



ASIAN TELEVISION NETWORK INTERNATIONAL LIMITED

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**Via e-mail [ic.btlr-elmrt.ic@canada.ca](mailto:ic.btlr-elmrt.ic@canada.ca)**

Ms. Janet Yale  
Chair  
Broadcasting and Telecommunications Legislative  
Review Panel  
c/o Innovation, Science and Economic Development Canada  
235 Queen Street, 1<sup>st</sup> Floor  
Ottawa, Ontario  
K1A 0H5

Dear Ms. Yale:

**RE: The Consultation Process Regarding the Broadcasting and  
Telecommunications Legislative Review.**

1. Enclosed is Asian Television Network's (ATN) submission to the Broadcasting and Telecommunications Legislative Review Panel. First I would like to thank the members of the Broadcasting and Telecommunications Legislative Review (BTLR) Panel for inviting me to make an oral presentation on the 9<sup>th</sup> of November 2018 in Toronto. Our exchange was a great experience and very enlightening.
2. As I pointed out during my oral presentation we have one issue to raise the BTLR panel that needs to be addressed by legislative amendments and that is the on-going programming piracy that is taking place. You will find that a substantial amount of information included in our submission was drawn from application FairPlay Canada that was filed with the CRTC earlier in 2018 to address this very issue. The application was filed by a coalition of nearly 30 directly affected broadcasters, cable companies, unions, guilds and associations representing Canadians that work in the film & television industries, independent production and media companies, distributors,

exhibitors and Internet service providers (ISPs). ATN was a party to this application as we, like others, are greatly affected by programming piracy.

3. In Telecom Decision CRTC 2018-384, the Commission determined that it does not have the jurisdiction under the Telecommunications Act to implement the steps proposed in the FairPlay Canada's application to address the issue of programming piracy. What FairPlay Canada had proposed were measures to combat the piracy problem including that the CRTC should create an independent agency to identify websites and services that are blatantly, overwhelmingly, or structurally engaged in piracy. Following due process and subject to judicial oversight, ISPs would ultimately be required to disable access to the identified piracy sites and services.
4. It is important to note that each of the stakeholders of FairPlay Canada supports net neutrality and the free flow of legal content on the Internet. The proposed approach does not raise net neutrality issues. ISPs remain neutral and simply implement decisions of the CRTC or other selected regulatory body to restrict the distribution of **content that is unlawful**. Net neutrality does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online. More than 20 of Canada's international peers have established similar regimes, including the UK, Australia, France, Belgium, Portugal, Spain, Italy, Ireland, Sweden, Norway, Finland, and Denmark. Some are administered by courts and others by administrative agencies like the CRTC.
5. Piracy, in particular ILLEGAL IPTV SET TOP BOX PIRACY, is a large and growing problem that threatens the massive employment, economic, and cultural contributions of Canada's film, television, and music industries. Canada has to undertake the necessary legislative measures to correct this problem that has been addressed by other countries.
6. The following internet link will show the efforts that ATN has undertaken to address the issue of programming piracy in the past years: <https://vimeo.com/299307189> and the effect that it has on employment in the programming productions sector..
7. Thank you for this opportunity to make our concerns known and to propose regulatory measures to address the programming piracy issue that is so important to us and many other stakeholders operating in the broadcasting industry in Canada. We hope the information provided will enlighten the Panel members in making recommendations to the government.

Respectfully submitted,

*(Tony Lacombe for)*

Dr. Shan Chandrasekar  
President and Chief Executive Officer

- c.c.
- The Honorable Prime Minister of Canada, Justin Trudeau.
  - The Honorable Minister of Innovation, Science and Economic Development, Navdeep Singh Bains.
  - The Honorable Minister of Canadian Heritage, Pablo Rodriguez.
  - The Honorable Minister of Tourism, Official Languages and La Francophonie, Mélanie Joly.
  - The Honorable Leader of the Oppositions, Andrew Scheer

**SUBMISSION TO THE BROADCASTING AND TELECOMMUNICATIONS LEGISLATIVE  
REVIEW (BTLR) PANEL  
BY  
ASIAN TELEVISION NETWORK (ATN)**

