

**APPLICATION PURSUANT TO
SECTIONS 24, 24.1, 36, and 70(1)(a) OF THE *TELECOMMUNICATIONS ACT*, 1993
TO DISABLE ON-LINE ACCESS TO
PIRACY SITES**

REPLY COMMENTS OF

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 vidéo (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).

14 MAY 2018

Table of Contents

	<u>Page</u>
1.0 EXECUTIVE SUMMARY	4
2.0 THE PIRACY PROBLEM	8
2.1 Piracy is a Large & Growing Problem	9
2.1.1 The MUSO Report	10
2.1.2 Data from Sandvine	11
2.1.3 Other data	12
2.2 Economic Impact of Piracy in Canada	14
2.2.1 Quantifying the economic impact	16
2.2.2 The legal market does not negate the impact of content theft.....	18
2.2.3 PIAC's extremist position must be rejected	19
3.0 THE REGIME WILL BE EFFECTIVE	22
3.1 The studies cited by the coalition are sound and reliable.....	24
3.2 The studies cited by interveners confirm the regime will be effective	25
4.0 NO PRACTICAL ALTERNATIVE.....	26
4.1 Copyright law alone is insufficient.....	27
4.2 Existing injunctive relief against ISPs	30
5.0 WHAT CANADIANS THINK	32
5.1 Campaigns based on deliberately false and misleading information	32
5.2 Survey evidence	33
6.0 WHAT THE APPLICATION ACTUALLY ADDRESSES.....	34
6.1 Identifying Piracy Sites.....	34
6.2 Limited to the Pressing Problem of Piracy	35
7.0 PRACTICAL FOR ISPS.....	37
7.1 Approaches to disabling access	38
7.2 No risk of over-blocking	39
7.3 ISPs' costs and liability	42
8.0 INTERNATIONAL BEST PRACTICE	44
8.1 Disabling Access to Piracy Sites is the Rule Not the Exception.....	44
8.2 Judicial and Administrative Models	45
8.3 Consistent with Human Rights and Free Expression.....	47
9.0 TELECOMMUNICATIONS POLICY & THE POLICY DIRECTION.....	51
9.1 Consistent with Net Neutrality.....	51
9.2 The Commission has Jurisdiction	54
9.2.1 Sections 24 and 24.1	54
9.2.2 Section 36	55
9.2.3 Relationship to the Copyright Act.....	56

9.2.4	Section 7 objectives	58
9.2.5	Policy Direction	59
9.3	The Commission is Best Placed to Implement the Regime	60

1.0 EXECUTIVE SUMMARY

The Scale & Impact of Content Theft

1. The theft of content by often anonymous and foreign-based operators of piracy sites¹ is a significant problem for Canadian creators, consumers, legal businesses, and the Canadian economy. Recognition of this problem, and the need to address it, was widespread among both supporting and opposing interveners.

2. The illicit and online nature of piracy makes it difficult to quantify precisely, but the extensive data on the record all point to the same conclusion – the reach of pirate operators on Canada's telecommunications networks is broad and rapidly increasing:

- According to Sandvine, piracy sites now regularly reach **up to 15.3%** of Canadian households (or **more than 2 million** households) through illegal set-top-boxes loaded with KODI piracy add-ons or providing access to piracy subscription services. This is up from effectively zero five years ago.²
- In addition, according to MUSO there were **2.5 billion** visits to piracy sites to access stolen TV content using web browsers in Canada in 2017. This form of piracy is also growing rapidly, up approximately 9% between just the first six months and the last six months of the year.³
- Professor Michael Geist indicated in his intervention that **one in every three** Canadians obtained music illegally in 2016, up approximately 30% from about one in every four Canadians in 2015.⁴

3. Effectively no contrary studies or data on the extent of piracy in Canada were put on the record by opposing interveners, and the few criticisms leveled at those above were simply inaccurate and based on fundamental errors in understanding and applying the data.

4. Not surprisingly, this content theft is having a significant economic impact on Canadian cultural industries that employ 630,000 people or ~4% of Canadians and contribute \$55B or ~3% of Canada's GDP:⁵

¹ This Reply uses the same defined terms as our Application.

² Sandvine, "Video Piracy in Canada" *Global Internet Phenomena Spotlight* [Sandvine Intervention] at pages 5 and 6.

³ MUSO, *Annual Piracy Report: TV – Canada (2017)*.

⁴ See Geist Submission at paragraph 43. This is addressed in the Intervention of Barry Sookman (12 February 2018) [Sookman Intervention] at page 3.

⁵ Canadian Heritage, *Creative Canada: Policy Framework (2017)* at page 7. See Application at paragraph 34.

- The creators of *Letterkenny* and the creators of *Goon* both estimate the economic impact from piracy of their individual productions has been in the millions or tens of millions of dollars.
- Three different approaches by the coalition, Sandvine, and Armstrong Consulting, respectively, all generate estimates of the economic impact of TV piracy in Canada with midpoints in the range of **\$500M to \$650M** annually.
- Studies show that piracy will cost legal streaming services such as Netflix and Amazon **more than \$50 billion** between 2016 and 2022.⁶

A Complementary & Effective Tool

5. With more than 40 countries around the world having adopted or been legally required to adopt regimes to disable access to piracy sites, in some cases for more than a decade, there is extensive evidence of the effectiveness of this approach. Study after study and court after court have reached the same conclusion.

6. Indeed, the studies show that taking reasonable steps to disable access to piracy sites reduces visits to those sites by between **70% and 90%**, reduces total piracy by **up to 51%**, and increases visits to legal websites (ignoring the likely significant impact on other legal products and services such as traditional TV and DVDs) by between **8% and 12%**. Studies, courts, and academic work also specifically confirm that for the average user this type of regime remains effective even in light of the availability of VPNs and other technologies that could theoretically be used to circumvent it.

7. Copyright law also provides an essential and occasionally powerful tool to address pirate sites, particularly if the pirate operators are identifiable and happen to live in Canada. However, copyright law alone is not sufficient to address the modern problem of widespread content theft on telecommunications networks. That is why regimes like the one proposed are being adopted in most of Canada's peer countries.

8. Canadians recognize the need for effective tools. 77% believe Canada should have the same or more protection as countries that disable access to piracy sites and 70% believe the government should remove piracy sites from Canada.⁷ At the same time, even evidence from opposing interveners indicates that ~60% of Canadians believe there is no or only a slight risk of the regime inadvertently blocking legitimate sites (compared to just 18% who think it is more likely than not or virtually certain).

⁶ Sookman Intervention at page 4; Stewart Clarke, "Piracy Set to Cost Streaming Players More Than \$50 Billion, Study Says" *Variety* (30 October 2017).

⁷ See Appendix D.

The Application is Narrowly Tailored and Practical

9. The proposed regime is not addressed simply at copyright infringement but only at websites and services that are ***blatantly, overwhelmingly, or structurally engaged in piracy***.⁸ This is a deliberately high bar intended to capture only sites that the IPRA and Commission will easily recognize as indefensible. The coalition does not intend or expect that it would or could apply to the legitimate platforms (such as Snapchat, Google Drive, or YouTube) identified as a concern by interveners nor to VPN and similar services used for legitimate privacy-protection or other purposes. There is no evidence to suggest the Commission would do any differently.

10. The regime can be readily implemented by ISPs at low cost and without inadvertently disabling access to legitimate sites, using largely existing infrastructure and processes such as the Response Policy Zone feature that is standard in DNS systems or traffic blackholing that is commonly used to respond to DDoS attacks.

11. The DNS approach in particular is expected to cost ISPs between **\$18 and \$36** to disable access to an incremental site. Moreover, combined with the proposed standard applying the regime only to entire sites that are blatantly, overwhelmingly, or structurally engaged in piracy, it eliminates effectively all risk of over-blocking. On examination, the international evidence confirms that cases of over-blocking (even using other approaches) are exceedingly rare and quickly corrected.

12. All this is reflected in the fact that the Application is supported by large and small, independent and vertically integrated ISPs, who together serve the vast majority of Canadian Internet subscribers. Indeed, even ISPs opposing the Application have not suggested that it would not be possible or practical, from a technical perspective, for them to implement it.

Telecommunications Policy

13. The coalition supports net neutrality and the free flow of legal content on the Internet, and the Application ensures ISPs remain neutral intermediaries who simply implement legal obligations imposed by the Commission. No intervener has pointed to any authority for the notion that net neutrality prevents the government from regulating ISPs to reduce the impact of harmful and illegal content online, and net neutrality rules in the US and EU did not and do not apply to unlawful content.

14. In any event, the Application is consistent with Canada's net neutrality laws. In particular, section 27(2) of the *Telecommunications Act* is not engaged by a Commission regulation and even if it was an ISP could never be doing something

⁸ Application at paragraphs 1, 10, 75, 84, 85, and 89.

“unjust”, “unreasonable”, or “undue” by implementing such a regulation. Similarly, section 36 of the Act explicitly does not apply to an action approved by the Commission, let alone one that is both mandated and approved.

15. The *Telecommunications Act* provides that Canada's telecommunications system should respond to the economic and social requirements of Canadian citizens and businesses, and safeguard, enrich, and strengthen our social and economic fabric. There is no doubt that the Commission, as Canada's telecommunications regulator with "comprehensive regulatory powers" including "the ability to impose *any* condition on the provision of a service,"⁹ has the jurisdiction to ensure this system is appropriately responsive to the widespread reliance on and use of telecommunications networks by illegal piracy sites.

The Commission is Best Placed to Implement the Regime

16. Within the existing legal and regulatory framework in Canada, it is the Commission that is best placed to implement the proposed regime.

17. In particular, the Commission has previously indicated both that it can require a telecommunications carrier to block specific content¹⁰ and that in any event it must be engaged before an ISP disables access to a website even pursuant to a statute or court order.¹¹ In these circumstances, implementing the regime through the Commission avoids a potential conflict or duplicative proceedings.

18. At a more practical level, there are a number of factors in favour of the Commission implementing the regime:

- The Commission is the regulator of Canada's telecommunications carriers and networks, and it can appropriately tailor and situate this obligation within the suite of obligations that apply to those carriers and networks.
- The Commission and the IPRA in particular will have unique expertise in telecommunications networks and Internet piracy, making them best placed to make technical decisions regarding how to best disable access to piracy sites and avoid overblocking.
- Commission processes are accessible, transparent, and efficient, particularly for small ISPs and individual Canadians.

⁹ *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 SCR 764, 2009 SCC 40 at paragraphs 32 and 36 (emphasis in original).

¹⁰ Compliance and Enforcement and Telecom Notice of Consultation CRTC 2017-405 (17 November 2018) at paragraph 27 (dealing with certain unwanted telephone calls).

¹¹ Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016); Telecom Decision CRTC 2016-479.

- The Commission has the experience and expertise to examine the practical impacts of piracy and disabling access to piracy sites in all of the areas it regulates, and to balance the interests of all relevant stakeholders.¹²

19. Based on the record of the proceeding to date, the coalition is more confident than ever that approval of its Application will have a significant positive impact on the problem of widespread content theft by piracy on Canada's telecommunications networks, with minimal costs or unintended effects. With the coalition having grown to more than 30 members since the Application was filed, and with extensive support from interveners, we look forward to working with the Commission and other stakeholders in implementing this important proposal.

2.0 THE PIRACY PROBLEM

20. Recognition that content theft is a significant problem that must be addressed was widespread among interveners, including both those supporting the Application and those who opposed it. Among others, the Canadian Chamber of Commerce,¹³ CCSA,¹⁴ CNOOC,¹⁵ Eastlink,¹⁶ Internet Society Canada Chapter,¹⁷ Telus,¹⁸ and VMedia,¹⁹ as well as universities and colleges training future leaders in media, video production, and game development,²⁰ groups representing Canadian broadcasters²¹ and publishers,²² and many Canadian and foreign studios, sports leagues, and other rightsholders, all joined the now more than 30 members of the coalition in expressing the view that piracy is a significant problem and that more should be done to address it. For example:

- **CNOOC:** "CNOOC 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. CNOOC 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

¹² Intervention of Telus Communications [Telus Intervention] at paragraphs 8-11.

¹³ Intervention of the Canadian Chamber of Commerce [CCC Intervention] at page 7.

¹⁴ Intervention of the Canadian Cable Systems Alliance [CCSA Intervention] at paragraph 5.

¹⁵ Intervention of the Canadian Network Operators Consortium [CNOOC Intervention] at paragraph 6.

¹⁶ Intervention of Bragg Communications Inc. [Eastlink Intervention] at paragraph 2.

¹⁷ Intervention of the Internet Society Canada Chapter [ISCC Intervention] at paragraphs 4 and 10.

¹⁸ Telus Intervention at paragraphs 1 and 2.

¹⁹ Intervention of VMedia [VMedia Intervention] at paragraphs 4 and 5.

