadcasting content in new media?

Are any of the definitions that the Commission uses for other platforms, such as radio and television, relevant? If so, how would they be applied?

- 46 On the assumption that the CRTC will be regulating New Media business undertakings and not user-generated content, we believe the Commission can rely on some of its existing definitions for Canadian content to apply them to the New Media context. These definitions are relevant because they address the industrial purpose of Canada's broadcasting legislation, which is to ensure that Canadians benefit through employment and income from the use of their broadcasting spectrum. Existing definitions of Canadian content could be modified to apply to Internet-based content, where this is appropriate. In some cases, such as programming that may be interactive, we would be concerned if programming were described as Canadian and the only 'Canadian' involvement came from audience participation. Programming that does not employ Canadian writers, creators, producers, directors, actors, announcers, journalists or technicians, or that is controlled by non-Canadians, cannot in our view be considered fully Canadian.

9 *NEW MEDIA LEVY*

Q.9. Given the level of Canadian broadcasting content in new media, are measures needed to support the creation, promotion and visibility of Canadian broadcasting content in new media?

If so, what measures, and how can these be accomplished within the mandate of the Commission?

- 47 As noted earlier, CCA does not have any precise data about the amount of New Media content available, or its origin. We believe the CRTC should collect and report such data.
- 48 Given decades of inadequate funding for conventional Canadian content, and the cultural funding reductions already announced by the Federal government in 2008, CCA clearly and strongly supports the creation, promotion, and visibility of Canadian New Media broadcasting content, through the establishment of a new New Media funding system.
- 49 CCA supports the establishment of a New Media levy, as described by Peter Grant in early 2008. We understand that Mr. Grant had originally proposed that ISPs and telecommunications service providers that enable New Media

- broadcasting content to be accessed by users, remit 2.5% of their Internet-derived income to a New Media fund. We also understand that it has been recommended that this amount be increased to 3%, possibly generating more than \$87 million annually and CCA supports this modification.
- 50 CCA believes that – just as the Commission has jurisdiction to require BDUs to remit funding to support Canadian television programming content – the CRTC has the jurisdiction and mandate to require telecommunications service providers to remit funding to support Canadian New Media broadcasting content. We believe that the CRTC could accomplish this by either by establishing a new class of licensee -- say, a New Media BDU – and setting out separate regulations for such undertakings, or by amending its existing BDU regulations to include a separate part to apply to New Media distributors. To avoid the BDU-CTF funding debacle of the last two years, CCA recommends that whether in a new set of regulations, or in amended existing regulations, regulations that apply to funding clearly state that such funds are to be remitted monthly.
- 51 Although we fully endorse the mandate of the Canadian Television Fund, we believe the Commission should consider a separate and independent New Media production fund.

10 MEASUREMENTS AND POLICY EVALUATION

Q.10. What benchmarks and measures are appropriate to assess the level of Canadian broadcasting content in new media? How should these standards be applied?

- 52 The CRTC has developed a number of useful measures to assess Canadian content levels, and these could also be applied to New Media broadcasting. We believe the key indicators with respect to New Media broadcasters are the perennial favourites -- revenue, expenditure, employment, and programming exhibition and delivery. Insofar as programming exhibition is concerned, the CRTC should at a minimum collect information about programs' language of delivery and genre. The CRTC should also collect information about advertising, including dynamic or other unregulated forms of advertising-based income.
- 53 In our view the CRTC should collect these data, given that the *Cabinet directive on streamlining regulation* requires departments and agencies to:
- identify the intended results of regulation in managing a public policy issue and, before submitting a regulatory proposal, develop time-based performance indicators for significant regulatory activities;
 - take measures to ensure that monitoring and reporting activities are effective while imposing the least possible burden on government, business, and Canadians;
 - integrate performance measures that can be used to adjust compliance plans as needed; and
 - collect performance information on the results of existing regulation and provide Canadians with this information in a timely manner.

- 54 As for the application of such standards, we believe that for the next decade at least, it will be necessary for the Commission to apply these measures to assess the degree to which Canadians have access to Canadian New Media content.

11 LOCAL NEW MEDIA CONTENT

Q.11. Is there a specific role for local broadcasting content in new media in achieving the broadcasting policy objectives of the Act?

If so, are measures required to further local participation in this environment?

- 55 Given the *Act's* explicit requirement that Canadians have local programming content available to them, we believe that local New Media broadcasting content should be encouraged.

