



February 2, 2018

VIA E-File

Mr. Claude Doucet

Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON, K1A 0N2

Dear Mr. Doucet,

**Re: Part 1 Application to Disable On-Line Access to Piracy Sites, CRTC
File No 8663-A182-201800467, Procedural Request**

This constitutes a procedural request by the Canadian Internet Policy & Public Interest Clinic (CIPPIC) and OpenMedia with respect to the above-referenced Part 1 Application brought by a coalition of 25 stakeholders (the "Bell Proposal") seeking to establish a wide-ranging and unprecedented website blocking regime by which Canadian ISPS will be legally obligated to block any and all access to websites alleged to have "blatantly, overwhelmingly, or structurally engaged in piracy".¹ The Bell Proposal raises far-ranging and complicated questions of law, fact and policy, including many of which are novel in the sense that the Commission has never before been called upon to engage with them. In light of the complexity of this application, the extensive factual allegations made within it, its inclusion of areas of law which fall outside the Commission's historical area of expertise, and its potential for far-reaching impact and unintended consequences, this procedural request calls upon the Commission to exercise its discretion under section 7 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277 ("Rules") in order to vary the restrictive timelines and fact-finding that would otherwise apply to Part 1 applications.

Specifically, this procedural request seeks the following amendments to the standard Part 1 process:

¹ 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").

- That 30 day time limit generally permitted for Answers and Interventions in Part 1 Applications be extended to 60 days at minimum;
- In lieu of the 10 day time limit generally permitted for the Applicants' Reply in Part 1 Applications, that a second supplementary comment period be extended to all parties and interveners at least 30 days following the deadline for Answers and Interventions;
- That an interrogatory and 'Request for Information' round be added following the deadline for the Applicants' Reply, wherein all parties and interveners may address interrogatories to other parties and interveners;
- That a second right of Reply be extended to all participants following the deadline for interrogatories;
- That a public hearing be held to address the more complex aspects of this matter before the Commission;
- That a final comment period be included following the public hearing.

Absent these modifications, the Commission will lack a sufficiently diverse and tested factual and legal record on which to base its ruling. This is particularly so given that the Commission is called upon to undertake factual and legal questions that fall well outside its home statute and historical expertise,² namely those relating to the overall balance of rights embedded in the *Copyright Act*, RSC 1985, c C-42 as well as to the alleged scope of impact factually alleged by the Applicants as justification for the extra-ordinary remedy they seek. More generally, however, the issues raised by this proceeding are more conducive to examination in the form of a Notice of Consultation. The Commission should therefore consider exercising its discretion to stay this proceeding on its own initiative and establish a Notice of Consultation.

Basis for Relief

The Part 1 process is not well-suited to addressing complex matters with far-reaching implications. While it provides for interventions, the timeline allotted to interveners is short, providing respondents and interveners with minimal time to generate an evidentiary record, no latitude for interveners, respondents or the Commission to seek clarification of the Applicant's evidence, and only one opportunity for respondents and interveners to engage with the legal, factual and policy arguments presented by the Applicant. In the past, the Commission has recognized such shortcomings by adjusting procedural safeguards in a manner similar to that suggested herein where a proceeding

² *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 25, paras 14-15.

raised complex and far-reaching legal, factual and policy questions.³ The Bell Proposal raises precisely the complexity and potential for far-reaching impact that demands a fuller proceeding if the Commission is to base its findings on a sufficient record.

Legal Complexity & Novelty

The Bell Proposal seeks to establish a regime by which a newly established non-profit entity will be called upon to apply the *Copyright Act* in order to determine whether particular “location on the internet is blatantly, overwhelmingly, or structurally engaged in piracy”.⁴ The basis for this determination will be “both the experience in other jurisdictions and related factors in the *Copyright Act*”.⁵ The non-profit entity would make determinations of fact in applying these criteria to decide whether to ‘recommend’ a given online location be added to a website blocking list.⁶ The recommendation would then be forwarded to the Commission, which would then be called upon to decide whether or not to follow the recommendation and issue reasons in support of its decision.⁷ At this stage, the online location will be added to the blocking list and Canadian ISPs will be legally obligated “to prevent access” to these sites.⁸

The precise relationship between online locations qualifying for the blocking list and Canadian copyright law is not clear from the Bell Proposal. What is clear is that a website or other online location will need to be ‘unlawful’ to qualify for the blocking list.⁹ Presumably, then, the Bell Proposal calls upon the Commission to undertake a new role under which it will be obligated to make legal determinations under the *Copyright Act*, a role far removed from the Commission’s area of expertise and one with which the

³ For example, see: Telecom Commission Letter to Distribution List, Re Part I Applications Regarding Videotron’s Practices Related to its Mobile Wireless Unlimited Music Service”, September 28, 2015, CRTC File Nos 8661-P8-201510199 & 8622-V42-201510735, September 28, 2015, <http://www.crtc.gc.ca/eng/archive/2015/lt150928.htm>, “The Commission will address requests for information to Vidéotron to ensure that the Commission has all the information it requires to rule on the applications. These requests for information will be sent following the filing of Vidéotron’s answer and interested parties’ interventions. In addition, the Commission considers that given the nature of the issues in this proceeding, it would be beneficial for all parties to have an opportunity to file final submissions.”