²⁰ Intervention of Charles Falzon, Dean, Faculty of Communication and Design, Ryerson University [Ryerson Intervention]; Intervention of Anne Sado, President, George Brown College [George Brown Intervention].

²¹ Intervention of the Canadian Association of Broadcasters [CAB Intervention] at paragraphs 3 and 4; Intervention of the Independent Broadcasters Group [IBG Intervention] at paragraph 10.

²² Intervention of the Association of Canadian Publishers [ACP Intervention] at page 2; Intervention of the Canadian Publishers Council [CPC Intervention] at page 1.

available to BDUs to invest in broadcasting infrastructure, and reduces tax revenues to government.”²³

- **Insight Productions:** “Allowing illegal piracy to thrive has had an immeasurable and detrimental impact on the prosperity of Canada’s creative industry. Specifically, independent Canadian production companies (like mine) are losing out on millions of dollars in revenue each year which in turn means that we are spending less money on hiring Canadian talent from directors to production designers to drivers to editors. I believe it is evident based on the increasing piracy figures over the last few years that Canada’s current tools to combat piracy are not working.”²⁴
- **Shaw:** “It is clear that Canada’s current legal and regulatory approach to internet piracy is insufficient. New tools are required to protect Canadian internet users from the risks associated with malicious internet piracy services and to protect rightsholders from the unprecedented volume of online theft and dissemination of pirated content.”²⁵
- **TELUS:** “Telus believes that ISPs have a role to play to combat the scourge of online content piracy, and undisputably illegal activity, given that their networks are used by piracy websites to disseminate infringing content. Implementing the FairPlay Application’s new anti-piracy enforcement regime will help efficiently address the worst offenders that are involved in the most blatant and egregious piracy activities.”²⁶

21. Nevertheless, certain interveners have attempted to convey the impression that in Canada piracy either is not a problem at all or is not a material problem. The data available on the record shows conclusively that is simply not the case.

2.1 Piracy is a Large & Growing Problem

22. Pirate operators, typically located outside of Canada and operating anonymously, are responsible for a large and growing problem in this country.

23. As set out in our Application, the illicit and online nature of piracy makes it difficult to precisely quantify its extent and impact. Nevertheless, the data available all points to the same conclusion – the reach of pirate operators over Canada's telecommunications networks is wide and increasing rapidly. In particular, the data discussed below shows that piracy sites are now regularly reaching **up to 15.3%** of Canadian households (or

²³ CNOC Intervention at paragraphs 7 and 8.

²⁴ Intervention of Insight Productions [Insight Intervention] at page 1.

²⁵ Shaw Intervention at paragraph 9.

²⁶ Telus Intervention at paragraph 35.

more than 2 million households) through illegal set-top-boxes, and in addition in Canada there were **2.5 billion** visits to piracy sites to access stolen TV content using web browsers in 2017.

2.1.1 The MUSO Report

24. In our Application we included a report from MUSO that quantifies the number of times piracy sites were visited from Canada in 2016 in order to access stolen TV content (i.e., excluding film and music). That report showed an astonishing 1.88 billion visits to piracy sites for TV content in 2016.²⁷ These data capture only visits made in web browsers, which means visits associated with the use of illegal STBs (as measured by Sandvine and discussed below) are not included.

25. Like us, many interveners cited the report as one example of the abundant evidence showing the size of the piracy problem affecting Canada.²⁸ However, a small number of interveners have claimed that the MUSO report shows piracy is not a major problem in Canada because (i) the number of visits was 5.4% lower in the latter six months than in the first six months of 2016²⁹ and (ii) some of the websites included in the report did not appear to be the kinds of sites intended to be addressed by the coalition's proposal.³⁰

26. With respect to whether piracy in Canada is growing, since our Application was filed new MUSO data for 2017 has been released,³¹ and the new Canadian-specific data for TV piracy was made available publicly by the coalition and referred to by some interveners.³² The new data show that there were **2.50 billion visits to piracy sites** to access pirated TV content in Canada in 2017. That is approximately **78 visits per Internet user in Canada**, nearly twice as many as the United States and more than Germany, Brazil, the United Kingdom, France, Vietnam, or Japan, among others. Not only is this a significant increase over 2016, but the number of visits grew by 8.96%

²⁷ See Exhibit A to our Application. The report addressed TV piracy specifically because a Canadian-specific report addressing multiple/all industries was not available.

²⁸ See e.g. CAB Intervention at paragraph 10 and Intervention of Manitoba Film & Music at page 1.

²⁹ Intervention of the Forum for Research and Policy in Communications (29 March 2018) [FRPC Intervention] at paragraph 56 (the FRPC Intervention also points to the decline in the share of Internet traffic associated with the P2P file sharing to suggest that piracy rates are falling; this is obviously incorrect, and only reflects the massive growth in both legal and illegal streaming traffic. Today, P2P accounts for as little as 15% of piracy.)

³⁰ Submission of Professor Michael Geist (29 March 2018) [Geist Submission] at paragraphs 47 and 50-51; FRPC Intervention at para 22; Intervention of the Public Interest Advocacy Centre (29 March 2018) [PIAC Intervention] at paragraphs 41 and 68.

³¹ Ernest Van der Sar, "Online Piracy Is More Popular Than Ever, Research Suggests" *TorrentFreak* (21 March 2018); Todd Spangler, "Global Piracy in 2017: TV and Music Illegal Activity Rose, While Film Declined" *Variety* (21 March 2018).

³² See e.g. the FairPlay Canada website at https://static1.squarespace.com/static/5a68f49af6576e4326f50337/t/5aba7b21575d1f1ca382ed4c/1522170661046/FairPlay_Canada_CRTC_Report_2018_EN.PDF and the intervention of Barry Sookman (28 March 2018) [Sookman Intervention] at page 90.

from the first six months to the latter six months of the year. Online content theft due to piracy in Canada is clearly growing, despite the claims of some interveners.

27. With respect to the sites included in the MUSO report, it is true that the proposed regime is carefully tailored to address only sites that are blatantly, overwhelmingly, or structurally engaged in piracy and therefore would not apply to every site that some in the industry might consider a piracy site. In this respect, some interveners were highly focused on one particular site – www.addic7ed.com – which is included in the MUSO report.³³ MUSO acknowledges that this site is one that is close to the line in its sample, and not generally representative of the sites it includes. In any event, that site accounted for approximately 2 million visits between both film and TV piracy, which means it accounts for significantly less than 0.01% of the site visits reported. Its inclusion in the MUSO report does not affect the only possible conclusion from this data – that piracy is a significant and growing problem.

28. We also note that PIAC has claimed that the country rankings in the MUSO report "appear[] erroneous."³⁴ This claim is based on PIAC erroneously comparing two reports that do not measure the same thing. In particular, PIAC appears to have mistakenly compared the Canadian MUSO report that is specific to TV piracy with the global report that includes TV, film, music, software, publishing, and adult content.³⁵ There is no error in the MUSO data; the global reports PIAC cites simply measure piracy in different industries than the TV-specific report the coalition included in its Application.

2.1.2 Data from Sandvine

29. We also cited in our intervention two previous reports issued by Sandvine, which showed that illegal set-top-box devices were regularly accessing stolen content in up to 14% of Canadian households (which would be up to 2 million households in Canada).³⁶

30. Our intervention clearly identified these two separate reports, which address two separate specific forms of piracy (i.e., illegal KODI piracy add-ons and illegal subscription piracy TV services), and which do not account at all for other forms of streaming piracy (such as those accessed through web browsers or other applications outside of KODI) nor for any download piracy (such as P2P and cyberlockers). Nevertheless, some interveners have attempted to portray the Sandvine data as

³³ See e.g. PIAC Intervention at paragraph 89.

³⁴ PIAC Intervention at paragraphs 30 and 31.

³⁵ A Canadian report for all of and only TV, film, and music – the industries represented by the coalition – was not available.

³⁶ Sandvine, *Global Internet Phenomena Spotlight: The "Fully-Loaded" Kodi Ecosystem*, May 2017; Sandvine, *Global Internet Phenomena Spotlight: Subscription Television Piracy*, November 2017.

indicating that just 7% of households are engaged in piracy, and to cast doubt on the value of the data by claiming that it is not specific to Canada.³⁷

31. Sandvine has filed an intervention in this proceeding that should eliminate this confusion. It confirms that illegal KODI piracy add-ons are in regular use in 7% of Canadian households (higher than 6% in the United States) and that illegal subscription TV services are regularly accessed in up to 8.3% of Canadian households (higher than 6.5% in North America as a whole).³⁸ Accordingly, with data specific to Canada it is clear that pirate operators make content available illegally in **up to 15.3%** of households (which would be **more than 2 million** households) using one these two forms of dedicated set-top-box piracy. Sandvine's intervention also confirms that these piracy services "have grown rapidly after having no adoption five years ago" and that this level of piracy "should also be considered a floor and not a ceiling" because it does not capture all forms of piracy.³⁹

32. The Sandvine intervention should also clear up the confusion that underpins PIAC's attempted traffic share analysis, in which it treats the data on illegal subscription piracy TV services as descriptive of the entire piracy universe and then works through a series of unwarranted assumptions to calculate an alleged share of web traffic from copyright infringing sources.⁴⁰ The whole premise is false. Illegal subscription piracy TV services are being used in 8.3% of Canadian households; 95% do so using purpose-built set-top-boxes and the remaining 5% using other means including KODI. In addition to this, non-subscription-based illegal piracy add-ons within KODI are being regularly used in 7% of Canadian households. In addition to that, there were 2.50 billion visits to piracy sites to stream or download pirated content in Canada in 2017. In other words, PIAC's analysis only examines one portion of the piracy ecosystem – illegal subscription piracy TV services – and therefore greatly understates the scope and scale of the piracy problem. As a result, it is fundamentally flawed and should be given no weight.

2.1.3 Other data

33. Some interveners have pointed to a two year old marketing claim by CEG TEK as evidence that piracy is declining.⁴¹ Even if the claim is true, no conclusion about the level of piracy in Canada can be drawn from it because CEG TEK did not (and did not

³⁷ See e.g. FRPC Comments at para 129 ("The applicant uses the estimate from the Sandvine report that "7% of households" access online copyright infringing content... The 7% estimate is based on North America as a whole) and Geist Submission at para 46 ("Sandvine data that 7% of North American households subscribe to unauthorized services leaves 93% not subscribing to such services, which does not help their argument") and PIAC Intervention at paragraph 33 ("cites a Sandvine study for the proposition that 6/5% of North American households are have [sic] interacted with known online copyright infringement services").

³⁸ Sandvine Intervention at pages 5 and 6.

³⁹ Sandvine Intervention at page 6.

⁴⁰ PIAC Intervention, paragraphs 33-35.

⁴¹ See e.g. PIAC Intervention at para 42; Geist Submission at paragraph 44.

even purport to) study the overall piracy level in Canada. Rather, it considered (i) only a small subset of specific film titles for which it was undertaking specific enforcement efforts for specific clients⁴² and (ii) only P2P downloading, which comprises as little as 15% of all piracy in Canada. Moreover, similar service providers doing similar comparisons reached entirely different results – for example, at the same time CEG TEK made this claim Canipre, a Canadian company representing producers in Canada, did an equivalent comparison and found an increase in piracy of more than 100%.⁴³

34. One intervener has claimed that piracy is not a problem in Canada because one in every three Canadians obtained music illegally in 2016, which was an increase from about one in every four Canadians in 2015.⁴⁴ Needless to say, in the real world this level of piracy and this high a growth rate proves the opposite – that piracy is a huge and growing problem.

35. Finally, PIAC has attempted to muddy the waters on all the relevant data by making back-of-the-envelope calculations regarding how many "minutes" of content are pirated in Canada. Unfortunately, PIAC has misunderstood and misapplied the data to such a degree that these calculations cannot helpfully inform the Commission's decision. Below are a few examples that illustrate why this is the case:

- PIAC equates the length of an average site visit reported by SimilarWeb with the amount of time spent watching pirated content. This is simply wrong; the "Visit Duration" metric, as defined by SimilarWeb and as is standard in the industry, does not include the time spent watching content but only the time taken to find the page from which the content is accessed.⁴⁵ This is a fundamental error in the use of the data that is the centrepiece of PIAC's analysis, and it renders the remainder of the calculations meaningless.
- PIAC assumes that each P2P download includes only a single episode of a

⁴² This is disclosed (though not discussed) in the PIAC Intervention but is misleadingly omitted entirely in the Geist Submission.

⁴³ Clare Brownell, "Pirates in your neighbourhood: How new online copyright infringement laws are affecting Canadians one year later" *Financial Post* (12 February 2016) (this indicated more than 2 million illegal downloads per year just for the specific films Canipre was covering for its specific clients).

⁴⁴ See Geist Submission at paragraph 43. This is addressed in the Sookman Intervention at page 3.