**8 JANUARY 2019**

## Executive Summary

- i. Asian Television Network International Limited (ATN) operates as programming undertaking since 1975 and has the largest collection of South Asian Canadian content in its television broadcasting library. It has been working hard to be an important part of the regulated Canadian broadcasting system and serve the ethno cultural communities of Canada.
- ii. ATN has been greatly negatively affected economically by the increasing presence of programming piracy occurring in Canada. Programming piracy is occurring since more and more programming is being made available through the Internet (the advent of digital media) made available by Internet Service Providers (ISPs) operating in Canada. To that end, earlier this year ATN along with more than 25 directly affected stakeholders (FairPlay Canada) have asked the CRTC to implement a process whereby piracy sites would be blocked by ISPs in a manner that would not impede on net neutrality. Similar approaches have already been implemented in more than 20 countries in order to combat the emerging threat of programming piracy affecting their constituents. The CRTC determined that it does not have the jurisdiction under the Telecommunications Act to implement the steps proposed by FairPlay Canada.
- iii. Programming piracy is causing 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. Piracy diverts potential customers away from the Canadian broadcasting system in favor of illegal programming services that do not acquire the rights to the programming being sold to their customers. The subscriptions to legitimate distribution undertaking in Canada is decreasing every year, such that, since 2012 it has decreased by 1.1 million households while in the same period approximately 700,000 additional dwellings were reported.
- iv. Piracy boxes are no longer hi-tech items but can be found with regular consumer goods. Digital media has made it possible to create a broadcasting distribution system that is parallel to the television distribution system that has been in place for many years. While some of the players in the digital media are legitimate, too many of the operators are illegitimate by not securing the necessary rights to the programming provided to their customers.

- v. ATN supports net neutrality but some solutions have to be found to ensure that programming piracy will be a thing of the past in the near future. Some have suggested that an amendment to the Copyright Act along with the necessary associated process could make it possible to address programming piracy in a satisfactory manner. If this is possible ATN would support such a change. However, ATN is more of the view that this issue can be addressed by the CRTC since one of its primary roles is to regulate broadcasting in Canada. To that end, we believe that amendments to **Sections 4, 36 and 41 of the *Telecommunications Act*** would include broadcasting activities and allow for the CRTC to develop fair and adequate procedures to implement the blocking of unlawful content and programming piracy sites in Canada. More specifically, Section 4 would be amended to include broadcasting and not exclude it. Section 36 would be amended to include broadcasting/programming content and limit its application to lawful programming content.

## Background

1. Asian Television Network International Limited (ATN), a publicly traded company on the TSX Venture exchange, is a long established Canadian company that has grown in stature along with the fast expanding South Asian population in Canada. ATN pioneered South Asian programming on television in Canada through its first venture as programming undertaking since 1975. Today it has evolved into one of the recognized players in the Canadian independent media industry, serving Canada's multi-cultural population and also serving the South Asian Diaspora across Canada.
2. The President and CEO of ATN is Shan Chandrasekar. Dr. Chandrasekar started his broadcast career in Canada after graduating from McGill University in Montreal with a Master's degree. Dr. Chandrasekar was inducted into the "Canadian Broadcast Hall of Fame" in November 2004. He was on the Board of Directors and Vice-Chairman of the Specialty and Pay Television Section of the Canadian Association of Broadcasters (CAB). Shan was Conferred an Honorary Doctorate (Doctor of Laws Degree) by York University in Toronto in June of 2010.
3. ATN operates over fifty specialty television digital channels including a CRTC licensed legacy service providing television programming in several South Asian languages and English. The company offers its flagship ATN-HD general interest service, several channels in Hindi, Urdu, Punjabi, Tamil, & Bangla, Bollywood movie channels and a variety of channels that include sports, news, music & lifestyle channels, and several regional language channels. ATN operates a South Asian Radio Service on Sirius XM Satellite Radio Service across the

United States and Canada. Some ATN content is also made available on Bell mobile phone service that supports video. ATN has programming alliances with leading international broadcasters.

4. ATN channels are available on various Cable, Satellite and IPTV Platforms across Canada. ATN is a Business Excellence Award winner from the Newmarket Chamber of Commerce. The Founder of ATN was a 2010 Ernst & Young Entrepreneur of the Year Award finalist, and has been inducted to the Canadian Broadcast Hall of Fame. ATN was a broadcast partner for the Vancouver 2010 Winter Olympic Games & London 2012 Summer Olympic Games, creating history by delivering more than 100 hours of live coverage in six languages on seven channels across Canada.
5. ATN has the largest collection of original South Asian Canadian content in its television broadcast library. The majority of these programs are exclusively produced by ATN over the last four decades. The archives are invaluable and reflect the community's contribution to art, culture, education, music, dance, cinema, sports, politics, business and public service. ATN's past and present productions also include original Canadian content with International celebrities from overseas. ATN has the infrastructure to do high quality productions in HD with two fully operating studios and two more under construction. ATN has ten post production editing suites fully equipped. It has several EFP (Electronic Field Production) cameras with vans and a mobile unit with multiple cameras. ATN has satellite down-link facilities and fiber connectivity across Canada.
6. We have worked hard to gain the trust of Canada's ethno cultural communities we serve by providing them with news, entertainment and lifestyle programming which serves their needs. We have integrated our programming into the lives of the communities we serve and understand their needs and aspirations. In particular we have broad experience and practice in balancing the competing interests and desires of diverse ethnic communities that may speak different languages, come from different countries of origin, represent different generations and levels of societal assimilation and come from different walks of life. This is an especially relevant skill set for managing a multi-ethnic, multi-lingual specialty TV service.
7. We have also worked hard to be an important part of the regulated Canadian broadcasting system and to fully respect the CRTC's rules and procedures. We have honored all of our commitments to the Commission. Our lifeblood is Canadian ethno cultural specialty television. That is our only business and it is a business we know very well. This being said, we are by no means a large broadcaster and our services are not lost in the balance sheet like it would be for a major vertically integrated broadcaster.

