

BROADCASTING AND TELECOMMUNICATIONS LEGISLATIVE REVIEW

APPENDIX 7

TO

**SUBMISSION OF CANADIAN NETWORK OPERATORS CONSORTIUM INC. TO
THE BROADCASTING AND TELECOMMUNICATIONS LEGISLATIVE REVIEW
PANEL**

11 JANUARY 2019

**BEFORE THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION**

**IN THE MATTER OF
APPLICATION PURSUANT TO
SECTIONS 24, 24.1, 36, AND 70(1)(A) OF THE *TELECOMMUNICATIONS ACT*
TO DISABLE ON-LINE ACCESS TO PIRACY SITES**

BY

**ACADEMY OF CANADIAN CINEMA AND TELEVISION, ALLIANCE OF CANADIAN
CINEMA, TELEVISION AND RADIO ARTISTS (ACTRA), ASSOCIATION
QUÉBÉCOISE DE L'INDUSTRIE DU DISQUE, DU SPECTACLE, ET DE LA VIDEO
(ADISQ), ASIAN TELEVISION NETWORK (ATN), ASSOCIATION QUÉBÉCOISE DE
LA PRODUCTION MÉDIATIQUE (AQPM), BELL CANADA, BELL EXPRESSVU,
BELL MEDIA, CANADIAN ASSOCIATION OF FILM DISTRIBUTORS AND
EXPORTERS (CAFDE), CBC / RADIO-CANADA, LES CINÉMAS CINÉ ENTREPRISE
INC., CINÉMAS GUZZO, CINEPLEX, CANADIAN MEDIA PRODUCERS
ASSOCIATION (CMPA), COGECO CONNEXION, CORUS, DIRECTORS GUILD OF
CANADA (DGC), DHX MEDIA, ENTERTAINMENT ONE, ETHNIC CHANNELS
GROUP, FAIRCHILD MEDIA GROUP, INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES (IATSE), LANDMARK CINEMAS, MAPLE
LEAF SPORTS AND ENTERTAINMENT (MLSE), MOVIE THEATRE ASSOCIATION
OF CANADA (MTAC), QUÉBECOR MÉDIA INC., ROGERS MEDIA, TELEVISION
BROADCASTS LIMITED (TVB), TIFF, AND UNION DES ARTISTES (UDA).**

INTERVENTION OF CANADIAN NETWORK OPERATORS CONSORTIUM INC.

MARCH 29, 2018

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
1.0 INTRODUCTION	10
2.0 CNOC SUPPORTS EFFORTS TO COMBAT ONLINE COPYRIGHT INFRINGEMENT THAT ARE EFFECTIVE AND LEGALLY SOUND	11
3.0 WEBSITE BLOCKING IS INEFFECTIVE AND COSTLY	12
3.1 IP address blocking	12
3.2 DNS blocking.....	13
3.3 Deep packet inspection technology.....	14
3.4 VPNs	16
3.5 FairPlay Canada’s evidence on the effectiveness of website blocking is inconclusive. 16	
3.6 Conclusions on the efficacy and costs of mandatory website blocking.....	20
4.0 THE COMMISSION DOES NOT HAVE THE JURISDICTION TO IMPLEMENT THE FAIRPLAY CANADA PROPOSAL	21
4.1 FairPlay Canada’s proposal conflicts with the purpose of the <i>Copyright Act</i>	23
4.2 FairPlay Canada’s proposal needs more legal certainty from the courts or Parliament before it can be implemented.....	27
5.0 THE TELECOMMUNICATIONS POLICY OBJECTIVES, THE POLICY DIRECTION AND SECTION 36.....	28
6.0 LIABILITY RISKS FROM INADVERTENT BLOCKING	30
7.0 CONCLUSION.....	31

EXECUTIVE SUMMARY

Introduction

ES-1. CNOC is hereby submitting its intervention in the proceeding initiated by FairPlay Canada's Part 1 Application. Any terms not defined in this Executive Summary are defined in the body of CNOC's intervention.

ES-2. FairPlay Canada's application requests that the Commission establish a new organization, the IPRA, which would be tasked with considering applications from rightsholders and other interested parties to add websites that are systematically engaged in the infringement of copyrighted content to a list of websites that Canadian ISPs would be responsible for blocking their end-users from accessing. The Commission would be responsible for reviewing the findings of the IPRA and ordering ISPs to engage in website blocking pursuant to sections 24, 24.1, 36, and 70(1)(a) of the *Telecommunications Act*.

ES-3. CNOC is supportive of fair and effective efforts to combat online copyright infringement which CNOC notes causes its members financial and competitive harms. Some of CNOC's members have expressed that their business plans to launch IPTV operations are jeopardized by unfair competition from the operators of websites systematically engaged in copyright infringement. CNOC also acknowledges that online copyright infringement has deleterious impacts on Canada's entire creative economy.

ES-4. However, CNOC is unable to support FairPlay Canada's application for two fundamental reasons. Firstly, CNOC is not convinced of the efficacy of FairPlay Canada's proposal, and, in fact, believes that mandatory website blocking could be circumvented with such ease that expending any resources on it is unlikely to be productive, yet it would impose significant costs on ISPs. Secondly, CNOC does not believe that the Commission has the jurisdiction to implement FairPlay Canada's proposal as it conflicts with the purpose of the *Copyright Act*.

Website blocking is ineffective and costly

ES-5. Regarding efficacy and costs, CNOC notes that there are three methods of blocking access to websites available to ISPs today: (1) IP address blocking; (2) DNS blocking; and (3) blocking that uses DPI technology. All these methods have unique problems that negatively impact their efficacy. In addition, all three methods can be circumvented through the use of VPNs.

ES-6. IP address blocking should not be adopted as it is extremely ineffective. In 2018 it is a very simple and easy thing for the operator of a website systematically engaged in copyright infringement to obtain a new IP address for their website. This could likely be accomplished in a matter of minutes. If such a mechanism was implemented, the IPRA, and by extension the Commission, would be deluged with a constant stream of applications to block each new IP address hosting a website systematically engaged in copyright infringement.

ES-7. In addition, IP address blocking would almost certainly result in the blocking of significant amounts of legitimate content. This will occur because in the modern Internet, a single IP address will often be shared by multiple websites. Thus, if an ISP were ordered to block an IP address used by a website systematically engaged in copyright infringement, it will likely also end up blocking access to numerous websites that have nothing to do with copyright infringement. The inadvertent blocking of legitimate content can also occur in situations where a hosting service recycles an IP address that has been blocked for use by other customers who may have nothing to do with copyright infringement.

ES-8. As for the costs associated with IP address blocking, CNOC's members have advised that while there may be certain capital costs involved, the most significant costs would be the ongoing operational costs resulting from having to commit from one to multiple hours of employee time per blocking request depending on the ISP's internal systems. In addition, if an ISP inadvertently blocked access to a legitimate website, there is a risk of costs associated with civil proceedings launched against that ISP by the website owner.

ES-9. DNS blocking should also not be adopted due to ineffectiveness, although it is a significantly more effective method than IP address blocking. Nonetheless, an end-user could easily circumvent DNS blocking, even without recourse to VPNs, by choosing to use a third-party DNS service, such as Google DNS, instead of their ISP's DNS service. It is possible for an end-user to set-up a third-party DNS service in a matter of minutes, for no charge.

ES-10. In addition, the ongoing deployment of the DNSSEC standard throughout the Internet increases the risk of the inadvertent blocking of legitimate content. DNSSEC is a security standard that relies upon cryptography. The problem is that if a website systematically engaged in copyright infringement is using a sub-domain, but the actual domain is shared by other legitimate websites, it would be extremely difficult if not impossible for an ISP to only block access to the sub-domain as opposed to the entire domain. This problem will grow as DNSSEC is increasingly deployed throughout the Internet.