⁴⁵ Visit Duration is defined as "the time that elapses between the first page visit and the last page visit" (see the definition in the SimilarWeb Glossary at <https://support.similarweb.com/hc/en-us/articles/115000501485-Visit-Duration>). In practice, this means that once a visitor reaches the movie or TV episode they want to watch on a site such as putlocker.is, this is the "last page" they visit and the duration is a record of the time taken to find that last web page, not how long they spend on that last web page once they have reached it. If the last page reached is a link to a torrent, the user would then download an episode, season, or entire series and none of the time spent downloading it or later watching it would be counted. Similarly, if the last page reached includes one or more video streams (including streams that auto-play the next episode), none of the time spent watching those streams would be counted. This is an industry standard approach – for example, Google Analytics also defines duration as "[t]he time of the first hit on the last page – the time of the first hit on the first page" and does not include the time that the user remains on that last page (see the definition at <https://support.google.com/analytics/answer/1006253?hl=en>).

TV show.⁴⁶ In fact, it is often equally or more popular to download entire seasons, entire series, or bundles of movies, at one time as a single package, which obviously significantly expands the number of minutes associated with each download.⁴⁷

- PIAC treats P2P downloading like it represents the entire piracy universe.⁴⁸ In fact, any consumption associated with P2P downloaded content would be in addition to consumption of streamed pirated content (with P2P estimated to account for as little as 15% of all piracy).
- PIAC assumes that pirated content is only ever watched by one person.⁴⁹ In fact, like legal content pirated content is very often watched together by multiple members of a household or other groups, particularly when it is watched via a dedicated STB connected to the primary TV in the household.

36. While these are not the only errors that PIAC has made in its calculations, they are more than sufficient to illustrate why no reliance at all can be placed on them.

2.2 Economic Impact of Piracy in Canada

37. In our Application we made four main points about the economic impact of piracy. First, we explained the important economic role played by Canada's cultural industries. These industries employ 630,000 people or ~4% of Canadians and contribute \$55B or ~3% of Canada's GDP.⁵⁰ Second, we explained the economic mechanics by which specific participants in this sector are harmed and the impact this has on the country, specifically including content creators,⁵¹ broadcasters,⁵² legal distributors,⁵³ consumers,⁵⁴ and the government.⁵⁵ Third, we gave concrete examples of these harms, including a multi-million dollar impact on the Canadian film *Goon* and a hundreds of millions of dollar impact contributing to the bankruptcy of Ten Network in Australia.⁵⁶

38. Finally, we provided multiple estimates of the total economic impact of piracy based on different sources and approaches – one global based on a report from

⁴⁶ PIAC Intervention at paragraph 36.

⁴⁷ Based on internal data collected by coalition members engaged in notice-and-notice programs. See statistics referenced at footnote 86.

⁴⁸ This is why they treat their calculations based on the MovieLabs data as a standalone estimate of total piracy, which it clearly is not. See e.g. PIAC Intervention at paragraphs 36 and 39.

⁴⁹ This is how they reduce the (already overwhelmingly understated) thirty movies or TV shows per Internet subscriber in paragraph 30 to ten movies or TV shows per Internet subscriber in paragraph 39.

⁵⁰ Canadian Heritage, *Creative Canada: Policy Framework* (2017) at page 7. See Application at paragraph 34.

⁵¹ Application at paragraphs 35-40 and 47.

⁵² Application at paragraph 41.

⁵³ Application at paragraphs 36 and 42-45.

⁵⁴ Application at paragraphs 48-51.

⁵⁵ Application at paragraph 46.

⁵⁶ Application at paragraphs 40 and 36, respectively.

Frontier Economics and two specific to Canada based in one case on lost BDU subscriptions (StatsCan) and associated revenue (CRTC Monitoring Report and ScotiaBank analyst report) and the other based on the impact of subscription piracy services (Sandvine). The global estimate for film alone was approximately \$160B in commercial value, while the first Canadian-specific approach for TV generated estimates from between \$220M-\$350M a year to between \$660M and \$1.050B while the second Canadian-specific approach generated an estimate of approximately \$500M.

39. Interveners from across the communications industry have confirmed the nature, breadth, and severity of this harm. They explain how piracy undermines their business and ability to innovate and contribute to Canada's economic and social goals:

- **CCSA:** “[I]t should be understood that, contrary to the arguments of some, this problem is not limited to large corporate interests but also extends to small players.”⁵⁷
- **CNOC:** “[B]usiness plans to launch IPTV operations are jeopardized by unfair competition from the operators of websites systematically engaged in copyright infringement.”⁵⁸
- **IBG:** “Independent broadcasters support the Fairplay proposal because they are affected by piracy taking place in Canada. There are currently no real, effective remedies to be pursued to prevent this piracy from taking place. As a result, ongoing innovation and growth in digital media by independent broadcasters is being affected. This has negative implications for the competitiveness of our media sector and for investments in content and distribution platforms.”⁵⁹
- **Manitoba Film & Music:** “[T]he cost of piracy also affects investors, which include both provincial and federal government agencies. The loss of revenue at the distribution stage affects the recoupment of funds that are slated to be reinvested in other projects. Because of piracy, Canadian creators not only lose out on revenue from their work, they are also able to access less government funding for their projects. When it comes to studio investment, piracy and the resulting loss of revenue impacts the value of their shares. In 2015, Canada Pension Plan (CPP) invested 290 million CDN to acquire an 18% stake in eOne. Piracy cost Canadians money as a

⁵⁷ CCSA Intervention at paragraph 5.

⁵⁸ CNOC Intervention at paragraph ES-3.

⁵⁹ IBG Intervention at paragraph 10.

result.”⁶⁰

- **Shaw:** “Given the size and far-reaching impact of the online piracy ecosystem, introducing effective measures to combat this activity is critical to the competitiveness and sustainability of Canada’s broadcasting sector in the digital age.”⁶¹
- **VMedia:** “[VMedia] stands with the Consortium in its expressions of concern, as set out in the Application, regarding the insidious effects of piracy and how it undermines (i) the commercial prospects of the BDU business and that of all our partners, which entrust us with their programming, as well as (ii) the cultural imperatives that are served by Canadian producers, the talent they employ, and the distribution channels that carry them to the public.”⁶²

2.2.1 Quantifying the economic impact

40. Despite this extensive evidence from participants in every aspect of the legal content industry, a small number of interveners claimed that piracy is not having an economic impact at all and in particular no or minimal impact on Canadian production.⁶³ In response to these claims and to address the inappropriate methodology on which they are based, the coalition retained Armstrong Consulting to provide evidence that replies to these interveners.

41. As set out in Appendix A, Armstrong Consulting conservatively defines the economic impact of piracy as “the fees that consumers would otherwise pay to the authorized distributors of television programming in Canada (BDUs) if they no longer had access to program piracy websites” (i.e., excluding the impact on film and music, on OTT services, and on the impacts of cord-shaving rather than cord-cutting).⁶⁴ The findings are summarized as follows:

After reviewing the available data from third party sources (including the CRTC, Media Technology Monitor, MUSO and Sandvine), the study offers three estimates of the economic impact of television program piracy based on three different estimates of the percentage of Canadian television households that currently do not subscribe to a legal BDU service but which might choose to do so if they no longer had access to television

⁶⁰ Intervention of Manitoba Film & Music at page 1.

⁶¹ Shaw Intervention at paragraph 10.

⁶² VMedia Intervention at paragraph 5.

⁶³ See e.g. PIAC Intervention at paragraphs 72-75 and CMRCP Intervention at paragraphs 142-145.

⁶⁴ As in the Application, Armstrong Consulting considers this aspect of the problem specifically simply because of the availability of data and of an appropriate methodology to calculate economic impact.

program piracy websites...

Based on these estimates, the number of subscribers lost to BDUs as a result of television program piracy ranges from 583K to 974K. The BDU revenue reduction, which equals the total estimated negative economic impact of television program piracy, ranges from **\$455M to \$761M**. The reduction in contribution ranges from \$23M to almost \$38M. The reduction in affiliation payments to Canadian television services ranges from \$158M to \$264M.⁶⁵

42. The economic impact of piracy is obviously not restricted to television and traditional BDUs. As interveners have pointed out, studies show that piracy will cost legal streaming services such as Netflix and Amazon **more than \$50 billion** between 2016 and 2022,⁶⁶ which is presumably why Netflix considers video piracy a substantial competitor and, if left unchecked, potentially its biggest competitor.⁶⁷

43. The economic impact also hits Canadian streaming services and their partners in the Canadian production industry, as the intervention of New Metric Media illustrates.⁶⁸ New Metric Media produces *Letterkenny*, which is a hit original comedy for Canadian OTT streaming service CraveTV. In their intervention New Metric indicates that *Letterkenny* has been downloaded more than 1.5 million times in Canada, and CraveTV confirms that a significant portion of those downloads are of entire seasons or the entire series, such that the data show that approximately 500,000 households have downloaded every single episode of the show. Those households could subscribe to CraveTV to watch the show at a cost of approximately \$0.30 per episode; the economic impact of them instead relying on piracy is approximately \$4 million per month or as much as \$48 million per year for this one title.⁶⁹ As New Metric explains:

The impact of this rampant piracy on the value of our production is impossible to know for sure but you can easily imagine that it would reach into the millions or even tens of millions of dollars. Anyone with any familiarity with the Canadian production industry knows the impact such losses will inevitably have on quality, as well as the ability to get future seasons of this show and future productions of other shows greenlit.

⁶⁵ Appendix A at page 1.

⁶⁶ Sookman Intervention at page 4; Stewart Clarke, "Piracy Set to Cost Streaming Players More Than \$50 Billion, Study Says" *Variety* (30 October 2017).

⁶⁷ Netflix, "Netflix's View: internet entertainment is replacing linear TV", available online at <https://ir.netflix.com/netflixs-view-internet-tv-replacing-linear-tv>.

⁶⁸ Intervention of New Metric Media (27 March 2018) [New Metric Intervention].

⁶⁹ A subscription to Crave TV costs \$7.99 per month. If 500,000 households rely on piracy rather than subscribing, that is approximately \$4 million per month or \$48 million per year.

44. The Canadian Chamber of Commerce has also provided additional forecasts of the global economic impact of piracy in 2022 in their intervention, ranging from an estimated C\$66B in film and TV revenue loss to an estimated C\$371B-\$827B economic value for film, a C\$68B-\$150B economic value for music, and C\$54B-\$122B economic value for software.⁷⁰

2.2.2 The legal market does not negate the impact of content theft

45. A number of interveners have pointed to the growth of some aspects of the Canadian media production and broadcasting industries as justification for ignoring the economic impact of piracy.⁷¹ This is an obvious fallacy; the relevant question is not whether the production industry alone is contracting in nominal terms despite the many powerful global forces contributing to its growth, nor has the coalition asserted that it is. The relevant question is what impact piracy has had on the industry as a whole up to this point and what impact it will have in the future if more effective tools to mitigate that impact are not introduced. On that question the evidence is clear - the impact of piracy is significant and growing rapidly. It is unreasonable to suggest that the problem should be ignored until a point of no return is reached.

46. The arguments based on growth in the legal industry are particularly fallacious given that, as one of these interveners admitted, "[m]uch of the growth in the last year was due to a spike in the volume of foreign location production in Canada" and in foreign OTT services "vastly ramping up production for their own services."⁷² It is not at all surprising that content production in Canada primarily for foreign markets – which generally have in place regimes like the one the coalition proposes (Europe, APAC) or other regimes such as notice-and-takedown (the US) – would be less affected by the level of piracy in the Canadian market. But that does not mean Canada should free-ride off the enforcement efforts of other countries, nor does it mean that the erosion of the legal Canadian marketplace is not having an economic impact on the Canadian industry.

47. To the extent arguments about the success of the legal market imply that piracy is merely about outdated business models, the coalition agrees with New Metric Media, who said in their intervention:

It is common for content creators and their partners to be blamed for piracy on the grounds that they rely on outdated or viewer unfriendly distribution models. In 2018, that excuse is simply that – just an excuse...

⁷⁰ Intervention of the Canadian Chamber of Commerce (29 March 2018) at pages 4 and 5.

⁷¹ See e.g. PIAC Intervention at paragraphs 45-49, Geist submission at paragraphs 56-68; Intervention of the Canadian Media Concentration Research Project (28 March 2018) [CMCRP Intervention] at paragraphs 127-132.

⁷² CMCRP Intervention at paragraph 129.