12 LINGUISTIC DUALITY, MULTICULTURAL NATURE, CANADIAN ABORIGINAL PEOPLES

Q.12. Does broadcasting content in new media reflect Canada's linguistic duality, multicultural nature, and special place of Aboriginal peoples within society, as well as the broadcasting policy objectives of the Act?

If not, are measures feasible or necessary, and how would they be applied?

- 56 As we have answered in response to other CRTC questions, we lack detailed information to answer this question, and believe the CRTC could and should collect such data, particularly since Parliament has expressly set out objectives with respect to these three issues in the *Act*. Without empirical measures, the CRTC cannot assess the impact of its policies, and Canadians cannot hold the CRTC to account.

13 INDEPENDENT PRODUCTION

Q.13. Is the Canadian independent production sector contributing in a significant manner in the environment for broadcasting in new media?

- 57 We are aware that Canada's independent production sector is generating New Media broadcasting content, but we lack data about its impact on our broadcasting system, whether through employment, exhibition or expenditures. Since Parliament has specifically address independent production in its broadcasting policy objectives, the CRTC should begin to collect such data, so that its contribution can be measured empirically. We might add that having such data will be critical to assessing the impact of a New Media funding mechanism, and that the agency best placed to collect the data is, of course, the CRTC.

14 TRAFFIC MANAGEMENT –NETWORK NEUTRALITY

Q.14. Are there practices that restrict or enhance the distribution of and access to Canadian broadcasting content delivered and accessed over the Internet and through mobile devices?

If so, describe the practices and the nature and extent of their effect.

Are measures necessary, and how would they be applied?

- 58 The CCA shares the serious concerns that others have expressed in the past and in the past year about network neutrality. This issue directly affects Canadians' ability to access Canadian New Media content, as CCA pointed out

in September 2006 when it provided examples of telecommunications service providers' control over internet content:

AOL (US)	In April 2006 stopped e-mail sent to AOL subscribers which included a link to a site opposing AOL's proposed e-mail tax; those sending the e-mails received a bounceback message stating that their e-mail had "failed permanently" ¹⁷
AT&T Corp (US)	In January 2006 "expressed support for charging companies to ensure that their content gets priority delivery" ¹⁸
Bell	Beginning late in 2003, Bell offers icarriers, ISPs, CLECs, Telcos and other service providers a Dynamic Traffic Shaping Service to enable them to "efficiently manage their individual customers' traffic, maintaining consistency of service, reducing churn and opening up new service revenue opportunities." ¹⁹
BellSouth Corp. (US)	In January 2006 "said it is in early talks with Internet movie companies and at least one gaming company with the aim of striking agreements on fees to guarantee fast content delivery over the Internet." ²⁰ Bellsouth's chief technology officer said in January 2006 that "he envisions charging content providers a fee based on the volume of material they send over BellSouth's network, as well as the bandwidth the content takes up." ²¹ In December 2005, BellSouth's chief technology officer said that "an Internet service provider such as his firm should be able, for example, to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc. [H]e said his company wants to be able to assure vendors such as online-gaming firms that their subscribers will get top performance even when there is heavy network traffic, which can slow a system." ²²
Eastlink	In early 2006, apparently limited access to the BitTorrent protocol by reducing upload speeds from 80 kB/s, to 22 kB/s ²³
Rogers	In 2005 acknowledged that it uses "traffic shaping" to grant priority to some online activities; customers of activities that the company considers to be lower in priority may gain access to these services with more difficulty; one effect may be to block access to BitTorrent and the downloading of podcasts from iTunes ²⁴ .
SBC Telecommunicaitons	CEO of SBC Telecommunications (that acquired Pacific Telsis, Ameritech and AT&T Wireless) said in October 2005 that companies such as Google, MSN, Vonage and others will have to pay for using SBC's infrastructure. "The Internet

¹⁷ Timothy Karr, "AOL Censors Opposition Site" *MediaCitizen* (14 April 2006)

<<http://www.freepress.net/news/14960>>.

¹⁸ Searcy & Schatz, *supra* note 41.

¹⁹ Bell Canada, "Bell Wholesale Internet Connect Internet Connect Service" online

<<http://www.wholesale.bell.ca/pdfs/internetconnect.pdf>>.

²⁰ Searcy & Schatz, *supra* note 41.