8. ATN has one issue to raise with the BTLR Panel as you have heard during my oral presentation and for us it is an extremely important one. It is the issue of programming piracy which is a large and growing problem that threatens our livelihood. It is a global problem but it affects us more than it could other larger players since we are a relatively small broadcaster. We estimate that since piracy of programming services has surged some 5 years ago ATN has since experienced a loss of revenue in the order of \$ 9,000,000.00 (nine million dollars) to this illegal activity..
9. Programming piracy is threatening the massive employment, economic and cultural contributions of Canada's film, television, and music industries. Although broadcasters and independent producers are accustomed to deal with the Broadcasting Act and associated regulations and policies, the issue of programming piracy is tied to the telecommunications side of the CRTC's responsibilities as it is happening through Internet service providers (ISPs). Piracy has occurred with the advent of digital media and is occurring since more and more of programming services have been made available through the internet and the World Wide Web. Some of the programming services available on the digital media are legitimate and operate in respect of the existing legislations. However there are too many of the programming services available via digital media that are illegitimate by not paying for programming that they sell to their subscribers.
10. Canada's telecommunications system must respond to the economic and social requirements of Canadian citizens and businesses, and must safeguard, enrich, and strengthen our social and economic fabric.<sup>1</sup> In some cases, that requires telecommunications service providers to participate in the solution to a problem they do not cause but which they are well placed to address.<sup>2</sup>
11. Internet piracy is a significant and growing threat to Canadian artists and the broader Canadian creative sector, Canadian broadcasters and legal distributors, as well as the Canadian economy. According to Sandvine 2017 report (pages 5 & 6) piracy sites now regularly reach up 15.3% of Canadian households (more than 2 million households) through illegal set top boxes. This is up from zero 5 years ago. Last year there were at least 2.5 billion visits made to piracy sites from Canada<sup>3</sup> and Canadian productions were pirated globally hundreds of millions of times. This activity infringes the rights of Canadians who create, produce, invest in, and disseminate creative works, and makes it difficult if not impossible to build the successful business models that will meet the evolving

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<sup>1</sup> Telecommunications Act, sections 7(a) and 7(h).

<sup>2</sup> For example, 911, emergency alerting, and VRS.

<sup>3</sup> MUSO, Annual Piracy Report TV – Canada (2017),

demands of Canadians, support Canadian content production, and contribute to the Canadian economy.

12. In 2016, the Department of Canadian Heritage initiated a substantial consultation process to assess the status of Canadian content creators in a digital world. As that consultation heard:

*There is a need to ensure that Canadian creators share in the financial rewards resulting from increased dissemination of cultural content via digital channels. Likewise there is a need to foster increased re-investments in order to promote the creation of Canadian digital cultural content. Doing so will help ensure the longer term financial viability of Canada's cultural content creators who may otherwise have to seek out other career paths in order to support themselves<sup>4</sup>*

13. Piracy undercuts all of these objectives – it robs Canadian creators of the financial and other intangible benefits of the creation of cultural content and guarantees that they do not share in the rewards from its increasing dissemination. Investing in programming is already risky, and becomes increasingly unviable if even the rare hit cannot be effectively monetized because it is pirated online. As a result, piracy undermines the creation of cultural content and threatens the viability of Canada's cultural sector and therefore the expression of uniquely Canadian perspectives and identities. It also puts at risk the economic contribution of a film and television production sector that, in 2015-2016, generated \$8.5 billion for the Canadian economy and contributed over 140,000 jobs.<sup>5</sup>
14. The harm to legitimate distributors such as licensed BDUs or over-the-top (“OTT”) digital services is also significant and often felt first and most directly. The experience of the affected stakeholders with their own customers suggests that households that engage with piracy sites and services (such as the use of illegal set-top-boxes) are many times more likely to cancel legal distribution services or not sign up for them in the first place. This results in the loss of potentially hundreds of millions of dollars in revenue for distributors that would otherwise support investment in modern telecommunications infrastructure in Canada, in the Canadian economy, and in the Canadian creative sector.<sup>6</sup>
15. This economic harm caused by piracy also results in millions of dollars in lost tax revenues for the government. Nor is piracy a benefit to consumers. Consumers may pay for a piracy subscription or device only to be left without recourse when

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<sup>4</sup> What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, “Key Themes” at page 8.