In case it isn't clear, we are not hostile to the valuable role the Internet plays in the modern content production system. After all, we produce new media content and turned a series of YouTube shorts into a hit OTT exclusive. We benefit from the open and dynamic nature of the Internet. ***But the Internet and piracy are not the same, and taking full advantage of one does not have to mean accepting the other.***⁷³

2.2.3 PIAC's extremist position must be rejected

48. The coalition is surprised to find itself responding to an attempt by PIAC to explicitly justify theft on the grounds that "piracy itself is an act of protest", that "many pirates see themselves as philanthropists", and that piracy is pro-competitive and does not result in any economic harm. This unrealistic and irresponsible position is inconsistent with Canadian law and the views of Canadians,⁷⁴ and should be rejected entirely by the Commission. Indeed, it is notable that PIAC is the only intervener that advanced such an extremist claim, with even the most consistent and vocal opponents of the coalition's proposal all at pains to point out that they are not "pro-piracy" and that "none of [the] data [they referred to] is meant to justify infringing activity."⁷⁵

49. PIAC (and the law professor, Ariel Katz, whom they enlist in their submission) have no evidence to support this position, although that does not stop them from misleadingly referring to third party sources. For example, both cite Sandvine for the claim that "[p]iracy services provide access to thousands of channels which are not legally available in Canada".⁷⁶ The Sandvine report cited says no such thing – it simply says piracy services provide access to thousands of channels (as do legal services), and that providers can use data from Sandvine to determine whether any of the pirated channels that are in high-demand are not available from a legal source. Had either PIAC or Professor Katz consulted the readily available evidence, they would quickly have discovered that all of the top channels identified in the Sandvine study are available legally in Canada.⁷⁷

⁷³ New Metric Intervention (emphasis added) at page 1.

⁷⁴ See the evidence presented in section 6.2 below.

⁷⁵ Geist Submission at paragraphs 40 and 53. See also CMCRP Intervention at para 55 ("This is not to condone the illegitimate use of copyright-infringing services by certain users of telecommunications services... the CMCRP supports intellectual property holders' various rights to control and remunerations from their works.") and the Intervention of Open Media and the Canadian Internet Policy & Public Interest Clinic [CIPPIC/OM Intervention] at paragraph 4 ("such activities are undoubtedly harmful").

⁷⁶ PIAC Intervention at paragraph 68.

⁷⁷ Star Plus has been available from ATN and is available on the Hotstar OTT service (Raj Baddhan, "Star Plus ends content deal with ATN in Canada" *BizAsia* (2 October 2017)); Willow TV cricket content is available on ATN cricket channels (ATN, Press Release, "ATN Acquires Exclusive Canadian Broadcast Rights for over 1000 days of Live Cricket" (10 September 2013)); Set TV (and Set TV Max), Aaj Tak, Aapka Colors, PTC Punjabi, local news channels, and CNN are all available from BDUs in Canada (see e.g. <https://www.bell.ca/Fibe-TV/Fibe-Programming-Packages/International.tab#rsx-tab-icon-container>).

50. Similarly, PIAC's claim that piracy "caus[es] no harm to legal demand"⁷⁸ rests entirely on an unscientific online "self-selecting opinion poll"⁷⁹ specifically regarding P2P file-sharing only, and conducted in Finland more than a decade ago. Even then, the source cited by PIAC does not even support the claim they attribute to it.⁸⁰ The fact that PIAC considered this the best evidence available for this proposition is instructive.

51. For his part, Professor Katz rarely grapples with actual data or facts about the market in Canada, and where he does he is either admitting that online piracy caused a crisis of precipitous revenue decline in the music industry,⁸¹ plainly failing to understand the data,⁸² or going to great lengths to explain away the data based on the theoretical possibility that piracy is a good thing while ignoring the real-world evidence that it is not.⁸³

52. The most pointed example of this is his claim that piracy does not harm content creators and distributors because people might just be sampling a show and then deciding to pay for it or otherwise contributing to the legal market. He points to *Game of Thrones* as an illustration and claims that "extensive piracy had not really bothered HBO".⁸⁴ The reality is that HBO is a founding member of the Alliance for Creativity and Entertainment, a new global coalition dedicated to protecting the dynamic legal market for creative content and reducing online piracy, and that it "aggressively protects its

⁷⁸ PIAC Intervention at paragraph 69.

⁷⁹ The source PIAC cites appears to be a working paper version of Joe Cox and Allen Collins, "Sailing in the same ship? Differences in factors motivating piracy of music and movie content" *J. of Behavioural and Experimental Economics* vol. 50 (June 2014), pages 70—76. See page 3 of the version cited by PIAC. Note that while the journal version of the paper was published in 2014, the underlying data are from August 2007, as reported under the heading "2. Method" on page 3 of the version cited by PIAC.

⁸⁰ PIAC cites this source for the claim that consumers generally believe that piracy does not harm legal demand. First, it is irrelevant whether the self-selecting respondents to a decade old Finish online poll believe that piracy reduces legal demand for content – what matters is whether piracy in Canada today in fact reduces that demand, which it clearly does. Second, this is not even what the source says. The poll reported in PIAC's source asked individuals to respond to the statement "P2P file sharing increases sales via legal channels" on a five-point Likert scale. The mean response was approximately 3, which merely indicates that the respondents "neither agree nor disagree" with the statement. There is no possible way to construe these results as indicating that piracy does not harm legal demand, and it is surprising that PIAC would claim that they do.

⁸¹ Katz Report at paragraph 3.

⁸² The most egregious example of this is at paragraph 142 (continued at paragraphs 150 and 151) of the Katz Report, which is the first time it even attempts to address the data the coalition provided in its Application. In that paragraph Professor Katz speculates with respect to the 700,000 additional occupied private dwellings reported by Statistics Canada that "maybe all of the occupants of these new dwellings are existing subscribers who moved to a new home." His speculation makes no sense – the Statistics Canada data reports that there are 700,000 additional occupied private dwellings. If 700,000 people simply moved during the time period the number of new occupied private dwellings reported would be zero. This basic fact is recognized even by other opposing interveners (see CMRCP Intervention at paragraph 145). That Professor Katz so confidently dismisses real evidence as "amateurish" while making such a rudimentary error himself suggests that the Commission should be cautious giving any weight to his opinion.

⁸³ Throughout, Professor Katz' only claim is that it could theoretically be the case that piracy is not harming all participants in the ecosystem. Indeed, the best summary of his report is at paragraph 5: "even if piracy harms content distributors, and even if it leads to lower revenue for creators, it only might harm the creation of new content." That type of merely speculative conjecture should not influence the practical policy-making decisions the Commission must make.

⁸⁴ Katz Report at paragraph 92.

content". One of the reasons it does so is that the reality of piracy in 2018, even for HBO, is starkly different than the rosy picture painted by Professor Katz:

[Game of Thrones'] seventh season, which wrapped up on Aug. 27, was pirated 1.03 billion times as of Sept. 3... What's most striking is the episode breakdown, because it suggests that many more people watched the blockbuster television series illegally this year than paid to see it on HBO. Those 1.03 billion illegal downloads and streams were spread out over seven episodes and a downloadable bundle containing the entire season... [with piracy accounting for more than 10 times the legal viewers].⁸⁵

53. This same pattern holds for Canadian television shows.⁸⁶ Such a pattern is inconsistent with the speculative suggestion that piracy might be good for creators and legal rights holders; instead, it demonstrates the common sense conclusion that piracy displaces legal consumption.

54. Professor Katz' unfounded insinuation that widespread content theft could theoretically be a good thing is not credible or supported by evidence. He is asking the Commission to believe that the tens of thousands of content creators represented in the coalition, and all of their counterparts in jurisdictions around the world, are acting contrary to their own interests by supporting the enforcement of their validly held copyrights. He is also suggesting that more than 40 countries have implemented regimes not just that are unwise but that provide no benefit to anybody at all. Of course, he can offer no explanation for either of these unlikely situations.

55. More fundamentally, his claims are largely beside the point, and in conflict with Canadian and international law. It has already been determined – in Canada, by every one of our international partners, and in treaties that recognize copyright as a fundamental human right – that copyright is beneficial and worth protecting.⁸⁷ The

⁸⁵ Travis M. Andrews, "Game of Thrones was pirated more than a billion times – far more than it was watched legally" *The Washington Post* (8 September 2017). It is worth noting that the massive shift toward predominantly illegal pirated means of watching *Game of Thrones* has taken place over a period during which HBO invested even more resources in the show and introduced an OTT streaming platform which, according to Katz, are the best ways to combat piracy.

⁸⁶ For example, all episodes for each season of *Orphan Black* have been downloaded between 6 million and 7 million times (as always, it must be recalled that P2P downloading is as little as 15% of all piracy) since mid-2015. Inconsistent with the "sampling" theory or similar theories, early seasons or early episodes within a season are not materially more pirated than later seasons and episodes. In the case of *Killjoys* and *Bitten*, later seasons are actually downloaded more than earlier seasons, which is an extremely strong indication that piracy is substitutive. In the case of *Letterkenny*, the latest season has been downloaded as a complete bundle (either alone or in a full-series bundle with all other seasons) more than 8 times as often as any individual episode in season 4, again very strongly indicating that piracy is not engaged in for "sampling" but as a complete substitute to legal demand.

⁸⁷ See e.g. *Copyright Act* and *Interventional Covenant on Economic, Social, and Cultural Rights*, Article 15(1) ("The States Parties to the present Covenant recognize the right of everyone... To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

question for the Commission is whether this is an area where telecommunications service providers should be required to participate in the solution to a problem they do not cause but which they are well placed to address, in order to ensure that Canada's telecommunications system responds to the economic and social requirements of Canadian citizens and businesses and safeguards, enriches, and strengthens our social and economic fabric.

56. It is particularly unfortunate that PIAC took this extremist position without providing in its intervention any evidence of what Canadian consumers actually believe regarding the coalition's proposal. In contrast to the eleven year old unscientific evidence from Finland relied on by PIAC, the coalition is providing reply evidence from a recent, properly conducted random survey of a representative sample of Canadians. As Appendix D (discussed in section 6, below) shows, more than two thirds of Canadians believe the government should remove piracy sites from Canada and more than three quarters of Canadians believe Canada should have the same or more protection for content online as countries that "actively block" piracy websites."⁸⁸

3.0 THE REGIME WILL BE EFFECTIVE

57. In our Application we cited academic research and additional expert studies that all demonstrate that regimes such as the one proposed by the coalition are effective. It is because these types of measures are known to be effective that so many jurisdictions around the world have adopted them. The leading and authoritative recent studies show:

- ***Danaher, Smith, & Telang – UK (2016)***: Blocking 53 major piracy sites in November 2014 led to a 90% reduction in visits to the blocked sites, a 22% reduction in total piracy for affected users, and a 6%-10% increase in traffic to legal sites.⁸⁹
- ***Danaher, Smith, & Telang – UK (2015)***: Blocking 19 major piracy sites in October and November 2013 led to an 83% reduction in visits to the blocked sites and a 12% increase in traffic to legal sites (for the heaviest pirate users, the increase in legal traffic was 24%).⁹⁰
- ***INCOPRO – Portugal (2017)***: Blocking 66 major piracy sites led to a 70% reduction in usage of the blocked sites and a 41% lower total piracy level than would otherwise have prevailed (i.e., a 10% reduction in usage of the

⁸⁸ Nanos, "Most Canadians think the government should remove piracy sites and have the same piracy protections in Canada as in other countries" (March 2018).

⁸⁹ Brett Danaher, Michael D. Smith, and Rahul Telang, "Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior" (18 April 2016) [Danaher 2016].

⁹⁰ Brett Danaher, Michael D. Smith, and Rahul Telang, "The Effect of Piracy Website Blocking on Consumer Behavior" (November 2015).

top 250 piracy sites in Portugal vs. a 31% increase in usage of those sites globally).⁹¹

- **MPA – Korea (2016):** Blocking 62 major piracy sites resulted in a 90% reduction in usage of the blocked sites and a 51% reduction in total visits to all infringing P2P sites.⁹²
- **INCOPRO – Australia (2017 & 2018):** Blocking 5 major piracy sites led to a 72% reduction in usage of the blocked sites and 8% reduction in usage of the top 50 piracy sites. Subsequent blocking of additional piracy sites further reduced the usage of the top 50 piracy sites so that the total decrease in usage of the top 50 piracy sites was 35% and of the top 250 piracy sites was 25.4%.⁹³

58. A policy that reduces the total level of piracy by up to 40% from the level that would otherwise have prevailed, and that increases the legal consumption of content, can only be considered incredibly effective. As we said in our Application, there is no single solution to problem of piracy. But that is not an excuse for doing nothing, and certainly not for refusing to adopt what is widely regarded as the most effective tool to reduce the widespread use of telecommunications networks for piracy. Indeed, we agree with the intervener with perhaps the most extensive one-the-ground experience with these types of regimes that:

While... any anti-piracy strategy has to involve a holistic approach and involve many strands of work, **we have not come across a more effective and proportionate method** than the targeted blocking of access to unauthorised content... In our view, the proposal put forward by FairPlay Canada is noble in its restraint. We have vast experience in enforcing our rights across the globe and **this is the very minimum that a rights holder will require** in order to maintain an efficient anti-piracy programme which stands a chance of working.⁹⁴

59. In response to questions raised by some interveners regarding the effectiveness of disabling access to blatant piracy sites in other countries, the coalition engaged European legal and technical experts to provide additional background and detail on the results achieved by such regimes in other countries. As can be seen in Appendix B and

⁹¹ INCOPRO, Site blocking efficacy in Portugal September 2015 to October 2016 (May 2017).