ES-11. CNOC's members have advised that while there may be certain capital costs involved, depending on the hardware that the ISP already has installed, the most significant costs would be the ongoing operational costs resulting from having to commit from one to multiple hours of employee time per blocking request depending on the ISP's internal systems.

ES-12. The final method of blocking available in the market today is the use of DPI technology. DPI technology is the most effective form of website blocking and can block access to specific named websites such as "Pirate Bay", for example. However, DPI technology must be rejected as a form of website blocking due to its prohibitive costs. In addition, as explained below, it can also be easily circumvented through VPN technology.

ES-13. DPI technology is prohibitively expensive as it must inspect every packet of data in an ISP's network. CNOC's members have advised that even a very small ISP would incur initial capital costs of upwards of \$100,000.00 to deploy DPI technology as well as ongoing operational and maintenance costs. These costs would increase as the size of an ISP's network increased.

ES-14. Many competitive ISPs are unable to bear the costs of DPI technology and a requirement to make use of this technology would have the effect of driving many competitive ISPs out of business.

ES-15. Website blocking is also of dubious efficacy as all three methods of website blocking described above can be easily circumvented by end-users making use of VPNs, which are easy to use and readily available for a few dollars a month.

FairPlay Canada's evidence on the efficacy of website blocking is insufficient

ES-16. FairPlay Canada attempts to address the obvious issues with the efficacy of website blocking through three paragraphs of evidence from a handful of international jurisdictions that FairPlay Canada claims demonstrates that traffic to websites that are blocked declines significantly after the blocking occurs, that overall online copyright infringement within a country declines following the blocking of major websites systematically engaged in copyright infringement, and that visits to legal websites offering licensed content increases following website blocking.

ES-17. With regard to the first claim, that traffic to websites that are blocked declines significantly after the blocking occurs, CNOC does not dispute that traffic to specific websites that are blocked will obviously decline, at least temporarily, following an ISP engaging in the blocking of that website. However, the studies cited by FairPlay Canada do not appear to have adequately considered the possibility that end-users continue to access the blocked websites through VPNs.

ES-18. FairPlay Canada's claims that mandatory website blocking results in a decline in visits to websites systematically engaged in copyright infringement more generally, including those that are not blocked, as well as a corresponding increase in visits to sites offering licensed content, are more problematic. Crucially, while the handful of studies cited by FairPlay Canada demonstrate a correlation between mandatory website blocking and declines in overall online copyright infringement and increases in visits to websites offering licensed content, these studies fail to demonstrate causation. The studies do not have any surveys of end-users in which the end-users clearly articulate that they decided to reduce their use of websites systematically engaged in

copyright infringement to access content, and instead rely more upon websites such as Netflix, as a result of mandatory website blocking.

ES-19. The correlation versus causation issue is made clearer by examining the case of Canada, which has seen significant declines in overall levels of online copyright infringement absent any form of mandatory website blocking. This leads CNOC to suspect that the declines in overall online copyright infringement, and corresponding increases to visits to legitimate websites offering licensed content, which are touted by FairPlay Canada as evidence of the efficacy of website blocking, could also be explained by the increasing availability of massive libraries of content for low monthly fees on services such as Netflix, Amazon Prime, and Apple Music.

ES-20. There are also many competing studies examining other international jurisdictions, such as Australia, which show little or no impacts from website blocking on overall levels of online copyright infringement.

ES-21. Overall, FairPlay Canada has failed to demonstrate the efficacy of mandatory website blocking as a means of curtailing online copyright infringement and its proposal should not be implemented by the Commission. However, if the Commission disagrees with CNOC's assessment and chooses to implement FairPlay Canada's proposal, CNOC emphasizes that it is imperative that ISPs not be required to make use of DPI technology, which would be an unaffordable burden for many competitive ISPs.

ES-22. In addition, if the Commission chooses to implement mandatory website blocking CNOC believes that ISPs should be permitted to charge rightsholders a moderate fee to assist with cost recovery prior to the ISP being obligated to engage in the blocking of any website systematically engaged in online copyright infringement. The ability to charge a moderate fee will aid ISPs in recovering their costs as well as reduce the number of spurious applications to the proposed IPRA to engage in mandatory website blocking.

The Commission lacks the jurisdiction to implement mandatory website blocking to combat online copyright infringement

ES-23. Aside from any issues with efficacy or costs of mandatory website blocking, CNOC is of the opinion that the proposal must be rejected as the Commission lacks the jurisdiction to implement mandatory website blocking of websites systematically engaged in copyright infringement. In particular, CNOC is of the opinion that FairPlay Canada's proposal conflicts with the purpose of the *Copyright Act*, and therefore falls outside the Commission's jurisdiction.

ES-24. The Supreme Court of Canada has held that the Commission cannot create regulations that would conflict with the purpose of the *Copyright Act*, or any other statute enacted by Parliament for that matter. The Supreme Court of Canada has also held that the rights and remedies created under the *Copyright Act* are "exhaustive". This statement of the Supreme Court of Canada, on its own, should give the Commission serious pause as to its jurisdiction to implement FairPlay Canada's proposal. FairPlay Canada's proposal is in effect creating a new remedy for rightsholders, namely the ability to have access to websites that infringe their copyright to be completely blocked for all Canadian end-users.

ES-25. Furthermore, FairPlay Canada's proposal would have the practical effect of rendering the notice and notice regime contained within the *Copyright Act* irrelevant. CNOC is hard pressed to understand why any rightsholder would avail themselves of the notice and notice regime when they could instead apply to have access to websites systematically engaged in copyright infringement blocked throughout Canada.

ES-26. Parliament cannot be presumed to have enacted the notice and notice regime only to intend for a subordinate body, the Commission, to enact a competing regime that would, for all intents and purposes, supersede the notice and notice regime. Previously, when Parliament has intended for the Commission to override its enactments, it has explicitly said so, such as when it invited the Commission in section 27.1 of the *Telecommunications Act* to override the wholesale mobile wireless roaming rates set by Parliament. No such invitation exists in the *Copyright Act* for the Commission to replace any of the rights or remedies that Parliament chose to create for rightsholders in that statute.

ES-27. Parliament has already considered, and rejected, a regime that was functionally equivalent to FairPlay Canada's proposal: notice and takedown. While FairPlay Canada attempts to distinguish between blocking access to infringing content by all ISPs, which is FairPlay Canada's proposal, and only requiring an ISP that is hosting the infringing content to block access to that content, which would be notice and takedown, CNOC notes that the effect of the two regimes would be functionally equivalent. This is further evidence that enacting FairPlay Canada's proposal would frustrate the purpose of the *Copyright Act* and is thus outside of the Commission's jurisdiction.

ES-28. FairPlay Canada's proposal would also require the Commission to make numerous determinations of fact and law under the *Copyright Act*, which is an area of law that it has never been called upon to regularly apply before. It is significant, in CNOC's view, that Parliament did not explicitly grant the Commission the power to make determinations under the *Copyright Act* and instead requires rightsholders to proceed via the notice and notice regime, or if they wish to pursue damages or block access to the content, through the courts. Once again, the Commission empowering itself to order the blocking of allegedly infringing content by all ISPs would appear to conflict with the purpose of the *Copyright Act*, in usurping a role that Parliament granted to the courts.

ES-29. It is also odd, in CNOC's opinion, that FairPlay Canada chose to bring this application at a time when the federal government has announced its intention to engage in comprehensive reviews of the *Copyright Act*, *Broadcasting Act*, and *Telecommunications Act*. Indeed, the press release from the federal government regarding the review of the *Copyright Act* indicated that it would likely address many of FairPlay Canada's concerns. With this in mind, CNOC suggests that, if it does not reject the application out of hand, it suspend further consideration of FairPlay Canada's application until Parliament has made clear what amendments, if any, it plans to make to Canada's telecommunications legislation. Otherwise, there is a risk that any measures taken by the Commission could end up being superseded by, or conflict with, subsequent measures taken by Parliament.