²¹ *Ibid.*

²² Jonathan Krim, "Executive Wants to Charge for Web Speed" online: [Washingtonpost.com](http://www.washingtonpost.com)

<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30AR2005113002109_plaintiff.html> (1 December 2005) at D05.

²³ "New Azureus Upgrade Bypasses Eastlink Traffic shaping" online: [halifaxlive.com](http://www.halifaxlive.com)

<<http://www.halifaxlive.com/content/view/537/2/>> (18 February 2006).

²⁴ BBC News, "Towards a two-tier Internet" online: <http://newsvote.bbc.co> (22 December 2005); Jack Kapica, "The new shape of broadband" online: globeandmail.com (08/12/05).

(US)	can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! Or Vonage or anybody to expect to use these pipes free is nuts! ²⁵
Shaw	The service it offers to customers of third-party VoIP services such as Vonage is alleged to be subject to packet delays and other limitations, while its own VoIP service is not; ²⁶ beginning in March 2005 Shaw invites subscribers to pay a \$10/month "enhancement fee" to improve VoIP service ²⁷
Telus	Telus blocked customers from visiting the "Voices For Change" web site, along with 600 other websites hosted at the same IP address, during a labor dispute ²⁸
Time Warner Cable (US)	In 2000, prevented its 3.5 million customers from accessing Walt Disney's television programs ²⁹
Time Warner AOL (US)	In April, Time Warner's AOL blocked all emails that mentioned www.dearaol.com — an advocacy campaign opposing the company's pay-to-send e-mail scheme.
Madison River (US)	In 2004, blocked its DSL customers from using any rival Web-based phone service.
Verizon (US)	Has entered into agreements with content owners, such as the Disney company, and has bypassed cable companies that refuse to license content ³⁰
Vodafone (Germany)	In 2005 there were reports that in Europe, some ISPs have similarly begun to block VoIP traffic, treating the popular Skype program as "inappropriate content." ³¹

59 Our main concern is not necessarily based on the prospect of telecommunications service providers wanting to censor New Media content, but on their interest in offering New Media content on differentiated tiers as an ever-growing source of income. As we already noted in September 2006, telecommunications service providers at that time foresaw "a system whereby Internet companies would agree to pay a fee for their content to receive priority treatment as it moves across increasingly crowded networks."³² What was predicted, has now clearly come to pass.

²⁵ "At SBC, It's All About 'Scale and Scope'" online: [freepress.net BusinessWeek](http://www.freepress.net/news/14959) (7 October 2005) <<http://www.freepress.net/news/14959>>. "Shaw files lawsuit and denies traffic shaping allegations" online: Digital Home Canada <<http://www.digitalhomecanada.com/content/view/1331/51/>> (19 June 2006).

²⁶ Jeff Baumgartner, "Shaw defends 'QoS enhancement' package" online: CED Magazine (19 June 2006) <<http://www.cedmagazine.com>>.

²⁷ Joseph Wilson, "Troubles over tiered net: Internet service providers might charge more for certain sites" online: nowtoronto.com <http://nowtoronto.com/issues/2006-08-03/goods_next.php> (3-9 August 2006).

²⁸ BBC News, *supra* note 24.

²⁹ Drew Clark, "A Tangled net: An In-Depth Look At The Network Neutrality Debate" online: National Journal <<http://www.njtelecomupdate.com/lenya/telco/live/tb-GMDB1152648438194.html>> (7 July 2006).

³⁰ OECD, Directorate for Science, Technology and Industry, *The Future of the Internet: DSTI/ICCP(2006)17* (Workshop Proceedings: 8 March 2006) at paras. 78-79.

³¹ BBC News, *supra* note 24.

³² Dionne Searcy & Amy Schatz, "Phone Companies Set Off a Battle over Internet Fees" *Wall Street Journal* (6 January 2006) <<http://www.freepress.net/news/13218>>.