<sup>5</sup> CMPA, *Profile 2016* at page 4.

<sup>6</sup> Similarly, for the music industry piracy can result in cannibalizing of music purchases and also discourages subscription to legal streaming services particularly premium subscription services that allow users to store music they like for offline listening. These losses deprive the rights holders of an important source of compensation.

it does not work as promised. More importantly, piracy sites expose consumers to privacy risks, hacking, identity theft, and malware. That directly harms consumers and undermines consumer confidence in the communications system and digital marketplace. Piracy also increases costs for consumers that choose legal ways of accessing content, and as a result end up subsidizing it for those who choose to access content through piracy sites.

16. For these same reasons piracy also undermines innovation and the digital economy. New business models in this economy depend on the integrity of digital markets, including the ability to rely on copyright to determine the sites and services on which creative content is made available. Piracy makes those business models exceedingly difficult; successful innovation in the digital economy will take place in markets that effectively mitigate the impact of copyright theft.
17. Piracy is illegal under the *Copyright Act* and the *Radiocommunication Act*. We refer to a specific aspect of the piracy problem – namely, the availability on the Internet of websites, applications, and services that make available, reproduce, communicate, distribute, decrypt, or decode copyrighted material (e.g., TV shows, movies, music, and video games) without the authorization of the copyright holder, or that are provided for the purpose of enabling, inducing, or facilitating such actions.
18. While there is no dispute that piracy is illegal, the problem is not easily addressed because its borderless nature renders the tools currently available in Canada largely ineffective. That is because piracy relies on the anonymous and global nature of the Internet, which allows pirate operators to disguise their true identities and piracy sites to be accessible in Canada while operating out of jurisdictions in which it is impossible or impractical to take the enforcement measures required to protect the Canadian market.
19. Thus, the nature of online piracy means that if the Canadian creative sector is left to rely solely on conventional domestic legal remedies, it will be doomed to fail. It is impossible to effectively combat piracy in Canada in the digital age by pursuing pre-digital legislation and regulations against pirate operators. The harm caused by piracy combined with its resilience in the face of traditional legal remedies and law enforcement strategies has led most of Canada's closest international partners to recognize that all players in the piracy ecosystem have a role to play in combating it. This includes intermediaries such as internet service providers (ISPs), hosts, payments processors, search engines, domain name registrars, and advertising networks, all of whom can be well placed to contribute to addressing this important issue. The appropriate role of intermediaries in combating IP infringement in the global Internet environment has also been recently recognized in Canada, both in a report commissioned by the Department

of Canadian Heritage last year and by the Supreme Court of Canada in the *Equustek* case.<sup>7</sup>

20. While there is no single solution to the piracy problem and countries around the world have adopted a variety of new measures to combat the emerging threat, one particularly common and effective approach has been the implementation of rules to require ISPs to disable access to specified piracy sites for their customers:

- In 2001, the European Union issued a directive requiring all member states to make it possible to obtain a mandatory order against intermediaries whose services are used to infringe copyright.<sup>8</sup>
- In 2003, the United Kingdom, despite determining that an injunction against ISPs was already available at common law, introduced a specific regime to make the process for obtaining such orders faster, more efficient, and more certain for all parties. The regime has been in place for more than a decade and orders disabling access to piracy sites have been successful in reducing rates of piracy and increasing the rate at which customers purchase creative content legally.<sup>9</sup>
- In 2006, France introduced a regime to require ISPs to disable access specified piracy sites and also require other intermediaries to remedy infringements to which they contribute.
- In all, more than 20 countries around the world including, in addition to the UK and France, Australia, South Korea, Norway, Denmark, Spain, and Portugal, have introduced specific regimes to make it possible for rights holders to request that ISPs be required to disable access to specified piracy sites for their customers. These include both processes operated through the courts and administrative regimes.

21. Disabling access to specific piracy sites is a practical and effective tool in the fight against piracy because it engages the ISP networks that consumers must rely on to access piracy sites and because it can be implemented entirely within the domestic legal and regulatory systems. At the same time, because the ISP's role is limited to disabling access to piracy sites as determined by the

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<sup>7</sup> See Examination of the "follow-the-money" approach to copyright piracy reduction, Final Report prepared by Circum Network Inc. for Canadian Heritage (14 April 2016) (describing a global piracy ecosystem that includes hosts, ISPs, search engines, advertising networks, and payment processors, and recommending that rules regarding each of them be examined) and *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 (finding that Google, as an intermediary, could be required to take steps to combat the infringement of IP rights globally).

<sup>8</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

<sup>9</sup> Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior, Danaher *et al.*

Commission, the system proposed does not offend any principles underpinning net neutrality.