See also: Telecom Procedural Letter to Distribution List, Re Part I Applications Regarding Videotron’s Mobile Wireless Unlimited Music Service – Further Process and Procedural Request, CRTC File No 8661-P8-201510199, November 13, 2015, <http://www.crtc.gc.ca/eng/archive/2015/lt151113.htm>; and Letter, Re: Revised process regarding an application by Benjamin Klass requesting the fair treatment of Internet Services by Bell Mobility, CRTC Reference Nos: 8622-B92-201316646, 8622-P8-201400142 & 8622-P8-201400134, January 31, 2014, <http://www.crtc.gc.ca/eng/archive/2014/lt140131.htm>.

⁴ Bell Proposal, para 85.

⁵ *Ibid.*

⁶ Bell Proposal, para 86 e).

⁷ Bell Proposal, para 87.

⁸ Bell Proposal, paras 87, 76 and 97.

⁹ Bell Proposal, para 76: “Instead, the role of ISPs would be restricted to implementing a legal requirement to prevent access to piracy sites, which are already unlawful, as directed by and identified by the Commission (on the recommendation of the IPRA).”

Commission has not had significant historical experience. The Bell Proposal suggests that this will not be problematic, as only online resources that are “blatantly, overwhelmingly or structurally engaged in piracy” will be added to the blocking list. Even accepting this premise, significant legal ambiguities will remain, in part because there has been only limited recourse to existing judicial mechanisms already offered by the *Copyright Act*. For example, in 2016, Canadian-based providers of online privacy services were blocked from receiving payments by PayPal under the theory that their privacy enhancing services infringed copyright law by allowing Canadian users to access geographically restricted content on paid services such as Netflix.¹⁰ As these services were blocked by PayPal on its own initiative, no injunctive relief was sought from the Courts and no ruling was ever issued on the question of whether accessing geographically restricted online content violates copyright law at all. Lacking expertise in substantive copyright, the Commission will require a detailed and robust record to fully comprehend the types of copyright legal determinations it will be called upon to resolve if it puts in place the Bell Proposal.

The website blocking mechanism advanced by the Bell Proposal also presents a novel application of copyright remedies. As the Bell Proposal notes, many common law jurisdictions include injunctive relief as available remedies for copyright infringement.¹¹ Canada’s *Copyright Act* provides a similar framework for injunctive relief as a remedy for copyright infringement.¹² The Bell Proposal seeks to override this framework that Parliament has encoded into the *Copyright Act* with one of its own making. One that is novel in terms of its intent to bypass the judiciary and empower a tribunal with no copyright mandate to make determinations of fact and law regarding infringement under the *Copyright Act*.¹³ Indeed, the Supreme Court of Canada has commented on the challenges that arise when an intermediary such as an ISP is called upon to remove access to copyright infringement access. In *SOCAN v CAIP*, the Supreme Court concluded that the most effective way to secure a vehicle for common carrier removal of content would be “the enactment by Parliament of a statutory ‘notice and take down’ procedure”.¹⁴ However, Parliament has refused to do so, opting instead for a ‘notice and

¹⁰ 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>.

¹¹ Bell Proposal, paras 63-65. See: *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors*, [2016] EWCA Civ 658, para 28, 57-58, 75-78; *Roadshow Films Pty Ltd v Telstra Corporation Ltd*, [2016] FCA 1503, paras 25-30, 35.

¹² See *Copyright Act*, RSC 1985, c C-42, sections 34 and 41.27; *Google Inc v Equustek Solutions Inc*, 2007 SCC 34. However, Canadian courts have not yet been called upon to determine the extent to which this injunctive power can be applied to Internet Service Providers and website blocking.

¹³ See footnote 11, above.

¹⁴ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427, para 127.

notice' procedure coupled with an ongoing ability for the judiciary to issue case-by-case injunctive relief.¹⁵ Assessing this proposal will therefore require an understanding of the *Copyright Act* and copyright law more broadly. As the Commission lacks expertise with copyright law matters, a complete and robust record should form the basis of any findings it issues in relation to said act.