- 60 Unfortunately, we still lack clear information about the impact of discriminatory carriage arrangements that have already been imposed or that are being contemplated. This means we cannot assess telecommunications service providers' arguments that crowded distribution networks will collapse unless subscribers agree to limit their use of the networks, to distributors' claims of ownership over distribution pipes and consequent right to control use and maximize profits.
- 61 In our view, however, arguments that "network operators must be free to control the type and quality of service on the system in which they have invested heavily"³³ lack weight. The private sector has not paid for Canada's telecommunications infrastructure in its entirety: subscribers and taxpayers (often the same person) financed the capital installations and upgrades of this infrastructure, in whole or in part, with regulated rates of return helping to moderate some level of risk.³⁴ Canadian public policy has encouraged and directly funded the expansion of broadband across the country – 'real estate', so to speak, that Internet service providers are now able to use to attract new subscribers and new subscriber revenues.
- 62 Rather than maximizing network efficiency, the pay-for-performance system advocated by distributors will reduce users' access to the Internet, limit the development of the new content that draws people online, and reduce innovation overall. Canadian search engines that cannot afford to pay for faster service may not attract the users they need to survive. Canadian creators and distribution entrepreneurs may be unable to pay the amounts paid by larger companies for dominant placement on or access to the Internet. Canadians' subscribers' access to content sites has been and may continue to be slowed, to encourage users to pay more for service quality, or to divert users to content sites owed or controlled by the ISP or TSP. Not-for-profit websites may find the online contributions they need to survive slowing down, if they are unable to pay for access to higher-speed service. The costs for so-called citizen journalists – bloggers – to post and share audio-visual clips may rise, silencing a valuable alternative source of information and creativity.³⁵
- 63 All that said, if the CRTC decides to establish a new class of New Media BDU, or amend its existing BDU definition to include New Media BDU companies, it should establish through its regulations that BDUs cannot discriminate against different forms of New Media broadcast content, and in particular, against New Media broadcast content in which it has no ownership interests.

³³ Krim, *supra* note 22.

³⁴ Subscribers, through the monthly fees paid to telecommunications service providers, and taxpayers, through the taxes they were required to pay since telecommunications service providers may deduct a portion of their capital expenditures from their taxable income.

³⁵ In 2006, the BBC reported on the existence of more than 27 million blogs, with 75,000 new blogs being created daily. BBC News, "Locking down our digital future" <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4690188.stm>> (2006/02/08).

15 *CROSS-MEDIA OWNERSHIP*

Q.15. The Commission has no policy with respect to the cross-ownership of licensed broadcasting undertakings and new media broadcasting undertakings.

Is such a policy necessary or appropriate? Why or why not?

- 64 CCA considers that cross-media ownership of the degree that exists in Canada today represents a serious threat to democracy, precisely because the CRTC has chosen not to study the issue empirically. Well-established empirical measures exist that would enable the Commission to determine whether and how ownership of content providers or content transmission systems affects content – but the CRTC has decided not to address this issue. Conclusions that the Commission subsequently draws – as it has from time to time – that it need not address cross-media ownership because no evidence exists of harm, are therefore difficult to take seriously.
- 65 In our view, the CRTC bears a duty under the *Act* to ensure that Canadians' interests are protected, along with the interests of content providers who have limited bargaining power when they work with the twenty or so large companies that control through programming content and delivery in this country.
- 66 Rather than simply concluding that it need not develop a cross-media ownership policy because it receives no evidence in this proceeding of any 'real' harm, CCA urges the Commission to develop an empirical research program in concert with Canadian universities to assess the impact of media ownership on media content and media access. Only this kind of empirical research can provide Canadians with the answers they need about whether one large company's control over radio programming, television programming, newspapers and Internet access actually has an impact on the content it provides to Canadians.

16 *DIVERSITY OF VOICES*

Q.16. How, and to what degree, does the environment for broadcasting in new media affect diversity of voices in the Canadian broadcasting system?

- 67 It is trite to say that New Media offers Canadians far more opportunities to express themselves than at any other time in history. What we do not know – because we have not seen any empirical content analyses of the question – is whether Canadians are enjoying substantially more new and original audio-visual programming content produced (using the business-oriented definition we proposed earlier in response to question 2), or not. If Canadian New Media broadcasters are in fact reusing, recycling or repurposing existing conventional media content, diversity is not increasing. Worse, the shelf-space that this repurposed content consumes, effectively occupies the field of New Media audio-visual content, perhaps dissuading others from attempting to enter the area.
- 68 We urge the CRTC to work in concert with Canadian universities to mount a multi-year research program to assess the degree to which 'diversity of voices' exists in Canadian New Media.

17 PUBLIC BROADCASTERS

Q.17. Is there a special role for Canada's public broadcasters in the environment for broadcasting in new media?

If so, are measures required? Describe any such measures and how these can be accomplished within the mandate of the Commission.