ES-30. Should the Commission wish to consider the merits of FairPlay Canada's proposal further, CNOC requests that the Commission direct a reference to the Federal Court of Appeal on the question of the Commission's jurisdiction to implement FairPlay Canada's proposal.

FairPlay Canada's proposal does not advance the telecommunications policy objectives and is not consistent with the Policy Direction

ES-31. Despite claims by FairPlay Canada that its proposal advances the policy objectives contained in section 7 of the *Telecommunications Act* and the Policy Direction, CNOC must disagree. A proposal cannot advance the policy objectives if it is ineffective, as is the case with the blocking of websites systematically engaged in copyright infringement. Ineffective measures that only serve to impose additional costs on ISPs and consumers cannot be said to advance any of the policy objectives. Moreover, these additional costs negatively impact the policy objectives related to efficiency, proportionality, affordability, and competition.

ES-32. The inability of FairPlay Canada's proposal to advance the policy objectives is significant as the Commission has previously ruled that it would only permit ISPs to block access to content under section 36 of the *Telecommunications Act* if it could be demonstrated that such blocking would further the policy objectives. In this case, due to a lack of efficacy, FairPlay Canada's proposal does not advance the policy objectives and therefore the Commission should not authorize the mandatory blocking of website systematically engaged in copyright infringement under section 36 of the *Telecommunications Act*.

There are significant liability risks for ISPs associated with mandatory website blocking

ES-33. As discussed above, there is a considerable risk with a mandatory website blocking regime, particularly if IP address blocking is utilized, that legitimate content on the Internet will be inadvertently blocked. The inadvertent blocking of legitimate content on the Internet, which CNOC notes previously occurred when TELUS attempted to block access to a union's website and ended up blocking access to 766 other websites, represents a serious violation of net neutrality as encapsulated in section 36 of the *Telecommunications Act*. In addition, inadvertent blocking raises constitutional, through subsection 2(b) of the *Charter*, which guarantees the right to freedom

of expression, and civil liability issues. Combined, the potential legal ramifications of inadvertent blocking for ISPs are a further reason why FairPlay Canada's proposal should be rejected.

Conclusion

ES-34. Overall, while CNOOC remains committed to working with industry partners to combat online copyright infringement, it cannot support FairPlay Canada's proposal. Mandatory website blocking does not appear to be an effective remedy and will inevitably result in at least some costs being imposed on ISPs. More problematically, the proposal is outside of the Commission's jurisdiction to implement and is more properly brought before Parliament.

1.0 INTRODUCTION

1. Canadian Network Operators Consortium Inc. (“CNOOC”) is in receipt of a Part 1 Application from a coalition (“FairPlay Canada”) of more than 25 content producers, Internet Service Providers (“ISPs”), broadcast distribution undertakings (“BDUs”), and other stakeholders that are affected by online copyright infringement.¹ CNOOC is hereby submitting its intervention in the proceeding initiated by FairPlay Canada’s Part 1 Application.

2. FairPlay Canada’s Part 1 Application requests that the Commission create a new Independent Piracy Review Agency (“IPRA”) that would be tasked with considering applications from rightsholders and other interested parties to add websites “that are blatantly, overwhelmingly, or structurally engaged in piracy” to a list of “locations” on the Internet (“websites”) that ISPs would be responsible for blocking their end-users from accessing.² The Commission would review any determinations of the IPRA, and if it agreed with the conclusion of the IPRA that a website was “blatantly, overwhelmingly, or structurally engaged in piracy”, it would order ISPs, pursuant to sections 24, 24.1, 36, and 70(1)(a) of the *Telecommunications Act*³, to commence blocking access to those websites.⁴ Other pertinent details of FairPlay Canada’s application are discussed further below.

3. CNOOC acknowledges that online copyright infringement has serious deleterious impacts on Canada’s creative economy, as well as the telecommunications industry. However, after reviewing FairPlay Canada’s proposal, CNOOC is unable to support FairPlay Canada’s proposal for two fundamental reasons.

4. Firstly, CNOOC is not convinced of the efficacy of FairPlay Canada’s proposal, and, in fact, believes that mandatory website blocking could be circumvented with such ease that expending any resources on it is unlikely to be productive, yet it would impose significant costs on ISPs.

¹ Asian Television Network International Limited, on behalf of a Coalition (FairPlay Canada), Part 1 Application, *Application to disable on-line access to piracy sites*, 30 January 2018, CRTC File No. 8663-A182-201800467 [“FairPlay Canada Part 1 Application”].

² *Id.* at paras 10, 18-19

³ SC 1993, c 38 [“*Telecommunications Act*”].

⁴ *Id.* at para 21.

5. Secondly, CNOC does not believe that the Commission has the jurisdiction to implement the scheme proposed by FairPlay Canada, which appears to conflict with provisions of the *Copyright Act*⁵. Given this apparent conflict, to the extent that it seeks to pursue the issue of mandatory website blocking further, which CNOC encourages it not to do so due to a clear lack of efficacy, FairPlay Canada should be required to pursue its proposal in the upcoming parliamentary reviews of the *Copyright Act*, *Broadcasting Act*⁶, and *Telecommunications Act*, and not through a Part 1 Application before the Commission.

2.0 CNOC SUPPORTS EFFORTS TO COMBAT ONLINE COPYRIGHT INFRINGEMENT THAT ARE EFFECTIVE AND LEGALLY SOUND

6. At the outset, CNOC emphasizes that it is fully supportive of devising practical and effective measures to combat the infringement copyrighted content via the Internet in a manner that operates fairly.

7. CNOC notes that several of its members operate BDUs that offer licensed content to paying subscribers.⁷ Accordingly, CNOC members can suffer a direct negative financial impact when end-users choose to rely on pirated content that is offered for free, or well below the cost of producing and distributing the content, instead of subscribing to licensed services.

8. CNOC also agrees with the coalition that online copyright infringement has a broader negative impact on Canada's entire creative economy. Online copyright infringement reduces the funds available to creators to reinvest in creating more content, reduces the funds available to BDUs to invest in broadcasting infrastructure, and reduces tax revenues available to the government. These are all negative impacts of online copyright infringement that CNOC has an interest in seeing reduced.

9. Therefore, CNOC is committed to working with industry partners to take effective and fair measures to combat online copyright infringement in Canada in a manner that accords with

⁵ RSC 1985, c C-42 [*“Copyright Act”*].

⁶ SC 1991, c 11 [*“Broadcasting Act”*].

⁷ See, for example, Altima Telecom at <https://altimatel.com/shop/tv>, Distributel at <https://www.distributel.ca/shop/tv/>, and CIK Telecom at <https://www.ciktel.com/DigitalTV/LocalTVPlans>.

Canadian law and values. However, mandatory website blocking is problematic, both in terms of effectiveness and legality, and CNOOC cannot support such a regime.

3.0 WEBSITE BLOCKING IS INEFFECTIVE AND COSTLY

10. The mandatory website blocking regime proposed by FairPlay Canada's application would be both costly and ineffective, given the current methods of blocking available in the market today, which consist of blocking IP addresses, DNS blocking, and blocking that makes use of deep packet inspection ("DPI") technology. Aside from issues with effectiveness that are unique to each method, all of these methods can be easily circumvented by end-users through the use of a virtual private network ("VPN"), as explained further below.

3.1 IP address blocking

11. The first method of blocking websites systematically engaged in copyright infringement, blocking IP addresses, should be rejected out of hand due to ineffectiveness and the high risk of inadvertently blocking legitimate content (even in the absence of recourse to a VPN). In 2018, it is a trivial matter for the owners of a website hosting pirated content to switch its IP address. This can be accomplished in a matter of minutes. Clearly, if copyright infringing websites can jump from one IP address to another with ease, there is little point in investing the time and effort to engage in IP address blocking. If such a mechanism was implemented, the IPRA, and by extension the Commission, would be deluged with a constant stream of applications to block each new IP address hosting a copyright infringing website.

