Presentation of the Internet Society, Canada Chapter,

on Bill C-10, amendments to the Broadcasting Act

Greetings, ladies and gentlemen. I am speaking today on behalf of the Internet Society, Canada Chapter. We are the independent Canadian chapter of the worldwide Internet Society.

The Internet Society Canada Chapter (ISCC) is a not-for-profit corporation that engages in internet legal and policy issues to advocate for an open, accessible and affordable internet for Canadians. An open internet means one in which ideas and expression can be communicated and received except where limits have been imposed by law. An accessible internet is one where all persons and all interests can freely access websites that span all legal forms of expression. An affordable internet is one by which all Canadians can access internet services at a reasonable price.

You can find out more about us at www.Internetsociety.ca, where you will find information about who we are and the public policy positions we have taken in recent years. I draw your attention particularly to our detailed analysis and critique of the *Final Report of the Broadcasting and Telecommunications Legislative Review Panel* – the so-called Yale Report.

Among our membership are those with a long history of engagement with the *Broadcasting Act*, going back to the period 1987-1991 when the current Act was drafted and adopted. Among our numbers are persons who have been responsible for broadcasting policy, the drafting of the current *Broadcasting Act*, and the administration of Act as former Commissioners of the CRTC. We have a comprehensive knowledge of the objectives of the current Act, the various policies adopted in its implementation, and the economic and policy context in which the current amendments have been proposed.

We want to make two points:

1) Streamers can be taxed, and the money can flow to Canadian video entertainment subsidies. We have no problem with the subsidization of Canadian video entertainment. Every jurisdiction does it, we are not alone.

2) We have to separate the subsidization of Canadian video entertainment as an issue from the expansion of the Broadcasting Act. Bill C-10 conflates the two issues and says, in effect, that only by expanding the role of the CRTC can we arrange for new subsidies to be taxed out of streaming services. This is not true, and in our view the confusion of these two issues is the chief problem with C-10.

   Bill C-10 will create an unnecessary storm of controversy. You can get the subsidies from the streamers without the massive regulatory over-reach that C-10 seems to want. We make recommendations for how this can be done.

Because we detach the subsidy issue from the specific approach promoted by Bill C-10, the ISCC does not believe that C-10 can be cured by minor adjustments. Only a major change in legislative approach will suffice. We want to attain the key objectives of the Bill -more subsidization of video entertainment - while avoiding the damage that C-10 will cause to the internet and to Canadian producers and consumers of internet services.

Bill C-10 serves two purposes:

- Its first purpose is to oblige online streaming services to make a financial contribution to Canadian programing. [Okay so far]
- The second purpose is to subject online streaming services – in particular foreign streaming services – to regulation as broadcasters, with all the regulatory burden that entails.

ISCC *accepts* the first purpose of the bill: something can and should be done to increase the flow of money to Canadian program production. We have no problem with the subsidization of Canadian programming. Just about every jurisdiction in the world promotes or subsidizes domestic TV, movie and music production. Canada is no exception. We do not seek to change that; we do seek to make the revenue collection and disbursement as effective as it can be made to be.

It is with the second purpose that we take exception. ISCC is firmly opposed to the regulation of online streaming services as broadcasting. Such regulation serves no useful purpose:

- it will lead to immense regulatory uncertainty;
- huge regulatory costs will be borne by those regulated;
- increased restrictions will apply to Canadian consumers and content creators; and
- nothing useful will be accomplished

Janet Yale herself, the head of the inquiry that led to Bill C-10, admitted in debate recently that it would take many years to work out who was covered under the new Act.[1]

Why is broadcasting regulation different from speech or printing?

We need to talk about why broadcasting regulation is so different from the rules of speech or print. Historically, broadcasting regulation is an exception to the general rule that you do not need a licence from government to speak, write, or publish. The print regime imposes penalties for libel and slander, but you do not need prior permission of the state to print. Normally communications across the Internet is governed by rules applicable to printing and speech.

Broadcasting regulation grew out of the nature of radio waves, which cross provincial and international borders. The *Radio Reference* of 1934 assigned the federal government authority over broadcasting because of this international and interprovincial aspect of radio waves. Broadcasting, given radio spectrum shortages, necessarily meant placing tremendous potential social and political power in the hands of broadcasting licenses. The government established a licensing regime for broadcasters and imposed public interest regulation to constrain the power of broadcasters to negatively influence public opinion or shock public morals. To hold a broadcasting licence was a privilege, and licensees were strictly regulated to ensure that broadcasters met public policy objectives.

What the Internet did

The internet stands the broadcasting model on its head. It presents no technological limits on the number of voices that can be heard, nor are there practical limitations on who may speak. People may be both consumers of programming and originators of it. The phrase often used to describe it is "permissionless innovation." They may at the same time be providers of content, whether words or, as people do these days, full-motion video programming (posting cute pet videos, vlogs, essays etc.).

In these circumstances, there is simply no lack of choice nor any reason to limit choice. The central assumption of broadcasting policy was that government could control the distribution of content. The Internet blew that assumption to pieces and no one is going to re-create a closed system[2].

In brief, ISCC rejects both the need and practicality of regulating online streaming services as "broadcasting". Note please, that this does not mean we reject taxing the large streamers. Our criticism is aimed at the means chosen, not the desired objective.