⁹² Intervention of the Motion Picture Association -Canada [MPA-Canada Intervention] at paragraph 23.

⁹³ MPA-Canada Intervention at para 24 and sources cited therein.

⁹⁴ Interventions of The Football Association Premier League.

in the interventions, a wide range of studies and reviewing courts have all concluded that disabling access to piracy sites is effective at reducing piracy.⁹⁵

3.1 The studies cited by the coalition are sound and reliable

60. The criticisms and discussion of this evidence advanced by opposing interveners are misleading and not persuasive; they amount to little more than restating the obvious fact that restricting access to egregious piracy sites does not completely eliminate the problem of piracy.

61. Most prominently, a number of interveners claim that the regime will be ineffective because it can be circumvented by use of a VPN.⁹⁶ The evidence, however, shows that despite this possibility regimes like the one proposed are nevertheless effective. Indeed, the Danaher study specifically considers this point and finds that "to the degree that users circumvented the blocks by using a VPN or similar measure," this is reflected in the fact that usage of the blocked sites does not decline by 100%. As that study explained, "while some people may circumvent the blocks, it is clear from the data that in addition to reducing visits to blocked sites, site blocking caused some former pirates to migrate their consumption toward legal channels."⁹⁷

62. In Appendix B, Wiggin and INCOPRO have provided multiple examples of courts that considered this issue and determined that despite the potential circumvention using VPNs or similar technology, disabling access to piracy sites is effective.⁹⁸ Additional evidence on this point from a range of other European courts is provided by interveners.⁹⁹ This is consistent with practicum research by Stanford Law School students (cited as authoritative by Professor Geist), which finds that "[i]t is possible to bypass all three forms of blocking using circumvention tools, but the blocks are effective against the average Internet user."¹⁰⁰

63. Those who have examined the actual evidence have determined that despite the potential availability of circumvention methods, regimes like the one proposed remain effective. Not all consumers have either the motivation or the sophistication to adopt a VPN simply to avoid restrictions on access to illegal sites. Moreover, VPNs come with costs, complexity, and performance losses that may deter even motivated and

⁹⁵ See e.g. the extensive cases and studies referenced in the Sookman Intervention at pages 41-48 (noting as well that certain cases cited in opposition to the proposed regime were overturned on appeal on precisely this issue). Mr. Sookman's discussion on this point is by far the most extensive and authoritative of any of the interveners.

⁹⁶ The extreme version of this argument is in the FRPC Intervention at paragraph 143, which claims that there was in the UK "mass circumvention rendering the blocks ineffective and ISPs' efforts wasted". This hyperbolic conclusion bears no relationship to the actual data.

⁹⁷ Danaher (2016) at pages 14 and 25.

⁹⁸ See Appendix B at paragraphs 8.22-8.28.

⁹⁹ See e.g. Sookman Intervention at pages 49 and 50.

¹⁰⁰ Stanford Law School Law and Policy Lab, "The 'Right to Be Forgotten' and Blocking Orders under the American Convention: Emerging Issues in Intermediary Liability and Human Rights" (September 2017).

sophisticated consumers from using them to circumvent the regime. VPNs also cannot readily be used for some of the most popular forms of piracy, such as those involving dedicated set-top-boxes. For all these reasons, the evidence shows that when access to a piracy site is disabled large numbers of consumers stop pirating content and increase their legal consumption of content rather than circumventing restrictions on access to illegal sites.

64. Other criticisms of this evidence are even less persuasive. PIAC claims that the Danaher, Smith, & Telang studies fail to account for "churn" that could explain some of the reduction in piracy. This is incorrect simply from a technical perspective – the paper uses a causal treatment model that only looks at continuous users, and as a result there is no churn to account for.

65. For its part, CMCRP attempts to discredit the Carnegie Mellon University research on the basis that the program receives funding from the MPAA. Contrary to the CMCRP's implication, that funding is clearly identified as unrestricted (gift) funding that gives the person or organization making the gift no editorial control or even control over the research questions asked and allocation of the funding. Moreover, the school has received similar funding from organizations with opposing views both before and after it received the MPAA funding. It is telling that beyond this attempt to discredit, the CMCRP can find no basis to object to any of the data or methodology in the CMU studies.

66. With respect to the impact on legal consumption, the Danaher studies likely dramatically understate the extent to which disabling access to piracy sites supports legal viewing. In particular, given the data used they were only able to measure the extent to which viewing to legal over-the-top services increased. It therefore does not capture any increase in viewing to broadcast and pay television services or DVDs, for example, despite these making up a very significant portion of the legal market for content in 2014. They also do not capture the legal sales that would otherwise become supplanted by piracy over time in the absence of the interventions. Accordingly, these studies likely show only a small portion of the contribution to the legal marketplace made by disabling access to major piracy sites.

3.2 The studies cited by interveners confirm the regime will be effective

67. Some interveners have cited additional studies, in particular one by Poort, Leenheer, Ham, and Dumitru and one by Aguiar, Claussen, and Peukert. Properly interpreted, these studies provide further support for the view that the proposed regime will be effective at reducing piracy.

68. The Poort study shows that when a single illegal peer-to-peer piracy site (The Pirate Bay) was blocked, between 8% and 9.3% of consumers who were engaged in illegal downloading (from any site, not just The Pirate Bay) at the time the block was implemented reported that they stopped their illegal downloading entirely.¹⁰¹ A further 14.5% to 15.3% reported that they reduced their illegal downloading.¹⁰² This shows the power of the regime the coalition is proposing. The common approach globally is to address between 20 and 70 of the most egregious sites at one time; the fact that even an extremely narrow intervention addressing only a single site can cause nearly 10% of users to abandon piracy entirely and a further 15% to reduce their total engagement with piracy illustrates the effectiveness of this type of intervention.

69. The Aguiar study similarly considered an extremely narrow intervention, disabling access to a single site – Kino.to.¹⁰³ Users of the site reduced their total level of piracy by 35% in the month after access was disabled and exhibited a statistically significant and persistent reduction in total piracy of 20% across the duration of the study period. PIAC claims that there was a 4.5% increase in piracy rates in Germany after access to Kino.to was disabled¹⁰⁴ but that is incorrect – the study reports that shutting down this single site *decreased* overall piracy rates for all users (regardless of whether they had ever visited Kino.to) by 4.5%,¹⁰⁵ another clear illustration of the effectiveness of the kinds of regimes the coalition is proposing.

4.0 **NO PRACTICAL ALTERNATIVE**

70. In our Application we identified four reasons why conventional domestic copyright law alone cannot effectively address the problem of piracy on telecommunications networks.¹⁰⁶ First, pirate operators can remain totally anonymous online while conventional legal action requires that the operator be identified in order to obtain effective relief. Second, pirate operators can operate in Canada from jurisdictions in which Canadian law cannot be effectively enforced, rendering conventional legal action pointless. Third, even if these obstacles can be overcome there is a structural imbalance between the time and resources required to shut a pirate site down through conventional legal action and the ease with which another site can emerge. Fourth, even aside from all these obstacles, pirate operators typically are unable to compensate their victims.

71. This was confirmed in interventions from Canadian and foreign rightsholders:

¹⁰¹ Joost Poort, Jorna Leenheer, Jeroen van der Ham, and Cosmin Dumitru, "Baywatch: two Approaches to Measure the Effects of Blocking Access to The Pirate Bay" (22 August 2013) at Table 3.

¹⁰² *Ibid.*

¹⁰³ Louis Aguiar, Jorg Claussen, and Christian Peukert, "Catch Me if You Can: Effectiveness and Consequences of Online Copyright Enforcement" (17 January 2018).

¹⁰⁴ PIAC Intervention at paragraph 60.

¹⁰⁵ Aguiar at pages 4 and 23.

¹⁰⁶ Application at paragraphs 53-58.

- **BBC Worldwide:** “Today, piracy websites operate anonymously online from jurisdictions all over the world. Legal tools must therefore be adapted in order to meet this highly mobile threat... the FairPlay proposal is a proportionate response that reflects the modern realities of piracy.”¹⁰⁷
- **Documentary Organization of Canada:** “Canada’s current tools to combat piracy are not working. Piracy websites operate anonymously online from jurisdictions all over the world, making it difficult to identify the people responsible for them or take action against them. It is also unreasonable to expect an artist or a small Canadian production company to track down and sue multiple anonymous parties operating in other countries everytime their content is stolen. This is something most DOC member simply do not have the resources to do.”¹⁰⁸
- **IBG:** The “existing enforcement problem [involves] multiple infringers in many hard-to-reach jurisdictions, able to reconfigure their digital platforms to avoid legal oversight. The remedy proposed by Fairplay gets to the heart of the matter. It provides an effective domestic remedy to guard against blatant piracy taking place in Canada. Otherwise, the practical reality is that there is no effective remedy available for content creators and rights holders in Canada.”¹⁰⁹
- **Shaftesbury:** “It is safe to say that Canada’s current tools to combat piracy are not working. Currently, individual artists, producers, broadcasters, etc. are expected to individually track down and sue anonymous parties pirating their works. Not only do we lack the resources to do this, but these parties tend to operate in other countries and under different jurisdictions, making them next to impossible to track down.”¹¹⁰

72. As we noted in the Application, these challenges are the same in other jurisdictions.¹¹¹ This is what has driven other countries to adopt regimes to disable domestic access to piracy sites, just as the coalition has proposed.

4.1 Copyright law alone is insufficient

73. While no intervener has addressed the issues we raised with respect to conventional enforcement options, some have nevertheless continued to suggest that

¹⁰⁷ Intervention of BBC Worldwide [BBC Worldwide Intervention] at page 2.

¹⁰⁸ Intervention of the Documentary Organization of Canada at paragraph 6.

¹⁰⁹ IBG Intervention at paragraphs 8-9.

¹¹⁰ Intervention of Shaftesbury Films Inc. at page 2.

¹¹¹ Application at paragraphs 59-65.

existing copyright law remedies alone are sufficient to combat the widespread piracy that takes place on telecommunications networks. As evidence, they cite cases that some members of the coalition and other rightsholders have brought under these laws.¹¹²

74. It is true that some Canadian rightsholders have devoted considerable time and resources to attempting to address the problem of online piracy using existing tools. In particular, while smaller rightsholders such as independent Canadian producers typically do not have the resources required to pursue this type of litigation, some of the largest members of the coalition have incurred millions of dollars of costs taking on multiple cases over the last three years (notably, in all that time none of those cases has yet reached a final resolution or even proceeded to trial).¹¹³ Moreover, piracy remains at an alarming level and continues to grow at an alarming rate despite this investment of time and resources under the existing rules. This experience demonstrates that existing tools alone cannot fully address the issue of content theft, and illustrates the following issues identified in our Application.

75. First, target identification is a prerequisite to the commencement of any judicial proceeding. Yet identifying a target can be extremely difficult given the anonymous and global nature of Internet and growing trend of pirate operators using all available means to hide their true identity in order to escape authorities and judicial action. For example, pirate operators regularly use anonymous domain name registration and hosting services, offshore companies in jurisdictions with far less corporate transparency and accountability, obfuscation of payment network information, and payment in cryptocurrencies, to avoid detection.

76. As a result, it typically takes several months or years of investigation and a huge investment of resources to identify the individuals behind a piracy site, if they can even be identified at all. In this context, it is impractical to expect rightsholders, especially smaller ones, to rely exclusively on an existing system that requires them to spend vast resources just to identify pirates, knowing that additional resources will be required to carry on litigation.

77. Second, the borderless nature of the Internet can make effective enforcement against foreign piracy sites that are accessible in Canada impossible. Indeed, a pirate operator or her accomplices may be located outside the jurisdiction of Canadian courts, and, in any event, can easily move their illegal activities outside of Canada at the first sign of trouble. Service providers located around the world may have little incentive to comply with the orders of a foreign tribunal or may be intentionally or unintentionally

¹¹² See e.g., Geist Submission at paragraphs 70-71 and PIAC Intervention at paragraph 18.

¹¹³ See e.g. *Bell Canada et al v. WatchNSaveNow Inc. et al*, T-1924-17 (Fed. Ct.); *Bell Canada et al v. Adam Lackman et al*, T-800-17 (Fed. Ct.).

constrained from doing so by domestic law in the other jurisdiction (for example, it could be an unintended consequence of local data privacy laws or a deliberate scheme similar to providing for an offshore tax haven). Indeed, as Professor Michael Geist has previously recognized, Canadian law cannot pragmatically be enforced against sites hosted outside the country.¹¹⁴ By contrast, the proposed regime addresses the harm to Canada entirely within Canadian law and through entities in Canada.