12. Blocking IP addresses as a method of blocking copyright infringing websites must also be rejected as it will inevitably result in the blocking of large amounts of legitimate content on the Internet, which is a problem that could have significant legal ramifications for ISPs and that CNOOC explores in greater detail further below. In the modern Internet, in which IPV4 address exhaustion is a serious issue, it is very common for many websites to be linked to a single IP address. Therefore, if an ISP were directed to block a particular IP address, it would also risk blocking access to many legitimate websites associated with that IP address that do not host any copyright infringing content.

13. The inadvertent blocking of legitimate websites can also occur as IP addresses are routinely, and quickly, recycled by hosting services. For example, if an IP address, (“IP Address #1”) used by a copyright infringing website was blocked, that copyright infringing website may quickly transition to another IP address, (“IP Address #2), which is an extremely easy thing to do. In this situation, the hosting service controlling IP Address #1 would, likely in a matter of days, make IP Address #1 available to other customers. The new customers using IP Address #1 may very well be legitimate websites, and if IP Address #1 was ordered to be blocked, the legitimate content of those new customers would then be blocked by all ISPs in Canada while the copyright infringing website carried on its activities safely from IP Address #2. Given the necessary amount of time and process before a decision to block an IP address could be taken, this is a real concern.

14. As for the costs of blocking IP addresses, CNOC’s members have advised that while there may be certain capital costs associated with this method, the most significant costs would be the ongoing operational costs resulting from having to commit from one hour to multiple hours of employee time per blocking request, depending on the size and complexity of the ISP’s systems and the level of automation. In addition, if ISPs inadvertently blocked legitimate websites there is a risk that ISPs could be sued by the owners of those websites. Even if an ISP was ultimately found not to be liable, there would be significant costs involved with defending any actions. Overall, given the ineffectiveness of IP address blocking and the seemingly unavoidable risk that some legitimate content would be blocked using this method, it is not justifiable to expend any resources on pursuing this method.

3.2 DNS blocking

15. The second method, DNS blocking, in which a domain name is blocked, must also be rejected due to ineffectiveness, although this method is certainly more effective than IP address blocking (once again, in the absence of recourse to a VPN which would render such blocking ineffective).

16. The problem with DNS blocking is that it is extremely easy for an end-user to circumvent. An end-user would just need to choose to use a third-party DNS service, such as Google DNS, instead of the ISP’s own DNS service, to circumvent DNS blocking. In fact, an end-user could

set-up its computer to use Google's DNS in a few minutes, for no charge, as set-out in this guide from Google: <https://developers.google.com/speed/public-dns/docs/using>. Of course, an end-user could also use a VPN to circumvent DNS blocking, as explained further below.

17. In addition, with the introduction of Domain Name System Security Extensions (“DNSSEC”), which is a security standard relying upon cryptography that is increasingly being deployed through the Internet, relying upon DNS blocking becomes more complicated if a copyright infringing website is using a domain name that is secured by DNSSEC. The problem here is that if a copyright infringing website is using a sub-domain, but the actual domain is shared by other legitimate websites, it would be extremely difficult if not impossible for an ISP to only block access to the sub-domain as opposed to the entire domain. For example, if a copyright infringing website was located at `copyrightinfringement.legitwebsite.ca`, there would be no way to block just `copyrightinfringement.legitwebsite.ca` without blocking any other, potentially legitimate websites, using the `legitwebsite.ca` domain. This problem will grow as DNSSEC is progressively deployed throughout the Internet.

18. As with the blocking of IP addresses, CNOc's members have advised that there may be certain capital costs associated with this method, depending on the hardware that the ISP already has installed. However, the most significant costs would be the ongoing operational costs resulting from having to commit from one hour to many hours of employee time per blocking request, depending on the size and complexity of the ISP's systems and the level of automation. However, given the ineffectiveness of DNS blocking, and the issues with the spread of DNSSEC described above, it is also not justifiable to expend any resources on pursuing this method.

3.3 Deep packet inspection technology

19. The last method of blocking available in the market today involves the use of DPI technology to determine the actual names of the websites that an end-user is trying to access, such as “Pirate Bay” and to block access to those names. The use of DPI technology is the most effective method of engaging in blocking, however, it can still be easily circumvented using VPNs, which CNOc addresses in greater detail below. However, regardless of its effectiveness, DPI

technology must be rejected as a method of blocking due to the prohibitive costs involved, which smaller ISPs would simply be unable to bear.

20. CNOC's members have advised that DPI technology is extremely costly as it involves examining every packet of data that is travelling through a network. Even for a very small ISP, installing the most basic DPI technology would involve initial capital costs of upwards of \$100,000.00. This cost would increase as the size of the ISP's network increases. In addition, there would be ongoing operational and maintenance costs associated with the DPI technology. Many competitive ISPs simply are unable to bear the costs associated with DPI technology and do not have the resources to deploy this method of blocking websites systematically engaged in copyright infringement.

21. CNOC has previously warned, during debates about installing DPI equipment in order to facilitate government surveillance, that a requirement for competitive ISPs to install and operate DPI equipment could drive many of them out of business.⁸ Indeed, CNOC notes that during the debate surrounding lawful access, even the vice-president of regulatory law at BCE Inc., one of Canada's largest companies, stated that "We have big concerns about the capital requirements", associated with the government's proposed lawful access bill, which likely would have required the installation of DPI technology.⁹ Obviously, driving competitive ISPs out of business would not be conducive to competition, and would thus undermine both the policy objectives contained within section 7 of the *Telecommunications Act* and the Policy Direction related to fostering greater competition in Canada's telecommunications market.¹⁰

22. Overall, CNOC cannot emphasize strongly enough that there must be absolutely no requirement imposed on ISPs to make use of DPI technology to engage in the blocking of websites systematically engaged in copyright infringement as many ISPs are unable to bear the cost of this technology, which can be circumvented by VPNs in any event, as explained further below.

⁸ Howard Solomon, "Surveillance law could close small ISPs: Lawyer", *IT World Canada*, 16 November 2011, <https://www.itworldcanada.com/article/surveillance-law-could-close-small-isps-lawyer/45062>.

⁹ *Ibid.*

¹⁰ *Telecommunications Act*, *supra* note 2, at s 7(c); *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, at s 1(a)(ii), 1(b)(ii)-(iii) ["Policy Direction"].

3.4 VPNs

23. Significantly, all the methods described above can be easily circumvented by end-users using VPNs. VPNs, which are readily available for a few dollars a month and can be installed in minutes¹¹, encrypt an end-user's data and can allow the end-user to connect to blocked websites from servers located outside Canada, thus circumventing any sort of blocking imposed by Canadian ISPs. In other words, a VPN creates a sort of protected tunnel around an end-user's traffic that makes it mostly impervious to observation and that tunnel can be directed from the end-user's device to a server outside of Canada, for example, and then to a blocked website. An ISP would be unable to block traffic protected by a VPN as it would not be able to determine the ultimate destination of the traffic, or its content.¹²

24. To be clear, the debate at hand is not, and should not be, about the appropriateness of using a VPN. VPNs are used by many businesses to allow their employees to securely connect to their servers from locations away from the business' offices. VPNs are also an excellent personal security tool for individuals that allow them to protect their connection from hackers and other cyber criminals, which is particularly important when using public Wi-Fi, for example.

25. However, in the context of the relief sought by FairPlay Canada, the ready availability of VPNs and their ease of use simply makes all the current methods of website blocking described above largely ineffective, and thus, not worth expending limited resources on implementing.

3.5 FairPlay Canada's evidence on the effectiveness of website blocking is inconclusive

26. To bolster its request for the Commission to implement a mandatory website blocking regime, FairPlay Canada has filed select evidence from international jurisdictions that it claims demonstrates the effectiveness of website blocking as a tool to combat copyright infringement online. As noted above, CNOC is supportive of effective and fair measures that combat copyright infringement online in Canada in a manner that accords with Canadian law and values. However, CNOC disagrees that the evidence cited by FairPlay Canada on the effectiveness of its proposal,

¹¹ Max Eddy, "The Best VPN Services of 2018", *PC Mag*, 26 March 2018, <https://www.pcmag.com/article2/0,2817,2403388,00.asp>.