22. To put the problem in perspective piracy is not a new problem but over time it has shifted from the bootlegging of physical media and theft of satellite signals to a decentralized network of anonymous and clandestine online operations, where piracy sites profit from charging users for unauthorized access to content and selling advertising associated with that content. The Internet has had a profoundly positive impact on Canadian society and individual Canadians but it also has exacerbated the piracy problem, making it easy for pirate operators to make their pirate sites available in Canadian homes.
23. The nature of online piracy itself is also changing, while the problem continues to grow overall. In particular, “peer-to-peer” file sharing (torrents, associated with sites such as The Pirate Bay) was until recently the most common means of accessing pirated content in Canada but has now been surpassed by streaming of pirated content. Today, up to 85% of Canadians’ engagements with online piracy are through such streaming sites.<sup>10</sup> Piracy is also evolving in different forms in the music sector. Stream ripping is the new leading form of music piracy.<sup>11</sup>
24. Content is accessed on piracy sites through web browsers and, increasingly, through applications that can also be loaded on phones, tablets, and set-top-boxes. These applications provide a more user-friendly interface that provides instant access to thousands of illegal streams available from a variety of piracy sites to find the “best” stream. This makes accessing piracy sites easy and effective for even the least technologically sophisticated user, and increases the importance of solutions that do not require protracted litigation against every one of the sites involved
25. The illicit and online nature of piracy means that it is difficult to track and quantify, but there is compelling evidence that the phenomenon is huge and growing: Because of its illicit and underground character, it is impossible to determine the full extent of the financial harm from this volume of piracy, which impacts rights holders,<sup>12</sup> distributors, exhibitors, and their legal partners and customers (let alone non-financial harms such as to licensing and windowing strategies, brand and reputational impacts from unauthorized uses, the destruction of legitimate commercial relationships, and the spread of malware and high-risk advertising). Nevertheless, even estimates that do not capture this full spectrum of harms suggest that globally piracy sites have generated approximately \$227 million in

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<sup>10</sup> MUSO Report.

<sup>11</sup> IFPI, Global Music report 2017, p.37.

<sup>12</sup> Rights holders can include content creators, distributors and exporters, and broadcasters, among others.

advertising revenue alone<sup>13</sup> and that piracy had an estimated commercial value (in this case of movie piracy alone, excluding television) in 2015 of \$160 billion.<sup>14</sup>

26. Piracy causes 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. Cultural industries employ 630,000 or ~4% of Canadians and contribute \$55B or ~3% to Canada's GDP.<sup>15</sup> Within this industry, according to the CMPA's 2016 Profile, film and television production accounted for 140,000 FTE jobs, \$8.5B in GDP, and \$3.3B in export value<sup>16</sup> – and that does not include the thousands of jobs and billions of dollars in economic value contributed by the other activities of broadcasters, broadcast distribution undertakings ("BDUs"), movie distributors, cinemas, retailers, and others impacted by piracy. Left unchecked, piracy will dramatically erode the contribution of these companies and their employees to Canada's digital and creative economies.
27. It does so by denying rights holders the right to control the quality and integrity of their works, when and how they are viewed, and the compensation they are entitled to seek in the market for the hard work, creativity, expertise, and resources they have invested in their works. This negatively affects their earnings and profitability, leading to reduced employment and fewer opportunities for writers, producers, composers, performers, costume designers, and other content creators to make their living producing content. By denying content creators fair compensation for their work, piracy also reduces the ability of content creators and other rights holders to develop, produce, and disseminate new content, undermining Canada's social fabric.
28. The effects on other legitimate participants in the ecosystem are the same. Rights holders deal with partners operating all manner of legitimate distribution models, including theatres, conventional and specialty television stations and the BDUs that distribute them, over the top services like Netflix or CraveTV, and online and bricks-and-mortar retailers. Piracy diverts potential customers away from these legitimate channels in favour of illegal services that do not negotiate or pay neither acquires rights nor complies with licensing rules. Indeed, in Australia the impact of piracy on Ten Network was described by its co-chief executive as being in the hundreds of millions of dollars and a direct cause of the potential bankruptcy of the network.<sup>17</sup>

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<sup>13</sup> Media Link/Digital Citizens Alliance, *Good Money Gone Bad: A Report on the Profitability of Ad-Supported Content Theft*, February 2014.

<sup>14</sup> Frontier Economics, *The Economic Impact of Counterfeiting and Piracy*, February 2017.

<sup>15</sup> Canadian Heritage, *Creative Canada: Policy Framework* (2017), at page 7.

<sup>16</sup> This includes \$2.64B in foreign location and service production that contributes 54,900 jobs.