78. Third, even for those global piracy operations based in Canada enforcing court orders is unduly difficult. The case of *Vincent Wesley dba Mtlfreetv.com*¹¹⁵ illustrates the challenge. Mr. Wesley was one of the original defendants to the 2016 action brought by several Canadian rightsholders against vendors of "fully loaded" set-top boxes that illegally make available copyrighted content. He operated a bricks and mortar store in Montreal and a website with an online store and related content. He was personally served with an interlocutory injunction issued by the Federal Court of Canada on June 1st, 2016 but continued selling the illegal preloaded set-top boxes. Multiple purchases were made from him on his premises for investigative purposes later in June, 2016.

79. Mr. Wesley was charged with contempt of court in July 2016 for violating the injunction and personally served with the charging order. Nevertheless, he continued selling the illegal pre-loaded set-top-boxes and later that same month another purchase was made from him on his premises for investigative purposes.

80. Mr. Wesley pled guilty to contempt of court and in December 2016 was sentenced to pay a fine of \$15,000 in 20 installments of \$750 per month. He ultimately did not pay and claimed he could not pay those amounts, so as an alternative was ordered to complete 275 hours of community service by December 2018, including filing periodic reports showing he was on track. He did not do that either and the plaintiffs had to move once again for an order of committal to get him to comply. Another order was issued by the court in April 2018, again requiring Mr. Wesley to complete his 275 hours of community service. Based on experience to date, he may yet fail to do so.

81. Meanwhile, even after pleading guilty to a first charge of contempt of court in December 2016, Mr. Wesley continued selling illegal pre-loaded set-top-boxes in breach of the interlocutory injunction. A further purchase was made from him on his premises for investigative purposes in January 2017. Mr. Wesley was then charged with contempt of court a second time and a hearing took place in June 2017. The

¹¹⁴ Michael Geist, "One More Response", available online at <http://www.michaelgeist.ca/2006/11/project-cleanfeed-canada/#comment-1895>. [Geist, One More Response] ("Claims that the law can currently address this issue by taking down [the] sites are also wrong – Canadian-based sites can be targeted, but... Canadian law cannot deal with [sites] hosted outside the country.") Professor Geist was referring to child pornography sites but the same is obviously equally if not more true in respect of piracy sites.

¹¹⁵ *Bell Canada et al v. Vincent Wesley dba MTLFreeTV.com*, 2018 FC 66.

decision in that case finding Mr. Wesley guilty of a second charge of contempt of court was issued in January, 2018. However, no sentence has yet been handed down.

82. Mr. Wesley now claims to have sold his online presence to a currently anonymous third party who will presumably carry on the infringing activity, and the plaintiffs are aware of additional defendants who blatantly continue not to comply with the court's order and soon will be charged with contempt. Thousands of similar illegal set-top-boxes remain readily available for purchase in Canada despite ongoing legal actions comprising more than 150 defendants in Canada.

83. Over two years some of the largest Canadian rightsholders have been unable to effectively enforce existing remedies against pirate operators doing business in their own names and in person in Canada. Knowing this, it is clearly not practical to expect any Canadian rightsholders (and certainly not small independent producers) to rely entirely on the existing rules to address anonymous operators with no physical presence in Canada operating exclusively over Canada's telecommunications networks. The proposed regime provides a different, practical response to content theft that complements existing tools.

4.2 Existing injunctive relief against ISPs

84. Perhaps because they recognize that the ability to disable access to egregious piracy sites is an essential tool in 2018, some interveners have argued against the proposal on the basis that the same remedy is readily available at common law today.¹¹⁶ Such an argument effectively admits that disabling access to piracy sites is a reasonable measure within the Canadian legal and regulatory framework, with the only relevant debate being which institution (i.e., the Commission, the courts, or both) is best suited to implement this measure.

85. Particularly in the absence of section 36 of the *Telecommunications Act*, the coalition agrees that courts in Canada may have the power to issue injunctions against ISPs requiring them to disable access to a piracy site that evades other enforcement efforts. That does not, however, obviate the need for the proposed regime.

86. First, specific to the Canadian legal and regulatory framework, the Commission's stated view is that pursuant to section 36 of the Act not even a court order is sufficient to allow an ISP to disable access to a website:

"[T]he Act prohibits the blocking by Canadian carriers of access by end-

¹¹⁶ See e.g. PIAC Intervention at paragraphs 15 and 16 (we note that PIAC does not explain why it believes section 27(2.3) of the *Copyright Act* could apply to ISPs in light of section 31.1(1)) and Geist Submission at paragraphs 74-75.

users to specific websites on the Internet without prior Commission approval... 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."¹¹⁷

87. This implies that, at a minimum, a duplicative Commission process would be required even if rightsholders successfully obtained an order under existing law disabling access to piracy sites.

88. Second, section 36 and the Commission's view also introduce significant uncertainty into the court process. While interveners have pointed to the Canadian case of *Equustek* (which dealt with search engines) and the UK case of *Cartier* (which dealt with ISPs in the UK), in neither case was section 36 of the *Telecommunications Act* or any analogous provision at issue. It is possible a court would be dissuaded from making an order against ISPs to disable access to a piracy site given section 36 and the Commission's view of its impact.

89. Third, the existing process can be inefficient and inaccessible for rightsholders. In response to this argument raised by interveners and to ensure the Commission benefits from a complete record on the point, the coalition engaged IP and technology law firm Hayes eLaw to explain the process that would likely have to be followed to potentially obtain such an order under existing legal rules. As can be seen in Appendix C, the process involves first completing litigation against each egregious piracy site, and could take up to 765 days and cost up to \$338,000 to address a single site.¹¹⁸

90. While copyright enforcement actions are a crucial and powerful tool in many cases, it is not reasonable to suggest that rightsholders should spend this much time and resources to address every case in which their content is being stolen. In some cases, litigation against a piracy site may be unlikely to successfully constrain that site's activities, and cannot reasonably be undertaken merely in the hopes of receiving a discretionary order to disable access to the site through ISPs. The same result can be achieved much more directly, accessibly, and transparently by the Commission with the proposed regime.

91. Indeed, in other countries in which regimes such as the one the coalition has proposed have been implemented, it was also the case that a lengthy and costly process could already achieve the desired result.¹¹⁹ They nevertheless proceeded to

¹¹⁷ Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016), affirmed in Telecom Decision CRTC 2016-479.

¹¹⁸ The total estimated cost of \$338,000 includes both legal fees and disbursements.

¹¹⁹ See *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658 at paragraph 57 and UK Patent Office, *Consultation on UK Implementation of Directive 2001/29/EC on Copyright and Related*

introduce more tailored regimes to eliminate uncertainty and reflect the reality of enforcement in this area.

92. Coalition members are eager to protect their rights and begin to alleviate the ongoing harm caused by Internet piracy. In that regard, coalition members have been and will continue to aggressively pursue every option reasonably available them. Unfortunately, under the existing rules there is no practical alternative to the proposed regime. In particular, conventional copyright remedies and discretionary third party injunctions potentially available at common law cannot effectively address the widespread use of Canada's telecommunications networks for piracy. Moreover, the fact that modern piracy is occurring over the very telecommunications networks that the Commission is mandated to regulate, combined with the fact that Parliament has delegated to the Commission the statutory power to authorize the disabling of access to a website, suggests that the Commission has the primary role to play in this area.

5.0 WHAT CANADIANS THINK

93. Some interveners have filed a large number of names on petitions or form letters purporting to show opposition from some individuals to the coalition's proposal, and the Commission also received related interventions directly from a number of individuals (including hundreds of supporting interventions). In addition, the FRPC has filed certain survey evidence. This type of evidence appears to be meant to lead the Commission to conclude that there is widespread opposition among Canadians to the coalition's proposal. In fact, no such conclusion can be drawn.

5.1 Campaigns based on deliberately false and misleading information

94. With respect to the petitions, form letters, and related interventions, these are addressed extensively in the intervention of Richard Owens. In particular, his extensive review of interventions filed prior to his demonstrates that they are the result of campaigns by online activists that are premised on misinformation.

95. In that regard, more than half of the individual interventions explicitly object to the proposal based on an objection to ISPs being able to unilaterally decide to block websites.¹²⁰ In fact, the proposal is the opposite – that ISPs would only be permitted to disable access to a website when ordered to do so by the Commission. As a result, these interventions do not actually address the proposal filed by the coalition.

96. The fact that the Commission received such interventions is not surprising, as every indication is that they were driven by online campaigns that made exactly this

Rights in the Information Society: Analysis of Responses and Government Conclusions (2003).

¹²⁰ Intervention of Richard Owens [Owens Intervention] at page 6.

false claim.¹²¹ Indeed, the petitions or form letters submitted by CIPPIC/OpenMedia, SumOfUs, and LeadNow all explicitly contain this particular point of misinformation.¹²² It is telling that only one of these groups submitted its own intervention, and that they did not repeat this false claim in that intervention – presumably because they know it to be false.

97. There are other issues with these campaigns. It appears that they have generated highly unrepresentative interventions (e.g., 90% male).¹²³ There are a number of obviously false interventions and the identity, veracity, and location of the others can generally not be confirmed. In the case of the petitions, there are more than 14,000 identified duplicate entries, and an unknowable number of other false entries.

98. The implication of all this is not that the Commission should ignore the interventions of individuals. The interventions show that many Canadians will be focused on the scope of the regime and the process in place for applying it. Indeed, these were major areas of focus of the coalition as well and are addressed in our Application. However, most of the interventions cannot be relied upon to assess whether Canadians generally would support or oppose the proposal because they are not representative and are based on erroneous assumptions about the actual proposal. The coalition fully expects that the Commission will reach its conclusions as an evidence-driven expert tribunal and not on the basis of an irresponsibly conducted letter-writing campaign.

5.2 Survey evidence

99. The FRPC provided survey evidence that, despite their characterization of it, actually supports the coalition's proposal. In particular, their evidence suggests that ~60% of Canadians believe there is no or only a slight risk that the Commission would block websites that should not be blocked, compared to just 18% who think it is more likely than not or virtually certain that the Commission would do so. Similarly, ~60% believe there is no or only a slight risk that the federal government¹²⁴ would block sites for reasons other than those proposed by the coalition, while just ~22% believe this is

¹²¹ See e.g., act.openmedia.org/DontCensor, which states "BIG TELECOM DECIDES WHAT YOU SEE" and "Unaccountable corporations should not be able to pick and choose what I see online."

¹²² In the case of Open Media it says "Unaccountable corporations should not be able to pick and choose what I see online" (obviously, the proposal is for the Commission to decide not "corporations"). In the case of SumOfUs it says "Any process that is concerned with the restricting access to the internet should have court oversight and not be in the hands of a few corporations" (obviously, the proposal is for it to be in the hands of the CRTC not "a few corporations"). In the case of LeadNow it says "A coalition of major telecom companies like Bell want Canada to create a review board with the power to control our online activities and block websites they don't like... Handing over control of the internet to corporate interests is a slippery slope" (obviously, the proposal is for the Commission to decide based on an objective standard not to "hand[] over control of the internet to corporate interests" to block sites "they don't like.").

¹²³ Owens Intervention at page 16.

¹²⁴ For some reason the FRPC survey shifts from a focus on the Commission to a wider focus on the government as a whole; it's not clear why that wider focus is relevant here.

more likely than not or virtually certain. This is despite the survey being clearly set up to prime respondents to inflate these risks.¹²⁵

100. In any event, the FRPC survey evidence is not particularly relevant to the determination the Commission has to make. For an evidence-based tribunal like the Commission, the question is not whether survey respondents think the Commission would block the wrong sites but whether the Commission concludes that it would be able to apply the regime appropriately.

101. In response to the FRPC survey, the campaigns initiated by Open Media and others, and to the claims made by some interveners that Canadians are opposed to the proposal, the coalition engaged Nanos Research to conduct a random survey of Canadians to understand their views on whether a regime to disable access to piracy sites is an appropriate policy. The Nanos report is provided as reply evidence at Appendix D. One question in the survey asked:

"Countries like the United Kingdom, Australia and France actively block piracy sites to protect artists and organizations that create content. Should Canada have more protection, the same amount of protection or less protection of copyrighted online content than countries such as the United Kingdom, Australia and France?"

102. 77% of Canadians believed Canada should have the same or more protection than those countries that disable access to piracy sites. Broadly consistent with this response, 70% of Canadians also believed that the government should remove piracy sites from Canada.

103. Overall, then, the evidence on the record demonstrates that Canadians support disabling access to piracy sites but expect decisions about which sites to be made by an independent decision-maker (like the Commission) and not by each ISP exercising its unilateral judgement. This is exactly what the coalition has proposed.