¹² Jonas DeMuro, "How does a VPN work?", *TechRadar*, 15 July 2017, <https://www.techradar.com/news/how-does-a-vpn-work>.

which CNOC notes consists of three short paragraphs in the application, is sufficient to support mandatory website blocking.¹³

27. There are three points that FairPlay Canada attempts to make with its international evidence on the effectiveness of mandatory website blocking. Firstly, FairPlay Canada claims that traffic to websites that are blocked declines significantly after the blocking occurs.¹⁴ Secondly, FairPlay Canada claims that overall use of websites systematically engaged in copyright infringement declines within a country following the blocking of major websites systematically engaged in copyright infringement.¹⁵ Thirdly, FairPlay Canada claims that visits to legal websites offering licensed content increases following website blocking.¹⁶ CNOC will discuss each of these claims in turn.

28. Regarding the claim that, following blocking by ISPs in a given country, traffic from that country to the specific websites that are blocked decreases is uncontroversial in CNOC's opinion. Obviously, if Website "A" is blocked, through DNS blocking for example, end-users will, at least initially, be unable to access that site, and Website "A" will see a decrease in traffic.

29. Although, CNOC notes that it does not believe the studies cited by FairPlay Canada fully account for the possibility that end-users may still access these blocked sites through VPNs, nor could those studies stand for this proposition, since by definition, VPNs can encrypt an end-user's data and make it appear as if the end-user is accessing the website from a different jurisdiction. Indeed, one study cited by FairPlay Canada, focused exclusively on the efficacy of blocking in Portugal, admitted that it did not consider the impact of end-users using "general purpose VPN or proxy services which offer access to any site" to access blocked websites.¹⁷ This is a serious flaw in the study in CNOC's opinion.

¹³ FairPlay Canada Application, *supra* note 1, at paras 68-70

¹⁴ *Id.* at para 68.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ INCOPRO, *Site blocking efficacy in Portugal September 2015 to October 2016*, May 2017, at pg 27.

30. In addition, another study cited by FairPlay Canada, which examined the impact of mandatory website blocking in the United Kingdom, argued that there was a 22% reduction in the total amount of copyright infringement online after access to fifty-three major websites systematically engaged in copyright infringement in the United Kingdom was blocked, as well as a corresponding 6-10% increase in visits to websites hosting legal content.¹⁸ The study claimed to record only moderate increase in VPN usage after mandatory website blocking was introduced, specifically, “for every 10 additional visits to blocked sites before the blocks, a consumer increased their visits to VPN sites after the blocks by an additional 30%.”¹⁹ However, the study does not clearly articulate how it was able to measure end-users’ VPN usage. The sample size is also so low - a few thousand users of copyright infringing content out of the entire population of the United Kingdom of over sixty-five million - that it seriously calls into question the statistical validity of the study’s conclusions.²⁰

31. However, leaving the issue of VPNs aside, the more problematic aspect of FairPlay Canada’s arguments in favour of mandatory website blocking is its claims that mandatory website blocking, where it has been introduced, has led to declines in the usage of end-users of websites systematically engaged in copyright infringement generally, regardless of whether they are blocked or not, as well as a corresponding increase in the usage of legitimate websites for accessing content, such as Netflix.²¹

32. While the studies cited by FairPlay Canada do show a correlation between the introduction of mandatory website blocking and moderate decreases in visits to websites systematically engaged in copyright infringement more generally, and moderate increases in visits to legitimate websites for accessing content, the studies do not demonstrate causation. Indeed, a critical flaw of these studies is that there are no surveys of actual end-users in which end-users articulate that they

¹⁸ Brett Danaher et al, *Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior*, April 2016, at pg 2.

¹⁹ *Id.* at pg 14.

²⁰ The study examined the behaviours of a panel of 58,809 UK Internet users from August 2014 to February 2015, but of that number, fully 53,273 were found to already not be accessing the blocked sites. Indeed, only 2,998 end-users were found to engage with the blocked sites more than three times in the three months leading up to the introduction of the blocks, and only 426 were considered extremely heavy users of the blocked sites. *Id.* at pgs 9-10.

²¹ FairPlay Canada Application, *supra* note 1, at para 68.

did in fact choose to stop accessing websites systematically engaged online copyright infringement, and instead spent more time accessing legitimate content, because of website blocking.

33. The correlation versus causation issue becomes even clearer when looking at Canada, where rates of copyright infringement online have declined significantly in the last few years, particularly since the notice and notice regime was introduced,²² without the use of mandatory website blocking.²³ As Professor Michael Geist highlights in his analysis of the MUSO Piracy Report on which FairPlay Canada relies, the rate of copyright infringement in Canada declined by 5.4% in 2016, without mandatory website blocking.²⁴ In addition, Professor Geist notes that after Australia introduced mandatory website blocking, usage of the top 250 websites systematically engaged in copyright infringement in Australia actually declined at a slower rate than the global average.²⁵

34. The natural decline in the rate of copyright infringement online in Canada suggests that the declines noted by FairPlay Canada in South Korea, the United Kingdom, and Portugal after the introduction of mandatory website blocking may not have been entirely due to website blocking, but also due to other market forces. Indeed, CNOC would posit that the increasing availability of massive libraries of content through subscription services such as Netflix, Crave, Amazon Prime, and Apple Music are an equally likely explanation for the decline in rates of copyright infringement online, and corresponding increases in traffic to legitimate sites, that appear to have occurred in South Korea, the United Kingdom, and Portugal from 2015 onwards.

35. Finally, CNOC notes that Professor Geist has compiled a list of academic studies, studies by regulators, and court rulings, that demonstrate that website blocking has been ineffectual in

²² CNOC does have significant issues with how that regime has been operationalized, which are outside the scope of this proceeding.

²³ Michael Geist, “*The Case Against the Bell Coalition’s Website Blocking Plan, Part 2: Weak Evidence on the State of Canadian Piracy*”, Michael Geist, 13 February 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-2-weak-evidence-state-canadian-piracy/>

²⁴ *Ibid.*

²⁵ Michael Geist, “*The Case Against the Bell Coalition’s Website Blocking Plan, Part 2: Weak Evidence on the State of Canadian Piracy*”, Michael Geist, 22 February 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-8-ineffectiveness-website-blocking/>.

reducing rates of copyright infringement online in Europe and Australia, thus showing that the evidence on efficacy is inconclusive, at best, and that opinion remains divided.²⁶ The existence of many competing studies that show that website blocking is ineffectual is a further indication that FairPlay Canada's evidence in favour of mandatory website blocking is insufficient.

36. Overall, there is simply insufficient evidence of causation between mandatory website blocking and declines in overall levels of copyright infringement online. CNOC urges the Commission not to introduce mandatory website blocking of websites systematically engaged in copyright infringement, which would be a major change in policy with the potential for ISPs to incur significant costs, based on the three short paragraphs in the FairPlay Canada application providing evidence from a handful of international jurisdictions purporting to demonstrate that mandatory website blocking is an effective tool against copyright infringement online. Far more research and evidence are needed before granting such an intrusive remedy, and, as CNOC explains in greater detail below, this evidence should be provided to, and thoroughly tested, before Parliament, not via the Part 1 application process where interested parties are only afforded one chance to make interventions and introduce their own evidence on the record.

3.6 Conclusions on the efficacy and costs of mandatory website blocking

37. Overall, the case for expending any resources on mandatory website blocking, at this point in time is extremely weak since: (1) an end-user with only moderate technical abilities can easily circumvent mandatory website blocking through the use of alternate DNS services or VPNs; and (2) the operator of a website systematically engaged in copyright infringement can circumvent mandatory website blocking by moving the website and/or its content to a different location on the Internet.