<sup>17</sup> <https://torrentfreak.com/pirates-cost-australias-ten-network-hundreds-of-millions-of-dollars-170616/>

29. While adapting funding models to the digital age is a complicated challenge, an essential step will be to ensure rights holders can appropriately monetize their content in a digital marketplace, which requires strong measures to stop the drain that piracy causes on an industry already under stress. Ensuring that Canadian content creators and distributors are actually paid for the work they produce and distribute (regardless of its distribution platform), rather than that work being appropriated by pirate operators and the pirate sites they operate, is an important and obvious step towards reinforcing the financial viability of the sector that can be achieved without requiring additional access to scarce government (or other) funding.<sup>18</sup> As the Heritage Consultation recognized, “*much of the needed change discussed involves collaboration between the Department of Canadian Heritage, other government departments, provinces and territories, as well as the public and private sectors*”.<sup>19</sup> The initiatives we are proposing would be an excellent example of such broad-based collaboration.
30. The harm caused by piracy is not just abstract but real, and it affects real projects. To take just one specific example, veteran Canadian film producer Don Carmody describes the piracy of his film *Goon* as like nothing he had experienced in four decades of filmmaking. He estimates that the film lost at least \$1 million of potential box-office sales in Canada to piracy and likely millions of more in subsequent DVD or download sales.<sup>20</sup>
31. As well as the creative sector, piracy directly harms the legitimate Canadian broadcasting system. Broadcasters make significant investments in their own programming and programming they develop jointly with independent producers. In exchange, broadcasters receive copyright in that programming, which they then monetize through a combination of traditional television channels and new OTT platforms in which they are also investing. These investments are extremely risky for both the producer and the broadcaster, as it is impossible to predict in advance what will be a hit or even which projects will break even. When a work is successful, it must pay for itself and for all the less successful productions in which investments had to be made to find that one hit. If hits can't be broadly monetized, broadcasters and producers will become increasingly reluctant to make the investments necessary to produce them.<sup>21</sup>

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<sup>18</sup> This is particularly important because, as the study recognized: “*There is general recognition that increasing the tax burden on foreign and/or Canadian enterprises to fund creative development is likely to have a direct impact on Canadian consumer. They were worried this would result in limiting affordability and access to high-speed Internet connections.*” What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, (Heritage Consultation) “Key Themes” p 10.

<sup>19</sup> Heritage Study, p 10.

<sup>20</sup> “Battling Bit Torrent: Can the movie studios beat online piracy?”

(<http://www.canadianbusiness.com/technology-news/battling-bit-torrent>)

<sup>21</sup> A similar situation prevails in the music industry, which is also a risky business. The inability to generate adequate incomes will affect risk-taking and will result in a less diversified music offering.

32. Legitimate broadcasting distributors (BDUs) face a similar impact as Canadians turn to piracy sites instead of legitimate subscriptions to obtain access to creative content. BDUs will not continue to invest in new telecommunications infrastructure, technologies, and distribution models if piracy, which relies on stolen content and existing Internet connections (often the result of investment by the same legitimate BDUs), continues to compete with them at no or little cost.
33. The impact on the broadcasting system is already being felt. Lawful television subscriptions are declining in Canada. According to CRTC data, cable, satellite, and IPTV BDUs in Canada collectively have lost subscribers every year since 2012, losing more than 400,000 totals over that time despite the number of occupied private dwellings increasing by approximately 700,000 during the same period.<sup>22</sup> While it is impossible to determine precisely how many of these 1.1 million households are lost subscribers due to piracy, the experience of relevant members of the coalition with their customers confirms that consumers who engage with piracy sites are many times more likely to cancel legal services or never subscribe to them in the first place than are those that do not engage with piracy sites.
34. The average television subscriber in Canada likely accounts for between \$50 and \$80 in monthly revenue to a legal BDU.<sup>23</sup> If even one third of the lost or never obtained subscriptions are in part attributable to piracy, the lost revenues for BDUs would be between \$220 million and \$350 million annually. There would be additional revenue losses from subscribers that do not cancel their subscriptions entirely but do reduce the size of their subscriptions by eliminating channels they can easily replace with piracy (such as those showing scripted programming and movies).
35. This estimate is broadly consistent with figures reported by Sandvine in a recent *Global Internet Phenomena* report in which it found that subscription piracy services alone result in an estimated annual financial loss to the industry in North America of US\$4.2 billion. If approximately one tenth of those losses are attributable to the Canadian market, the impact here would be approximately \$500 million.
36. This economic harm has an additional impact on government finances, resulting in millions of dollars in lost revenues from sales and corporate taxes that would be paid by legitimate participants in the cultural economy.