Factual Complexity & Novelty

The Bell Proposal also calls upon the Commission to issue findings of fact in relation to the costs imposed by unauthorized online copyright infringement onto creative industries. The Bell Proposal calls upon the CRTC to find as fact that the online web resources it wishes to block "cause[] significant harm to Canada's social and economic fabric, including the broader Canadian economy, the telecommunications system, the cultural sector, the broadcasting system and consumers."¹⁶ The Bell proposal further calls on the CRTC to find that the to-be blocked web sites and services "represent a dramatic and growing threat to the Canadian creative and broadcasting sectors and the Canadian economy as a whole"¹⁷ and that the annual financial loss that results from accessing these services in Canada is in the hundreds of millions of dollars.¹⁸

It is on the basis of these findings of fact that the Bell Proposal asks the Commission to grant the extra-ordinary remedy it seeks—the creation of an expedited website blocking vehicle not available in other jurisdictions for copyright infringement or for other types of online harms in Canada.¹⁹ However, attempts to accurately measure the real costs imposed by online copyright infringement have been historically fraught with difficulties specific to the copyright context. For example, a 2007 economic study commissioned by Industry Canada found "a strong positive relationship between P2P file sharing and CD purchasing."²⁰ Another study conducted by the US Congress, Government Accountability Office in 2010 found that most industry attempts to estimate the cost of copyright infringement were fraught with methodological problems that undermined any conclusions regarding the magnitude of these costs and their impact on creative

¹⁵ Dara Lithwick, "Bill C-32: An Act to Amend the Copyright Act", *Library of Parliament*, Publication No 40-3-C32-E, July 20, 2010, <https://lop.parl.ca/Content/LOP/LegislativeSummaries/40/3/c32-e.pdf>, section 3.2.3, pp 23-24.

¹⁶ Bell Proposal, para 33.

¹⁷ Bell Proposal, para 52.

¹⁸ Bell Proposal, paras 44-45.

¹⁹ Bell Proposal, paras 66-67.

²⁰ For two historical examples itemizing these challenges, see: Michael Geist, "Gov't Commissions Study Finds P2P Downloaders Buy More Music", *MichaelGeist.ca*, November 2, 2007, <http://www.michaelgeist.ca/2007/11/ic-p2p-download-study/>; and 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>.

industries, were generally based on flawed presumptions regarding substitution rates, and frequently mis-attributed creative industry-wide revenue losses specifically to online copyright infringement.²¹

While there is no doubt that unauthorized copyright infringement imposes costs on the creative industry, the Bell Proposal calls upon the Commission to find as fact that the damage caused by the online resources it wishes to block is of such a magnitude that it justifies the extra-ordinary remedy sought. As the Commission lacks historical experience, Commission precedents or a developed costing methodology to draw upon in making such determinations of fact, this proceeding will require a robust record so that the Commission's findings are not premised on largely untested evidence.

Constitutional & Judicial Impacts

In an extensive legal opinion obtained by Bell Canada and attached to the Bell Proposal, it is argued that the website blocking vehicle the Proposal calls upon the Commission to put in place does not violate section 2(b) of the *Charter* and includes sufficient safeguards to meet the Commission's procedural fairness obligations.²² However, the impact on the constitutional right to freedom of expression and on due process obligations will certainly be contested in this proceeding, and the Commission will be called upon to make determinations as to the scope of such protections. In addition, the constitutionally protected right to privacy can be implicated by website blocking schemes of the type sought by the Bell Proposal.²³ Indeed, the Bell Proposal appears to anticipate that the Commission might be called upon to secure "a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate."²⁴

The potential impact on constitutionally protected rights and on due process that is implicated in this proceeding elevates its importance and should only occur—if at all—on the basis of a robust record.

²¹ 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>. See also, *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427, para 130: "It has been estimated that in 2002 sales of recorded music fell by almost 10 percent due to Internet-based file sharing (see Anonymous, "The music industry: In a spin", *The Economist* (March 2003), at p. 58), but this "estimate" is a matter of ongoing controversy. Some say Napster was a boon to the music recording industry."

²² Bell Proposal, Appendix A. See also: *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors*, [2016] EWCA Civ 658, para 75: "the website blocking orders sought ... would amount to a limitation on ... subscribers' rights under Article 11, of the Charter. ... any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms."

²³ *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, [2011] ECR I-11959, Court of Justice of the European Union (Third Chamber).

²⁴ Bell Proposal, Appendix A, p 53.

Conclusion

In light of the legal and factual complexity outlined above as well as the potential impact on constitutionally protected rights raised by the Bell Proposal, we respectfully ask that the procedural request we seek be granted. In addition, due to the short timeline of Part 1 Applications, we respectfully request that the Commission expedite its consideration of this procedural request and attempt to rule on it within one week.

Yours Truly,

A handwritten signature in black ink that reads "Tamir Israel". The signature is written in a cursive, flowing style.

Tamir Israel

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