38. Mandatory website blocking is not supported by the inconclusive evidence relied upon by FairPlay Canada to justify mandatory website blocking, which fails: (1) to show causation between mandatory website blocking and declines in rates of copyright infringement online; or (2) account for what appears to be a declining rate of copyright infringement online in Canada absent any form of mandatory website blocking.

²⁶ *Ibid.*

39. However, if despite all of the foregoing concerns, as well as concerns further discussed below that the Commission does not have the jurisdiction to enact a blocking regime, the Commission does choose to proceed with any form of mandatory website blocking, which CNOC believes it should not, CNOC emphasizes that it is imperative that it not mandate ISPs to make use of DPI technology, which would be prohibitively costly and thus impossible for many smaller ISPs to adopt into their networks. In addition, CNOC believes that ISPs should have the ability to charge any applicant requesting the blocking of a website a fee to assist in covering the costs associated with blocking. The fee would have to be paid to the ISP prior to the ISP being required to start blocking a website. CNOC notes that making blocking subject to a moderate fee payable to the ISP would have the salutary effect of cutting down on the number of frivolous applications to the proposed IPRA.

4.0 THE COMMISSION DOES NOT HAVE THE JURISDICTION TO IMPLEMENT THE FAIRPLAY CANADA PROPOSAL

40. Putting aside the problematic elements of FairPlay Canada's proposal regarding costs and effectiveness, perhaps the most glaringly obvious problem with the proposal is that the Commission does not have the jurisdiction to implement the proposal. In fact, the jurisdictional problem is so significant that BCE Inc., the parent company of Bell Canada which is a member of the FairPlay Canada coalition, felt compelled to commission a 63 page memorandum from McCarthy Tétrault LLP ("McCarthy Memo") demonstrating the Commission's jurisdiction to implement FairPlay Canada's proposal for mandatory website blocking.

41. Much of what the McCarthy Memo states is uncontroversial in CNOC's opinion, such as its recitals of the history of section 24 of the *Telecommunications Act* reaching back to the *Railway Act*²⁷. The real crux of the issue of the Commission's jurisdiction comes down to whether there is a conflict between the proposed scheme and any other pieces of legislation enacted by Parliament.

42. In this vein, CNOC notes that it agrees with the following propositions of the McCarthy Memo, including that:

²⁷ RSC 1985, c R-3, FairPlay Canada Application, *supra* note 1, McCarthy Memo at pg 9.

- a) the Commission’s authority as it relates to telecommunications is very broad;²⁸
- b) Canada’s telecommunications law can be found in, what the Supreme Court of Canada has referred to as the “interrelated scheme”, that consists of the *Telecommunications Act*, the *Broadcasting Act*, the *Radiocommunication Act*²⁹, and the *Copyright Act*;³⁰ and
- c) while the Commission’s authority is very broad as it relates to telecommunications, it is not infinite, and it may not make orders or regulations that conflict with the provisions of one of the statutes noted above that compose the “interrelated scheme” governing telecommunications in Canada.³¹

43. CNOC is also in full agreement with the McCarthy Memo that the Supreme Court of Canada has articulated two types of conflict, which are relevant to the question of whether the Commission has the jurisdiction to implement the proposed scheme, namely, “operational conflict” and “purpose conflict”.³² As the Supreme Court of Canada stated about conflicts between federal statutes and the CRTC’s authority in the *Broadcasting Reference*³³:

[43] Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the *purpose* of the other (*Lévis*, at para. 54; Sullivan, at p. 330).

[44] This view is not inconsistent with the approach to conflict adopted in federalism jurisprudence. For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an *impossibility of compliance* with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the *purpose* intended by Parliament in another. See, e.g., *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 (CanLII), [2007] 2 S.C.R. 86, at paras. 77 and 84.

²⁸ FairPlay Canada Application, *supra* note 1, McCarthy Memo at pg 10.

²⁹ RSC 1985, c R-2 [“*Radiocommunication Act*”].

³⁰ *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, at para 34 [“*Broadcasting Reference*”]; FairPlay Canada Application, *supra* note 1, McCarthy Memo at pg 28.

³¹ *Broadcasting Reference*, *supra* note 32, at paras 44-45; FairPlay Canada Application, *supra* note 1, McCarthy Memo at pg 29.

³² *Broadcasting Reference*, *supra* note 32, at paras 43-45; FairPlay Canada Application, *supra* note 1, McCarthy Memo at pg 29.

³³ *Broadcasting Reference*, *supra* note 32.

[45] Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (*Friends of the Oldman River Society*, at p. 38). These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.³⁴ [Italics in original, underline emphasis added.]

44. CNOC does not dispute that there are no obvious operational conflicts between FairPlay Canada's proposal and the *Broadcasting Act*, *Telecommunications Act*, *Radiocommunication Act*, or the *Copyright Act*. That is to say, nothing in FairPlay Canada's proposal would prevent an entity from complying with both FairPlay Canada's proposal and the provisions of one of those statutes. It is less clear whether a purpose conflict exists between FairPlay Canada's proposal and the *Broadcasting Act*, *Telecommunications Act*, or the *Radiocommunication Act*. CNOC reserves judgment on that matter at the present time.

45. However, CNOC does see a clear purpose conflict between FairPlay Canada's proposal and the provisions of the *Copyright Act*. Accordingly, absent a clear ruling from the courts or amendments to the *Copyright Act* and/or *Telecommunications Act* by Parliament, as well as demonstrated efficacy and cost effectiveness, CNOC cannot endorse FairPlay Canada's proposal at this time.

4.1 FairPlay Canada's proposal conflicts with the purpose of the *Copyright Act*

46. The primary problem with FairPlay Canada's proposal, from a jurisdictional standpoint, is that it grants significant new rights to copyright holders that Parliament deliberately chose not to adopt and thus conflicts with the purpose of the *Copyright Act*.

³⁴ *Id.* at paras 43-45.

47. The Supreme Court of Canada has held that “copyright is a creature of statute, and the rights and remedies provided by the *Copyright Act* are exhaustive”³⁵ [Emphasis added]. This statement of the Supreme Court of Canada alone should give the Commission serious pause as to its jurisdiction to implement FairPlay Canada’s proposal. After all, the entire point of FairPlay Canada’s proposal is to provide rights holders with a new remedy against those who infringe their copyright, namely requiring ISPs to block access to websites that infringe their copyright.

48. The McCarthy Memo attempts to manoeuvre around this inconvenient statement from the Supreme Court of Canada by arguing that FairPlay Canada’s proposal does not “create a new copyright”.³⁶ That may be so, but FairPlay Canada’s proposal does create a new remedy for a breach of copyright that is facilitated over the Internet, in apparent contradiction to the Supreme Court of Canada’s holding that the remedies provided by the *Copyright Act* are exhaustive.

49. One need only look at the notice and notice regime to understand why FairPlay Canada’s proposal undermines the purpose of the *Copyright Act* and thus is outside the Commission’s jurisdiction to implement. Sections 41.25-41.27 of the *Copyright Act* establish the notice and notice regime, which, in brief, requires ISPs to forward notices from copyright holders to the end-users of ISPs that are suspected of infringing that copyright by accessing copyright infringing content online.

50. However, why would any copyright holder avail itself of the notice and notice regime if the copyright holder could just apply to the proposed IPRA to have the websites infringing their copyright blocked throughout Canada? The system envisioned by FairPlay Canada is a far more robust and comprehensive remedy than the notice and notice regime, and, if end-users were blocked from accessing the infringing content in the first place, presumably there would be no reason for a copyright holder to require an ISP to forward a notice to that end-user.

³⁵ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at para 82 [“*Society of Composers*”].

³⁶ FairPlay Canada Application, *supra* note 1, McCarthy Memo at pg 43.