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<sup>22</sup> Statistics Canada, *Dwelling counts, for Canada, provinces and territories, 2016 and 2011 censuses – 100% data*, available at: <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm?Lang=Eng&T=108&S=50&O=A>

<sup>23</sup> See Scotiabank, *Converging Networks* (2015), estimating that each television service subscriber represented approximately \$53.36 to \$77.67 in monthly revenues (\$640.32 to \$932.04 in yearly revenues) for Canadian BDUs; according to the CRTC's most recent financial reports the total revenue for all BDUs is approximately \$65 per subscriber per month.

37. Moreover, because Canadian BDUs contribute 5% of their revenue directly to Canadian production funds this is a direct loss of between \$11 million and \$25 million or more every year. More importantly, hundreds of millions of dollars are no longer invested by BDUs, both in affiliation payments to Canadian broadcasters that are ultimately directed to programming and in Canada's telecommunications infrastructure.<sup>24</sup>
38. Piracy also harms consumers, exposing them to serious privacy, hacking, identity theft, and malware risks, all of which directly harm Canadians, their ability to use the communications system, and their confidence in the communications system and digital marketplace. These risks have been well-documented:
39. Our experience with programming piracy has evolved such that piracy boxes are no longer hi-tech but can be found with regular ordinary consumer goods. Piracy is open, flagrant and often connected to organized crime. It is making use of digital media, existing parallel to television distribution in place for many years, and is exempt from CRTC regulatory process. Piracy is an outright theft and seems to operate beyond the reach of the Criminal Code.
40. In reality operations of piracy sites exist on a global basis where a head end is created off shore and set top boxes intended for piracy or adapted for piracy within a legitimate box are sold from a store in various worldwide locations and fees are collected on a monthly basis. The head end operation steals the signal generally at its source, or where it seems convenient, is encrypted and distributed to be accessible over the set top box upon payment of a monthly fee.
41. We also have discovered that local sales agents sell paid advertising to be placed on pirated channels much in the manner of how legal television and specialty services do. As a first, this creates a direct economic impact for legal television and specialty services by reducing viewership and advertising revenues which translates to less investment reaching the creative community for the production of programming.
42. Furthermore, programming piracy activities create an underground unreported and unrecorded economy. It is a cash economy and an almost primitive economy where foot soldiers, more in the mode of street traffickers of drugs, go round collecting monthly or quarterly revenues from piracy subscribers. All the income is unreported and there is no tax of any kind paid by any one on that income. That revenue or most of it is sent off shore unrecorded and through illegal routes. This may go to support terrorism or any other criminal activity.

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<sup>24</sup> The 2017 Communications Monitoring Report reveals that Canadian BDUs paid \$3.034 billion in affiliation fees to Canadian discretionary services in the previous year, representing approximately 35% of all BDU revenues. Accordingly, a reduction in BDU revenues of between \$220 million and \$500 million would be associated with a reduction of affiliation payments to Canadian programmers of between \$77 million and \$175 million annually.

## Analysis and Recommendations

43. At the outset we would like to note that we are aware that there is a logical drive to do away with the current Broadcasting Act and Telecommunications Act and replace them with a new combined Legislation. It is logical since both of these communications sectors are regulated by the CRTC and even more so since unlike when these two legislations were created there are increasingly more broadcasting activities that are present over the Internet, which is regulated by the Telecommunications Act. Other countries such as the U.K. and Australia have already done so.
44. ATN supports any recommendation in that direction with the caveat that it is used as a measure to correct the programming piracy problems that is currently occurring. More and more boxes like Kodi with requisite software pre-installed are flooding the marketplace to stream stolen content on the pirate programming services. We are of the view that the combination of both existing legislations will require more than five years to be put in place. Therefore, ATN submits that amendments to existing legislations require to be implemented AS FAST AS POSSIBLE to get on top of this problem.
45. As odd as it may be our laws, as interpreted and enforced currently, support and even pamper programming piracy that is taking place by availing it shelter under the umbrella of Net Neutrality. Our (Canadian) net neutrality is amoral in that it does not distinguish between lawful and unlawful radio-telecommunication. Section 36 of the Telecommunications Act, ... (the Act) provides as follows:

‘Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunication carried by it for the public.’
46. Upon review of CRTC decisions in regards to Section 36, the reality is that it has not been able to deal with viral hate propaganda over the net under our present framework and that is evident.
47. Currently with the existing Section 36, leaves the CRTC unequipped to undertake proper course of action to the content of messages being carried by Canadian carriers. It is not empowered to make a determination that content is lawful or unlawful. Therefore, as it stands Section 36 nurtures unlawful (i.e. child pornography) or pirated content over Canadian carriers and at that creating a disservice to Canadians.
48. ATN first and foremost wants to make it clear that it supports net neutrality and the free flow of legal content on the internet. Given the information provided above, measures have to be put in place to restrict the distribution of content that is unlawful such as programming piracy. More than 20 of Canada’s international peers have established similar regimes, including the UK, Australia, France, Belgium, Portugal, Spain, Italy, Ireland, Sweden, Norway, Finland, and Denmark.