6.0 WHAT THE APPLICATION ACTUALLY ADDRESSES

6.1 Identifying Piracy Sites

104. As set out in our Application, the proposed regime is not addressed simply at copyright infringement online, nor is it in any way targeted at individual Canadians; rather, it would only apply to websites and services that are **blatantly, overwhelmingly,**

¹²⁵ The survey firsts asks about visiting websites "accidentally"; obviously there is no valid comparison between a consumer casually visiting a website accidentally (e.g., clicking an unintended link) and the Commission blocking a site improperly under the proposed regime, but by linking the two questions the survey primes respondents to view them similarly.

or structurally engaged in piracy.¹²⁶ This is a deliberately high bar intended to capture only sites that the IPRA and Commission will easily recognize as indefensible.

105. Some interveners have nevertheless suggested that legitimate sites and services, such as Periscope, Snapchat, Glide, Google Drive, and YouTube, could be captured.¹²⁷ That suggestion is absurd on its face, and no rationale has been provided for why both an independent expert body like the IPRA and a sophisticated quasi-judicial tribunal like the Commission would find that these sites or services are blatantly, overwhelmingly, or structurally engaged in piracy.

106. To be clear, the coalition does not intend or expect that an application under the proposed regime would ever be made in respect of any of these or similar sites, nor in respect of any VPN service used for legitimate privacy-protection or other purposes, much less that any such application could ever succeed. In other countries with similar regimes, we are not aware that anybody has ever alleged that these types of legitimate sites and services should be subject to the regime, nor has access to these types of legitimate sites and services been disabled.

107. We believe the proposed standard (blatantly, overwhelmingly, or structurally engaged in piracy) and proposed evaluation criteria set out in the Application would ensure the regime is appropriately and narrowly tailored. They address precisely the sorts of issues identified by interveners, such as whether a site or service is intended or promoted as a piracy site, and the need to compare the prominence of piracy with the prominence of legal content or uses.

108. Nevertheless, the coalition recognizes the importance of getting this issue right. That is why we recommended in the Application that the actual evaluation criteria be developed jointly by ISPs, rightsholders, consumer advocacy and citizen groups for consideration by the Commission in a follow-up proceeding.¹²⁸ We note that none of the interveners raising this issue have identified any specific concerns or made any suggestions to improve the proposed criteria.

6.2 Limited to the Pressing Problem of Piracy

109. Some interveners have insisted that the Commission should reject the proposal regardless of its merits because it might lead to calls for the Commission to use a similar mechanism to address other forms of illegal content online.¹²⁹

¹²⁶ Application at paragraphs 1, 10, 75, 84, 85, and 89.

¹²⁷ See e.g., PIAC Intervention at paragraph 87 and CIPPIC/OM Intervention at paragraph 28.

¹²⁸ Application at paragraph 84.

¹²⁹ For example, the CMCRP Intervention at paragraph 63 and the FRPC Intervention at paragraph 172.

110. No evidence has been offered to support this argument,¹³⁰ and in fact the evidence shows the opposite. There are 42 countries in the world that have adopted or are legally required to adopt regimes similar to the one proposed, and yet no intervener has pointed to a single one that started with such a regime and then leveraged it to expand into other areas. Similarly, Canadian ISPs have been disabling access to web pages containing child pornography under Cleanfeed for more than a decade without calls for that regime to expand to other areas. Indeed, this same criticism about supposedly "inevitable" mission creep and abuse was raised regarding Cleanfeed at the time it was proposed. Professor Michael Geist rejected that criticism as follows:

It is worth noting that when Cleanfeed was launched in the UK two years ago, many of the same criticisms were raised... However, more than two years later, I have had trouble finding comments, articles or reports that suggest that the Internet Watch Foundation (the UK equivalent of Cybertip.ca) has added sites that stray beyond child pornography.¹³¹

111. The same applies here: there is simply no evidence to support the claim that anyone would seek to extend the proposed regime beyond the problem of piracy.

112. Moreover, there is no reason to believe that the Commission would accede to any call to extend the regime inappropriately. In the coalition's view, the Commission can be relied upon to keep the regime restricted to its original purpose. There are many principled reasons why a regime that is appropriate to address the issue of piracy may not be appropriate for other equally or more problematic content.¹³²

113. Accordingly, the Commission need not be concerned that adopting the most appropriate and effective response to widespread content piracy on telecommunications networks would establish an unwanted precedent for addressing other issues.

¹³⁰ The CMCRP cites no evidence; the FRPC cites two injunctions granted by courts in countries that do not have regimes like the one the coalition has proposed, as well as some general conclusions from a Freedom House report none of which address disabling access to piracy sites.

¹³¹ Geist, One More Response.

¹³² For example, there is extensive evidence that requiring ISPs to disable access to piracy sites significantly reduces piracy, while similar evidence may not exist for other types of content. This may be because accessing pirated content is mainstream and widespread, whereas other types of content are only accessed by highly dedicated users (who may have greater motivation and capacity to circumvent the types of measures contemplated in this Application). Similarly, the evidence demonstrates that the large number of piracy sites, their ability to operate anonymously, and their operation from jurisdictions outside the reach of Canadian law renders other enforcement mechanisms ineffective; in other cases there may be fewer sites, with greater connection to Canada, less anonymity, and more opportunities for enforcement (e.g., the need to ship physical goods or greater direct connection to payments processes). Contrary to the suggestion in the CIPPIC/OM Intervention at paragraph 23, there are endless principled bases on which an evidence-based tribunal like the Commission might ultimately reject calls to expand the proposed regime to address other issues. We note that the coalition is not aware of any other proposal that may be made to the Commission and is not expressing a view on any particular proposal that is being or may be considered.

7.0 PRACTICAL FOR ISPS

114. Videotron, Telus, Shaw, Rogers, Cogeco, CCSA, Cable Cable, and Bell have all supported the proposed regime (or, in the case of the CCSA, supported conditional on recovery of any related costs). This group of supporters includes large and small, independent and vertically integrated ISPs, who together serve the vast majority of Canadian Internet subscribers.

115. Xplornet, the ITPA, and Eastlink filed neutral interventions raising particular issues and VMedia, Teksavvy, ECN, CNOC, and the BCBA filed opposing interventions.

116. Accordingly, most of the ISPs participating in the proceeding, who serve the vast majority of Canadian subscribers, have supported the proposed regime. More importantly, no ISP has suggested that it would not be possible or practical, from a technical perspective, for them to implement it. This is consistent with the fact that a number of ISPs across the globe comply with these kinds of regimes.

117. Internationally, ISPs have also recognized that disabling access to piracy sites is a practical, proportionate, and responsible approach that they should adopt. For example, rightsholders and ISPs in Belgium recently made a joint application to disable access to 33 piracy sites and 450 domains, with the parties stating “things are changing. There is a certain maturation of minds, we realise, from all sides, that we must take the problem of counterfeiting head-on through blocking measures” and “[t]he responsible actors want to demonstrate that it is possible to stop piracy” using this approach.¹³³ CCSA and Telus expressed similar views in their interventions:

It is because online copyright infringement remains a significant problem despite all the efforts to address it over the last twenty (plus) years that CCSA is now open to Canada considering new methods to reduce it... by not holding on to past arguments simply for the sake of doing so and instead being open to examining new and novel approaches for Canada which have proven successful elsewhere – we believe we have matured our views regarding this issue.¹³⁴

TELUS believes that ISPs – as good corporate citizens – have an ethical responsibility to lend their efforts to help fight online content piracy, given that their networks provide the means for its dissemination.¹³⁵

¹³³ Robert Briel, “Belgian ISPs agree to block 450 ‘pirate’ domains” *Broadband TV News* (7 May 2018).

¹³⁴ CCSA Intervention at paragraph 6.

¹³⁵ Telus Intervention at paragraph E13.

118. Nevertheless, some questions have been raised by interveners regarding (i) whether there is a risk of inadvertently disabling access to additional (unintended) sites in the process of implementing the requirement to disable access to a piracy site and (ii) the costs to ISPs of implementing the regime. For the reasons discussed below, we do not believe either of these issues should be obstacles to the Commission approving the Application.

119. The coalition recognizes that these issues are affected by the technical means adopted by an ISP in order to disable access to identified piracy sites, and that our Application did not specify what means must be adopted. In our view, the regime should be flexible in this regard, with the specific steps required to be taken in any given case reflecting the nature of the piracy site to which access is being disabled and the existing capabilities of each ISP.

7.1 Approaches to disabling access

120. By way of illustration, ISPs all use a Domain Name System (DNS) server to translate domain names (i.e., "www.domainname.ca") into numeric IP addresses that are used to route traffic over the Internet. The ability to disable access to a specific list of domains through a DNS server (i.e., by not returning the associated IP address in response to a look-up) is now a standard feature on DNS platforms. This feature is sometimes called a Response Policy Zone (RPZ).

121. ISPs could take reasonable steps to disable access to specified piracy sites simply by keying the specified domains into the relevant list or RPZ. The DNS would then be set either to return no result for those domains or, more likely, to return some form of Commission- or industry-operated, or ISP-specific, landing page explaining why the site is not available and providing other relevant information to the user. As explained above, studies have shown that this type of measure is effective in overwhelmingly reducing the usage of the targeted websites. This type of measure would address both websites (including the websites accessed by illegal KODI add-ons) and illegal subscription services or other services using CDNs (which use the DNS to access the command-and-control server for the illegal service).

122. It is also the case that ISPs typically have in place the network infrastructure required to engage in "traffic blackholing". This involves rerouting traffic received from a particular IP address to "nowhere" rather than to its intended destination and is used to respond to distributed denial of service (DDoS) attacks and prevent them from potentially crashing or degrading the network.

123. ISPs could similarly take reasonable steps to disable access to specified piracy sites simply by employing traffic blackholing against the relevant IP address.¹³⁶ This would leverage existing infrastructure and standard business practices already in place for network security purposes.

124. Other approaches may also be beneficial or even necessary in some cases, and will need to be studied by the Commission. In that regard, the Commission may wish to develop a relevant record and provide guidance on this issue in the proposed follow-up proceeding. But in any event, the evidence available on the record of this proceeding is already sufficient to demonstrate that ISPs will be able to implement the proposed regime in at least some effective form.

7.2 No risk of over-blocking

125. Certain interveners have vastly overstated the risk that, when disabling access to a piracy site under the proposed regime, ISPs will inadvertently disable access to legitimate sites as well. In particular, they have done so by referring to anecdotes that are typically unrelated to the proposed regime. The Commission should be skeptical of these claims, which apparently do not raise the same concern for ISPs (for whom there is an overwhelming commercial imperative to avoid any inadvertent blocking) and which do not reflect the views of those who have actually been involved in these types of regimes.

126. By way of illustration, certain opposing interveners cite the following unrelated incidents: fraudulent use of US DMCA notice-and-takedown requests (which do not involve any independent review),¹³⁷ a "temporary restraining order" granted by a US court with respect to the sale of alleged counterfeit bridal and prom dresses,¹³⁸ the application of YouTube's ContentID system to a white noise video,¹³⁹ a court order in Germany requiring a website to implement commonly used geo-gating technology (and not involving ISP blocking),¹⁴⁰ a blocking order against a backbone provider (not targeted in the proposed regime) that blocked additional pirate sites beyond the one targeted,¹⁴¹ a unilateral attempt by Telus more than ten years ago to urgently block an IP address for safety reasons,¹⁴² and the complex, automated, and optional web content filters available in the UK.¹⁴³ None of these anecdotes has anything whatsoever to do with residential ISPs disabling access to specific piracy sites following a hearing and

¹³⁶ As discussed below, this is a type of IP address blocking and appropriate safeguards would need to be in place to ensure access is not affected for sites that share the IP address but to which access is not meant to be disabled.

¹³⁷ FRPC Intervention at paragraph 303.

¹³⁸ FRPC Intervention at paragraph 304.

¹³⁹ FRPC Intervention at paragraph 306.

¹⁴⁰ FRPC Intervention at paragraph 307.

¹⁴¹ Geist Submission at paragraph 101.

¹⁴² Geist Submission at paragraph 99.

¹⁴³ FRPC Intervention at paragraph 305.

decision by the Commission, and they should play no part in the Commission's decision on the Application.

127. In other cases, interveners have cited claims that are simply false. For example, Professor Michael Geist claims "India blocked access to... Google Docs".¹⁴⁴ In fact, Google Docs was inadvertently included on a proposed list but identified during the review process and not blocked.¹⁴⁵ That is an example of how the proposed regime can be expected to function appropriately.

128. Cutting through this noise, it appears that despite the number of countries with these types of regimes (in some cases for as long as a decade), there have been only a small number of cases in which access to legitimate sites has been inadvertently disabled, and those cases have typically been resolved quickly. These cases fall into two categories.