51. FairPlay Canada’s proposal would have the Commission, through the establishment of the IPRA, make the notice and notice regime obsolete and irrelevant. This is problematic as Parliament cannot be presumed to have enacted a regime to address infringing content on the Internet only to have the Commission render that regime irrelevant. As the Supreme Court of Canada has affirmed, and the *Interpretation Act* states, every enactment of Parliament “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.³⁷

52. It would be inconsistent with this principle of interpreting Parliament’s enactments in a liberal fashion to best ensure the attainment of the enactment’s objects if a subordinate body, namely the Commission, could render those enactments irrelevant by regulatory fiat. Indeed, when Parliament has intended the Commission to override its enactments, it has explicitly said so, such as when it gave authority to the Commission, via section 27.1 of the *Telecommunications Act*, to override the rates set by Parliament for wholesale mobile wireless roaming. No such invitation exists in the *Copyright Act* for the Commission to override the rights and remedies enacted by Parliament in that statute.

53. In CNOC’s view, the existence of the notice and notice regime is clear evidence of a purpose conflict between FairPlay Canada’s proposal and the *Copyright Act*.

54. The interpretation that a purpose conflict exists between FairPlay Canada’s proposal and the *Copyright Act* is bolstered by the McCarthy Memo’s acknowledgment that

the ss. 41.25-41.27 amendments were made against the backdrop of prior legislative proposals for “notice and takedown” and “graduated response” regimes (the “**Rejected Regimes**”) in the *Copyright Act* which were ultimately rejected by Parliament in favour of the “notice and notice” regime reflected in ss. 41.25-41.27 themselves.³⁸

55. In CNOC’s view, the fact that Parliament chose to reject a notice and takedown regime is compelling evidence that FairPlay Canada’s proposal conflicts with the purpose of the *Copyright*

³⁷ *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 45, at para 2; *Interpretation Act*, RSC 1985, c I-21, at s 12.

³⁸ FairPlay Canada Application, *supra* note 1, McCarthy Memo at pg 48.

Act as enacted by Parliament. While the McCarthy Memo attempts to distinguish between blocking access to infringing content by all ISPs, which is FairPlay Canada's proposal, and only requiring an ISP that is hosting the infringing content to block access to that content, which would be notice and takedown, CNOOC notes that the effect of the two regimes would be functionally equivalent.³⁹ Under both scenarios access to the infringing content is blocked for Canadian end-users, leaving aside the many methods described above for Canadian end-users and the operators of websites systematically engaged in copyright infringement themselves to effectively circumvent blocking of any kind.

56. However, Parliament rejected a notice and takedown regime and chose to proceed with the notice and notice regime, and thus rejected any form of blocking of access to infringing content outside of the traditional route of gaining an injunction from a court. In this regard, CNOOC notes that while it sympathizes with FairPlay Canada that gaining court orders to block access to infringing content may be a cumbersome process, that does not mean that the Commission can ignore Parliament and establish a competing regime for copyright holders that will effectively supplant the one established by Parliament in the *Copyright Act*.

57. CNOOC is also concerned that FairPlay Canada's proposal would see the Commission called upon to interpret an area of law, namely whether content is infringing copyright under the *Copyright Act*, that it has never been called upon to interpret before. Presumably the Commission would be required to make extensive determinations of law and fact under the *Copyright Act* in reviewing the IPRA's recommendations, particularly if the owner of a website contested whether the website is in fact systematically engaged in copyright infringement. It is significant, in CNOOC's view, that Parliament did not explicitly grant the Commission the power to make determinations under the *Copyright Act* and instead requires rightsholders to proceed via the notice and notice regime, or if they wish to pursue damages or block access to the content, through the courts.⁴⁰ Once again, the Commission empowering itself to order the blocking of allegedly infringing content by all ISPs would appear to conflict with the purpose of the *Copyright Act*, in usurping a role that Parliament granted to the courts.

³⁹ FairPlay Canada Application, *supra* note 1, McCarthy Memo at pgs 48-50.

⁴⁰ See, generally, *Copyright Act*, *supra* note 5, at Part IV – Remedies.

58. The Supreme Court of Canada has stated that the rights and remedies provided by the *Copyright Act* are exhaustive⁴¹. Thus, FairPlay Canada's proposal would render some of those rights and remedies meaningless, as well as see the Commission expand its jurisdiction into interpreting and applying an area of law that Parliament has assigned to the courts. Thus, CNOC believes FairPlay Canada's proposal would result in a purpose conflict with the *Copyright Act* and is therefore outside the Commission's jurisdiction to implement.

4.2 FairPlay Canada's proposal needs more legal certainty from the courts or Parliament before it can be implemented

59. CNOC does not believe that the Commission has the jurisdiction to implement FairPlay Canada's proposal. Thus, if the Commission is convinced that it should proceed with FairPlay Canada's proposal due to its merits, CNOC urges the Commission to direct a reference on a question of law to the Federal Court of Appeal, pursuant to subsections 18.3(1) and 28(2) of the *Federal Courts Act*⁴², requesting the Court to rule on its jurisdiction before implementing the proposal. It would be a considerable waste of scarce resources for the Commission to establish the IPRA and direct ISPs to commence blocking websites only to have the entire scheme struck down by the courts as being outside the Commission's jurisdiction.

60. In addition, CNOC notes that FairPlay Canada has chosen to bring its Part 1 application at an odd time given that Parliament is about to undertake comprehensive reviews of the *Copyright Act*, *Telecommunications Act*, and *Broadcasting Act*.⁴³ In particular, the government has stated that the review of the *Copyright Act* should

enable Canada's creators to take full advantage of the opportunities presented by digital technology, provide a supportive environment for business and investment, and position creators for success in a competitive marketplace.⁴⁴

⁴¹ *Society of Composers*, *supra* note 37, at para 82.

⁴² *Federal Courts Act*, RSC 1985, c F-7.

⁴³ Innovation Science and Economic Development Canada, "Parliament to undertake review of the *Copyright Act*", 14 December 2017, https://www.canada.ca/en/innovation-science-economic-development/news/2017/12/parliament_to_undertakereviewofthecopyrightact.html ["ISED Announcement of Copyright Act Review"]; Canadian Heritage, "Launch of Creative Canada - The Honourable Mélanie Joly, Minister of Canadian Heritage", 28 September 2017, https://www.canada.ca/en/canadian-heritage/news/2017/09/creative_canada_-_avisionforcanadascreativeindustries.html.

⁴⁴ ISED Announcement of Copyright Act Review, *supra* note 45.

61. The excerpt above from the government's press release announcing the review of the *Copyright Act* makes it seem likely that Parliament will be turning its mind to the concerns that animate FairPlay Canada's application. Therefore, these reviews raise the risk that any framework that the Commission establishes as part of this proceeding could be superseded by amendments to the above-noted pieces of legislation by Parliament in the near future. Thus, if the Commission does not choose to reject FairPlay Canada's proposal out of hand, it should, at the very least, suspend the present proceedings until it becomes apparent what amendments, if any, will be made to the relevant pieces of legislation.

62. Given the risk of a purpose conflict described above, CNOC believes the proceeding via the Parliamentary process is the appropriate avenue to consider whether any changes to existing legislation are necessary. For the time being, Parliament has already spoken on this issue by enacting the notice and notice regime.

63. Overall, if the Commission does not choose to reject FairPlay Canada's proposal on other policy grounds, it should, at a minimum, suspend the proceedings until such time as Parliament has completed its reviews of Canada's telecommunications legislation, including the *Copyright Act*, *Broadcasting Act*, and *Telecommunications Act*, and/or direct a reference to the Federal Court of Appeal for guidance on whether it has the jurisdiction to implement FairPlay Canada's proposal.

5.0 THE TELECOMMUNICATIONS POLICY OBJECTIVES, THE POLICY DIRECTION AND SECTION 36

64. CNOC is concerned that FairPlay Canada's proposals, even if found to be within the Commission's jurisdiction, could undermine the policy objectives contained in section 7 of the *Telecommunications Act* and the Policy Direction.