Some are administered by courts and others by administrative agencies like the CRTC.

49. In our view there is a need to amend **Section 4 of the Telecommunications Act** so as to allow regulating broadcasting/programming communications over the Internet. Also, **Section 36 of the Telecommunications Act** needs to be amended to include broadcasting/programming content and limit its application to lawful programming content. Such that upon application, and not only from a Canadian carrier, the Commission could direct Canadian carriers or/and ISPs to block any unlawful content. In line with these, regulatory measures will need to be developed for a transparent process on how unlawful content will be determined and dealt with, including penalties and websites blocking notifications in the event of violations.
50. Along with this change, we are of the view that the Criminal Code and the Copyright Act need to be amended to better protect producers and broadcasters from piracy of programming intellectual property and to treat this in a manner in which we deal with the theft of tangible property.
51. ATN has reviewed the submission that BELL recently provided to the Standing Committee on Industry, Science and Technology regarding the ongoing **Statutory Review of the Copyright Act** and supports its position in regards to necessary measures needed to combat online content theft. More specifically the amendments needed to **Section 42(1) of the Copyright Act** to make existing offences technology neutral, establishing a public body to enforce IP protection and provide for injunctions to apply to intermediaries such as ISPs and set top boxes retailers. Recognizing that the BTLR Panel has not been tasked to consider amendments to the Copyright Act, ATN prefers the alternative of introducing the necessary amendments to the Telecommunications Act so that the regulatory process to eliminate programming piracy would be under the purview of the CRTC.
52. ATN would like to observe that programming piracy is not the first issue that was created by the arrival of digital media over the internet. As a first example, Canadians spelled out clearly and loudly on how unwanted telephone calls at their home by telemarketing businesses were a nuisance and a threat to privacy. To address this problem and to support a safe telemarketing environment Section 41 of the Telecommunications Act was amended allowing creating a Do-Not-Call List (DNCL) which permitted Canadian to register on the list that telemarketing operators would subscribe to and not call Canadians that are registered on the list. Also important, monetary penalties were accepted in case of failures by telemarketing operators.

53. Second, in regard with spam communications that Canadians were experiencing through their e-mail services. Corrective measures were taken while at the same time promoting the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities. Again Section 41 of the Telecommunications Act was amended and other legislative measures were enacted affecting the *Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act* and chapter 23 of the *Statutes of Canada, 2010*, in 2014 in order to address the spam communications issue. The CRTC developed Regulations and guidelines in support of Canada's anti-spam legislation (CASL) including penalties in case of violations. Basically, all these measures were put in place to ensure consent was obtained by commercial establishment before sending electronic messages of commercial nature to Canadians.
54. The observation that we would like to make is that the two processes put in place for DNCL and CASL noted above were important for all Canadians that were affected by these new phenomena created by the arrival of digital media. It is accurate to point out that these corrective measures were in fact implemented to "prevent inconvenience or nuisance" being experienced by Canadians. In the case at hand with programming piracy the phenomenon does not affect Canadians directly but it does indirectly. The direct impact in this case is rather felt by programming producers, broadcasters, distributors and by the Canadian government. Here the result is a negative economic impact on these stakeholders.
55. Certainly, if corrective measures were being able to be put in place for DNCL and CASL to protect Canadians from the nuisance and inconvenience being experienced it time that corrective measures be put in place to protect programming producers, broadcasters, distributors from the negative economic impact caused by programming piracy. ATN proposes that if the Copyright Act cannot be amended to put in place adequate measures to block ISP sites that distribute programming piracy in Canada, then as an ***alternative measure should be taken to amend Sections 4, 36, and 41 if need be, of the Telecommunications Act*** to prohibit unlawful distribution of programming to Canadians. Associated regulations and procedure would have to be put in place for the administration of the process and spell out penalties in case of violations. With this option the CRTC which is already a regulatory body in the sector would be charged with the corrective measures put in place to deal with programming piracy.
56. At least 20 countries, including most of Canada's closest partners; have implemented regimes to disable access to piracy sites. These include both regimes that are operated through the courts (for example, the UK) and either alternative or additional administrative regimes (for example, Portugal, which in

2015 established a regime to provide for disabling of access to piracy sites that is overseen by the Inspeção Geral Das Actividades Culturais).

57. Unsurprisingly, all of these regimes have processes in place to ensure procedural fairness and include mechanisms to compel compliance by internet service providers (ISPs). Clearly such a regime cannot be effective if any ISP can simply choose not to participate, as in that case individuals wishing to access illegal pirated content could simply migrate to the non-compliant ISPs, who would be gaining an unfair competitive advantage. Therefore, the regime put in place must require participation and compliance by all Canadian ISPs.

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