69 The CBC's special role is already set out in Canada's broadcasting legislation, and CCA does not understand why the Commission appears to suggest that the CBC should not play this role in a New Media broadcasting environment.

70 Insofar as "measures" are required, CCA has long supported adequate, stable, predictable funding for the Corporation and continues to do so.

18 NEW MEDIA COMMUNITY BROADCASTERS

Q.18. Is there a special role for community broadcasters in the environment for broadcasting in new media?

If so, are measures required?

Describe any such measures and how these can be accomplished within the mandate of the Commission.

71 CCA supports the CRTC's endeavours to promote community broadcasting, and recommends that community broadcasters be encouraged to provide New Media programming content. We support any measures the CRTC may wish to take to reinforce their role within the broadcasting system, noting as we do so that, similar to the CBC, community broadcasters also require adequate, stable and predictable funding to achieve their mandate under the *Act*.

19 CURRENT NEW MEDIA EXEMPTION ORDERS

Q.19. Do the exemption orders for new media broadcasting undertakings and mobile television broadcasting undertakings continue to be appropriate?

Why or why not?

Are measures and/or regulatory amendments required to ensure that the environment for broadcasting in new media is contributing in an appropriate manner to the achievement of the broadcasting policy objectives of the Act?

If so, describe any such measures or amendments.

72 CCA has opposed the CRTC's exemption orders for New Media broadcasting and mobile television broadcasting. In our view, the Commission appeared to base its decisions on its view that parties to the mobile television proceeding, for example, "provided no evidence ... to indicate that new media broadcasters have been responsible for any significant loss in television audiences for licensed Canadian broadcasters."³⁶ The CRTC concluded that,

³⁶ CRTC, *Regulatory framework for mobile television broadcasting services*, Broadcasting Public Notice CRTC 2006-47 (Ottawa, 12 April 2006).

Given the current technical challenges associated with the wireless technology noted above, the mobile television broadcasting services are unlikely in the near future to become substitutes for conventional broadcasting services or to impede the ability of traditional broadcasters to fulfill their obligations under the Act.

- 73 CCA considered and still believes that this “no-harm” test is not the test described by the CRTC in its *New media* notice. There, the Commission’s focus was on section 9(4) of the *Broadcasting Act*, which is effectively a “benefits” test:

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

- 74 In our view, the CRTC’s 2006 exemption decision created a two-tiered regulatory system. In the case of the mobile television decision, the CRTC asked nothing of a particularly large and important ‘entrant’ (BCE) even though its carriage of television content was clearly designed to attract subscribers and subscriber revenue. In our view, section 9(4) requires the CRTC to determine whether a broadcaster’s compliance with the requirements of Part II of the *Act* will or will not contribute materially to achieving Parliament’s broadcasting policy.

- 75 The sole question to be asked about New Media undertakings, then, is how the broadcasting system would or would not benefit if the CRTC regulated these undertakings. As we have previously said, we lack the data needed to provide the Commission with more informed comment about specific measures the CRTC could adopt. We strongly urge the Commission to rescind its current exemption orders, and to replace these with requirements that will ensure that telecommunications service providers and ISPs contribute to achieving Parliament’s broadcasting policy objectives.

20 REVISING EXEMPTION ORDERS

Q.20. Under what conditions should the Commission revisit the appropriateness of the new media exemption orders in the future?

- 76 Given the previous question, which asked whether the New Media exemption orders are appropriate, we are uncertain what this question is attempting to answer. We do not believe the existing orders were appropriate to begin with.
- 77 Insofar as new New Media exemption orders are concerned, we believe the Commission must continue to be guided by section 9(4) of the *Act*, and ensure that broadcasters who are capable of contributing to the *Act*’s objectives do so.

21 ISSUES BEYOND THE COMMISSION’S JURISDICTION

The Commission ... has received comments that identify issues and ideas pertaining to copyright, direct government subsidy, and amendments to the federal Income Tax Act.

While the Commission will not be in a position to implement any of these proposals, it will consider arguments and solutions which call for broader policy deliberations to assess whether any problems might best be resolved in a different context.

- 78 CCA supports the development of new, converged communications legislation, and in particular the introduction of an express and mandatory requirement that the CRTC achieve its mandate by serving the public interest.
- 79 We also believe that Parliament must address the issue of advertising deductions in New Media broadcasting within the context of the *Income Tax Act*.
- 80 Finally, we support adequate, stable and predictable funding for New Media broadcasting endeavours.