65. Given that CNOC is not convinced about the efficacy of FairPlay Canada's proposals due to the relative ease with which they can be circumvented, FairPlay Canada's proposal appears inconsistent with subsection 1(a)(ii) of the Policy Direction, which directs the Commission, when relying on regulation, to use measures that are efficient and proportionate to their purpose.

Regulations that require ISPs to incur costs, but are ineffective in achieving their stated goal, such as website blocking that is easily circumventable, can be neither efficient nor proportionate.

66. Similarly, the policy objectives contained in subsections 7(b), (c), and (f) of the *Telecommunications Act* also require regulation to be efficient, as well as to promote the competitiveness and affordability of telecommunications services. As noted above, regulations that are ineffective cannot be efficient or proportionate. In addition, if ISPs are required to incur costs to implement FairPlay Canada's proposal, these costs will likely be passed onto end-users, thus negatively impacting the affordability of telecommunications services. These costs will also likely have a disproportionate impact on smaller ISPs, thus negatively impacting their ability to offer robust competition to the incumbent operators. This will particularly be the case if ISPs are required to use any form of DPI technology, which, as CNOC noted above, would be completely unaffordable for most non-incumbent ISPs.

67. CNOC is aware that FairPlay Canada has advanced various reasons why its proposal is consistent with, and indeed advances the policy objectives found within section 7 of the *Telecommunications Act* and the Policy Direction.⁴⁵ However, CNOC maintains that if, as described above, any website blocking is readily circumventable, none of the policy objectives will actually be advanced by FairPlay Canada's proposal and, in fact, they will be negatively affected by the additional costs imposed on ISPs and consumers.

68. The fact that FairPlay Canada's proposal does not advance the policy objectives contained within section 7 of the *Telecommunications Act* or the Policy Direction, because website blocking is largely ineffectual, is significant given the Commission's previous rulings that it would only use its power under section 36 to authorize an ISP to block access to content if it was convinced that such blocking would further the policy objectives. As the Commission recently affirmed in Telecom Decision 2016-479⁴⁶:

⁴⁵ FairPlay Canada Application, *supra* note 1, McCarthy Memo at para 95.

⁴⁶ Telecom Decision CRTC 2016-479, *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act*, 9 December 2016.

The Commission expressed the preliminary view [which it affirmed in this decision] that the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet without prior Commission approval, whether or not such blocking was the result of an Internet traffic management practice. Such blocking would only be approved where it would further the telecommunications policy objectives set out in section 7 of the Act. Accordingly, compliance with other legal or juridical requirements—whether municipal, provincial, or foreign—would not, in and of itself, justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act.⁴⁷ [Emphasis added]

69. Consequently, as FairPlay Canada’s proposal does not advance the policy objectives contained in section 7 of the *Telecommunications Act* or the Policy Direction it should not be implemented by the Commission.

6.0 LIABILITY RISKS FROM INADVERTENT BLOCKING

70. CNOC is also very concerned that any inadvertent blocking of legitimate websites, which could easily occur with IP address blocking and DNS blocking as the DNSSEC standard becomes more common, as described above, will result in significant risks of liability for ISPs.

71. The inadvertent blocking of legitimate content is a serious violation of the principles of net neutrality, which, in CNOC’s view, dictate that, absent authorization from the Commission under section 36 of the *Telecommunications Act*, ISPs must act as common carriers and not interfere with, or block, any of the traffic that they carry. Obviously, an ISP that inadvertently blocks access to a legitimate website would be acting outside an authorization from the Commission under section 36 of the *Telecommunications Act* to only block a specific website systematically engaged in copyright infringement and thus be running afoul of section 36 of the *Telecommunications Act*, as well as the concept of net neutrality encapsulated within that section. The ISP would then be liable to sanction from the Commission, ironically, because it tried to comply with a Commission order directing the blocking of websites systematically engaged in copyright infringement but inadvertently blocked non-infringing websites.

⁴⁷ *Id.* at para 7.

72. In addition, the inadvertent blocking of legitimate content as a result of a Commission order would raise constitutional issues. Since the order would emanate from a regulatory authority created by the federal government, namely the Commission, the *Canadian Charter of Rights and Freedoms*⁴⁸ [“*Charter*”] would apply to the blocking order. The blocking of legitimate content almost certainly violates subsection 2(b) of the *Charter*, which guarantees freedom of expression, and CNOC is hard-pressed to see how such an order could be justified under section 1 of the *Charter* as being a reasonable limit on freedom of expression.

73. As noted above, CNOC is also concerned with the potential for civil liability should an ISP inadvertently block access to legitimate websites and then be sued by the owners of those websites. Even if an ISP was ultimately found to not be liable, defending against lawsuits could result in ISPs incurring significant, and unnecessary, costs.

74. The inadvertent blocking of legitimate content is not merely a hypothetical problem in the Canadian context. When TELUS blocked access to the website of a union with which TELUS was in a labour dispute, which most likely occurred via the blocking of an IP address, it also ended up blocking access to 766 other websites.⁴⁹

75. Overall, the legal risks associated with inadvertent website blocking, which will almost certainly occur with IP address blocking and will become increasingly problematic with DNS blocking as the DNSSEC standard is deployed, are significant and are a further reason why FairPlay Canada’s proposal should be rejected.

7.0 CONCLUSION

76. CNOC is supportive of effective and fair measures that combat online copyright infringement in Canada in a manner that accords with Canadian law and values CNOC is also committed to working with all stakeholders to reduce the infringement, via the Internet, of

⁴⁸ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [“*Charter of Rights and Freedoms*”].

⁴⁹ Michael Geist, “The Case Against the Bell Coalition’s Website Blocking Plan, Part 6: Over-Blocking of Legitimate Websites”, *Michael Geist*, 20 February 2018, <http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-6-blocking-legitimate-websites/>.

copyrighted content. As CNOC noted above, its members' ability to compete is hampered by online copyright infringement, which makes it more difficult for competitors to operate IPTV offerings

77. However, CNOC cannot support FairPlay Canada's proposal. There is insufficient evidence as to the efficacy of website blocking in the application and CNOC's members have advised that all three methods of blocking in the market today can be easily circumvented both by end-users and those that operate websites systematically engaged in copyright infringement. ISPs only have a finite amount of resources and expending time and money on a system that will ultimately fail is not an appropriate use of those resources.

78. In the alternative, should the Commission choose to implement FairPlay Canada's proposal, CNOC reiterates that it is imperative that ISPs not be saddled with an obligation to use DPI technology, which would represent insurmountable capital expenditure requirements for many competitive ISPs. The Commission should also consider allowing ISPs to charge a reasonable fee prior to engaging in blocking, which would reduce spurious applications to the proposed IPRA as well as allow ISPs to recover the costs that they will incur from complying with blocking orders.

79. More fundamentally, CNOC is of the view that implementing FairPlay Canada's propose would undermine the remedies that Parliament intended to grant rights holders in the *Copyright Act* and thus is outside the Commission's jurisdiction to enact. At the very least a reference should be directed to the Federal Court of Appeal on the jurisdictional issue before the Commission implements FairPlay Canada's proposal, if the Commission believes that the proposal has merit.

80. CNOC is also surprised that FairPlay Canada would lay this proposal before the Commission while Parliament is about to embark on a review of three of the major components of Canada's telecommunications legislation, namely the *Telecommunications Act*, *Broadcasting Act*, and the *Copyright Act* and believes that the it would be more proper to bring its concerns before the committees examining those pieces of legislation. To avoid potential conflicts, the Commission should be cautious not to require parties to implement any of FairPlay Canada's

proposal prior to understanding how Parliament intends to amend, if at all, the legislation noted above.

81. Overall, while CNOC remains committed to working with all stakeholders to address the online infringement of copyrighted content, it urges the Commission to reject FairPlay Canada's proposal.

*** END OF DOCUMENT ***