What government wants to achieve

The overarching objective of the Government was expressed by The Prime Minister in his January 15th Mandate Letter to the Minister of Canadian Heritage. He directed the Minister to "work to ensure that the revenues of web giants are shared more fairly with our creators and

[1] https://cmpa.ca/prime-time/session/prime-time-face-off-modernization-of-the-broadcasting-act/ Janet Yale speaking at 18:16

[2] Unless we establish a gigantic national firewall like China or other authoritarian states.

media, and require them to contribute to the creation, production and distribution of our stories on screen, in lyrics, in music and in writing."

Bill C-10

Bill C-10 fails to do this. Rather than focus on ensuring that the revenues of web giants are efficiently shared with Canadian creators, Bill C-10 needlessly extends to web services the micro-regulation that characterizes our broadcasting regulatory regime.

Moreover, C-10 proposes applying Canadian broadcasting regulation to foreign streaming services. These entities are strangers to the Canadian regulatory system. They can hardly be expected to incur the costs of compliance with Canadian broadcasting policy nor incur the penalties associated with non-compliance. Such regulatory costs and associated penalties invite retaliation in international trade agreements – particularly USMCA.

A simple levy divorced from regulatory burdens and penalties would do much to avoid retaliatory trade measures.

In short, ISCC argues that you do not have to expand the reach of the *Broadcasting Act* in order to support Canadian program production. Extending broadcasting regulation would be self-defeating and essentially unworkable.

A proposed funding formula

We believe that a simple, formula-driven levy should be imposed. We believe the basic elements of the levy scheme should be as follows:

1) The very large platforms – we will call them streamers – will pay a levy. The levy would apply to subscription and advertising revenues derived from the Canadian market only. The levy would be imposed purely on financial criteria with no discretion to apply other criteria that would undermine the objectivity or credibility of its imposition

2) The legislation itself should establish a very high limit – we suggest $250 million in annual Canadian revenues – below which the scheme does not apply to any streamer. The threshold amount should be reviewed every five years to ensure it remains appropriate to the size of the Canadian market.

3) The amounts raised by the levy would be directed to an arm's length body such as the Canada Media Fund for distribution to productions meeting the criteria for certification as Canadian productions.

4) The criteria for certification should be expanded to include specific cultural elements, such as:

    a. the setting of productions in distinctively Canadian locales;

    b. the productions feature distinctively Canadian characters; and

    c. the productions are based on Canadian books, history or themes.

We observe that the parallel certification scheme in the United Kingdom[3] rewards cultural criteria more richly than mere industrial and employment factors. We should look carefully at the criteria applied by other nations to shape a certification policy that really supports cultural objectives.

5) A fixed amount of levy would be set by the government. Foreign streamers would have the choice: they could contribute the full amount to a domestic content fund, or invest some or all directly into domestic content, subject to all applicable criteria. At the end of the reporting period, what had been spent on domestic content could be deducted from what was otherwise payable to the fund. The Australians have established a two-year period for assessing contributions, and a 5% levy on gross domestic revenues. We might do something similar.

6) The levy should not be collected by the CRTC but by Revenue Canada or by the Canadian Audiovisual Certification Office, who should determine the reporting and audit requirements that support the collection of the levy.

How in essence does this approach differ from that of Bill C-10?

Our approach does not define streamers as "broadcasters" within the meaning of the *Broadcasting Act* and does not attempt to regulate them as broadcasters. This will avoid endless litigation and regulatory proceedings. It will also achieve an important goal for us, namely, to constrain the application of the *Broadcasting Act* to clearly defined and proper boundaries.

Regulatory Over-reach

The current wording of C-10 envisages a vast expansion of regulated entities without clear justification. Here are examples.

The Bill, if passed in its current form, would apply to personal or professional websites employing video, to C-Span, PBS, Spotify, Radio Swiss Classic, to newspapers, you name it. Section 9(4) of the Bill provides for the expansion of the Act to cover anything that, in the opinion of the Commission, would contribute to the implementation of broadcasting policy. Though the clause is couched in terms of an exemption policy, it aims at subordinating to broadcasting policy whatever the Commission deems appropriate at the moment. From 4 -to- 5,000 regulated entities, which we have now, the Act would expand to cover tens, if not hundreds of thousands, of people, businesses, and associations.

Summary and conclusion

In summary:

[3] https://www.bfi.org.uk/apply-british-certification-tax-relief/cultural-test-film/summary-points-cultural-test-film

We seek to create an efficient subsidy scheme for Canadian content from foreign streamers.

We seek to broaden the criteria for the certification of Canadian productions to include specific cultural criteria rather than purely industrial criteria.

We want to encourage greater investment in Canadian productions by making productions owned by streamers eligible to be certified as Canadian if they meet the enriched cultural criteria.

We seek to restrict the *Broadcasting Act* to domestic broadcasters, and to keep the Internet a zone of permissionless innovation.

C-10 extends regulation to potentially hundreds of thousands of Canadian individuals. The number of entities that need to be taxed to achieve a subsidy are an infinitesimally minute fraction of what C-10 would allow the CRTC to capture. People are becoming aware of this gap. The disproportion between what C-10 says it aims at and what C-10 legally allows to happen is vast. When more people figure this out, questions will inevitably be asked as to what the government really intends for the regulation of Internet users and creators. C-10 appears to be a cover story for a much larger power grab.

Ladies and gentlemen, we thank you for your attention. We are available for your questions.

Respectfully submitted by

The Internet Society, Canada Chapter