129. The first are associated with IP address blocking where multiple websites share the same address. In one case seven years ago, ISPs in Argentina disabled access to all of Blogger in an attempt to disable access to specific blogs (something that could never be done under the proposed regime). As Google said at the time, "[t]here are other less restrictive technical procedures than the one used, which allow ISPs to comply with court orders fully, while affecting only the sites involved."¹⁴⁶

130. As set out in Appendix B, ISPs in the UK undertake IP address blocking and within the UK regime safeguards have been developed to minimize the risk of over-blocking. These include only requiring IP address blocking where the ISP has been notified that the IP address does not host other sites; requiring the relevant rightsholder to notify the ISP if that changes; and allowing any affected website to seek to amend or dissolve the order. As the UK experts at Wiggin report:

In the six and half years that section 97A orders have been in place in the UK, there has only been one reported case of over-blocking as a result of IP address blocking. That occurred in August 2013 when two UK ISPs blocked access to an IP address following a notification by the FA Premier League under the order in respect of the FirstRow website. The IP address in question hosted a number of websites that were not the subject of the order, including the Radio Times website. Access to those websites was blocked for a number of days until the situation was corrected.¹⁴⁷

¹⁴⁴ Geist Submission at paragraph 101.

¹⁴⁵ Diksha Madhok, "Relax, there is no ban on Google Docs in India" *Quartz India* (7 July 2004).

¹⁴⁶ Jillian York, "Argentine ISPs Use Bazooka to Kill Fly" *Electronic Frontier Foundation* (19 August 2011). In another case, the Australian securities regulator, unfamiliar with the technology and process, made a similar order with unintended consequences. It was subsequently corrected.

¹⁴⁷ Appendix B at paragraph 6.10.

131. Since that time, courts considering proposed IP address blocking in the UK have found "no evidence of overblocking"¹⁴⁸ and at the EU level have found "no threat of blocking lawful content."¹⁴⁹ As BBC Worldwide put it in their intervention, "[i]n case after case, the UK High Court has held that site blocking injunctions are a proportionate response to the threat of piracy, and have been applied in a way that does not block lawful content."¹⁵⁰

132. While in 2018 IP address blocking can readily be implemented without over-blocking, DNS blocking eliminates any risk that sites not targeted by a Commission order are affected, even without additional safeguards. That is because the proposed regime would only address entire websites "that are blatantly, overwhelmingly, or structurally engaged in piracy". By definition, using the DNS server to disable access to a site would only disable access to the site with that domain name (which would be what is intended) and would not impact any other sites. Accordingly, a court in Australia recently found that DNS blocking would be effective "without giving rise to a danger of 'overblocking' legitimate websites."¹⁵¹

133. As a result, when DNS blocking is used to disable access to top-level domains that are piracy sites, the only risk of over-blocking results from human error. This is the second type of case identified by interveners, but they have identified only one case of such an error, which took place in Portugal (and related to an attempt to disable access to an online gaming site, not a piracy site). In that case someone attempting to enter www.carbongaming.com into a list of sites to which access was to be disabled accidentally entered www.carbongames.com and access to that site was disabled until the error was discovered and corrected.

134. Beyond DNS and IP address blocking, today even more advanced and effective forms of disabling access to piracy sites can be implemented with minimal or no risk of over-blocking. As Friend MTS, a global expert with extensive on-the-ground experience with this kind of regime, stated in its intervention:

It should be noted that approximately one year since dynamic blocking first came into effect through the FAPL Order, and with thousands of distinct servers being blocked at one point in time during that period, there has not been a single complaint about 'overblocking'. Indeed, there has not even been a single non-automated response to any notification sent to the infrastructure providers (who typically pass such notices on to their customers) of a server being blocked, showing just how safely the process

¹⁴⁸ *FAPL v BT* [2017] EWHC 1877 (Ch) at paragraph 5; *UEFA v BT* [2017] EWHC 3414 (Ch) at paragraph 12.

¹⁴⁹ *Constantin Film Verleih GmbH v UPC Telekabel Wien GmbH*, 4 Ob 6/12d.

¹⁵⁰ BBC Worldwide Intervention at page 2..

¹⁵¹ *Universal Music Australia Pty Limited v. TPG Internet Pty Ltd.*, [2017] FCA 435.

has been implemented with regard to safeguarding against the blocking of non-infringing material.¹⁵²

135. Finally, one intervener pointed to a few entries in Google's Transparency Report with respect to Bell Media to imply that regime will target sites that are not piracy sites.¹⁵³ There is obviously no comparison between an automated search delisting process under the DMCA that involves minimal human intervention and the independent, evidence-based review process proposed by the coalition. Moreover, the FRPC has simply cherry-picked a few atypical examples; in the last twelve months, Bell Media has submitted more than a million search de-listing requests¹⁵⁴ and the search engines have complied more than 98% of the time. In any event, in the cases identified by the FRPC the take-down was not "declined" because it was over-broad (i.e., not a clearly infringing URL) but because that particular URL was not indexed.¹⁵⁵

7.3 ISPs' costs and liability

136. There are very low-cost options readily available to ISPs to disable access to piracy sites. For example, with respect to DNS blocking, given that this is typically already a standard feature in DNS systems, the only cost associated with adding a site to the list is the staff time associated with keying in the domain. This process can also be easily automated. Either way, this minimal cost is reflected in the fact that ISPs in Australia implementing website blocking in 2016 estimated the costs of adding an incremental site to be in the range of \$18 to \$36.¹⁵⁶

137. Nevertheless, the coalition is aware of the concerns raised by smaller ISPs in this proceeding regarding the potential cost to them of implementing a site-blocking regime.¹⁵⁷ We believe it is the responsibility of ISPs to incur the costs of complying with their regulatory obligations, and that for the majority of ISPs the costs required to carry out reasonable methods of disabling access to piracy sites would be manageable. We are, however, sensitive to the view that for particularly small ISPs even those costs could be material to their operations. For that reason, the coalition recommends that the Commission consider adopting, for particularly small ISPs, CNOC's proposal that

¹⁵² FriendMTS Intervention at page 2.

¹⁵³ FRPC Intervention at paragraphs 152-153.

¹⁵⁴ Search de-listing is URL-specific and for that reason much more extensive than disabling access to piracy sites under the proposed regime.

¹⁵⁵ In other words, the request involved a clearly infringing URL but Google simply did not have to take any action either because it had not indexed that URL (e.g., because it contained a hash character, which Google does not index) or because another rightsholder had already had that infringing URL deindexed.

¹⁵⁶ Nigel Cory, "How Website Blocking is Curbing Digital Piracy Without 'Breaking the Internet'" (August 2016) at pages 11 and 12. Costs for other types of blocking may be slightly larger – for example, for the the large ISPs in the UK with complex hybrid blocking systems the costs have been estimated between a few hundred and a few thousand dollars.

¹⁵⁷ For examples, see interventions from the Canadian Network Operators Consortium, Canadian Cable Systems Alliance, Xplornet, Independent Telecommunications Providers Association, and British Columbia Broadband Association.

the requirement for those ISPs to disable access to a specified site would be subject to the payment of a moderate fee.¹⁵⁸

138. The coalition recommends that the Commission consider applying this proposal to particularly small ISPs for whom the implementation of site-blocking obligations would be prohibitively expensive. If the Commission chooses to go this route, it must take into account the unique telecommunications landscape in Canada, in which hundreds of telecommunication service providers (TSPs) provide Internet services through their own facilities and in particular through the resale of Internet access service pursuant to wholesale arrangements.

139. If CNOC's proposal is adopted for particularly small ISPs, the Commission should establish a reasonable threshold and should only apply the proposal to ISPs falling below this threshold. The coalition recommends that the appropriate threshold and details of the proposal be developed as part of a subsequent industry-wide consultation. As part of this subsequent proceeding, the coalition recommends that the Commission consider whether:

- The entitlement to a moderate fee should be based on:
 - an ISP's subscriber base;¹⁵⁹
 - an ISP's telecommunication revenue;¹⁶⁰
 - market size;¹⁶¹ or
 - some other indicator.
- The requirement for particularly small ISPs to disable access to a piracy site should always be contingent on payment of the fee, or should be contingent only in particular cases (e.g., where disabling access would be more costly).¹⁶²
- ISPs should be prohibited from disclosing that they are not or may not be required to disable access to piracy sites, in order to reduce the marketing advantage that these ISPs would gain as a piracy haven.
- This proposal should only apply for a transitional period, while ISPs incur the costs of setting up efficient processes and while the volume of requests may be somewhat higher as Canada catches up to other countries who

¹⁵⁸ This proposal will ensure that the implementation of the site-blocking regime will not interfere with the CRTC's policy objective set out in section 7(b) of the *Telecommunications Act*.

¹⁵⁹ See Telecom Circular CRTC 2005-4, which requires all TSPs to submit a Reporting Entity Profile for industry data collection, which includes subscriber numbers.

¹⁶⁰ The revenue-based contribution regime requires all TSPs to file annual reports, including annual revenue.

¹⁶¹ For example, see Broadcasting Regulatory Policy CRTC 2016-224 where the Commission imposed higher local programming exhibition requirements for local TV stations in metropolitan markets.

¹⁶² In doing so, the costs associated with implementing various site-blocking techniques would need to be identified and a determination made as to whether these costs amount to an undue financial hardship for a given ISP.

have been addressing this issue on an ongoing basis.

140. In developing the details of the proposal, the Commission will need to consider whether it would be appropriate from the perspective of competitive equity that, within a given territory, some ISPs may not always be required to disable access to piracy sites while other ISPs comply fully with the proposed regime. The Commission also must ensure that access will generally be disabled for the vast majority of the Canadian population. If this were not to happen, the effectiveness of the regime would be compromised.

141. The Commission may also wish to consider providing comfort to particularly small ISPs that they will not be required to implement DPI-based means of disabling access to piracy sites if they do not reasonably have the ability to do so.

8.0 INTERNATIONAL BEST PRACTICE

8.1 Disabling Access to Piracy Sites is the Rule Not the Exception

142. In our Application we indicated that more than 20 countries, including many of Canada's closest peers, have regimes that provide for disabling access to piracy sites. Interveners who have experience with this issue around the world have provided detailed evidence that in fact there is a legal basis established for such regimes in more than 40 countries.¹⁶³

143. Nevertheless, Professor Michael Geist has claimed in his submission that "website blocking for copyright purposes is quite rare."¹⁶⁴ Professor Geist understates the number of countries with such regimes by almost half, but even if he were correct about the number describing it as "quite rare" would be inaccurate. Even other opposing interveners recognize that "website blocking to combat blatant piracy has become more common"¹⁶⁵ and through their own review find that it is in place in more than half of forty OECD and EU countries.

144. Even that understates the number of jurisdictions in which such regimes are in place. For example, Professor Geist attempts to identify five "notable" countries that he says do not provide for disabling access to piracy sites;¹⁶⁶ one of the five in fact does have such a regime¹⁶⁷ while another is actively considering adopting one.¹⁶⁸ For their

¹⁶³ MPA-Canada Intervention at paragraph 4.

¹⁶⁴ Geist Submission at paragraph 89.

¹⁶⁵ CMCRP Intervention at paragraph 11.

¹⁶⁶ Geist Submission at paragraph 88.

¹⁶⁷ Mexico has such a regime pursuant to *Ley Federal del Derecho de Autor, Precepto 177*. Professor Geist dismisses Mexico because, relying on a third party source (the pro-piracy news site TorrentFreak), he believes its Supreme Court has ruled that the regime is disproportionate. In fact, the Mexican court ruled that in the case of one particular site, blocking the entire site was not appropriate and only specific infringing content should be

part, the CMCPR claim, without authority, to identify 17 countries other than Canada that do not have these regimes;¹⁶⁹ twelve of the eighteen in fact do have such a regime, as the record of this proceeding shows,¹⁷⁰ while another is actively considering adopting one.¹⁷¹

145. Ultimately, interveners have only identified five countries that do not have regimes to disable access to piracy sites: the United States (which has notice-and-takedown), Japan (which is actively considering adopting a regime), Switzerland, New Zealand, and Poland. It is clear that these are exceptions to the general rule that Canada's international peers provide a direct process to disable access to piracy sites.¹⁷²

8.2 Judicial and Administrative Models

146. Perhaps the issue most prominently raised by opposing interveners is the fact that the proposed regime would rely on a process before the Commission as a quasi-judicial expert administrative tribunal having the "powers of a superior court with respect to the production and examination of evidence and the enforcement of its decisions"¹⁷³ rather than a Federal or superior court itself. In particular, interveners claim that the process proposed by the coalition would make Canada a global outlier and that administrative processes raise greater issues with respect to international human rights norms and free expression.

blocked. In a subsequent decision, it clarified that where a substantial majority of content on a site is infringing the whole site can be blocked. See Sookman Intervention at page 16.

¹⁶⁸ This is Japan: see Sookman Intervention at page 13.

¹⁶⁹ CMCPR Intervention at paragraph 171.

¹⁷⁰ Croatia, *Copyright and Related Rights Act*, Article 185; Czech Republic, *Copyright Act*, Article 40; Estonia, *Copyright Act*, s. 81(1) and *Law of Obligations Act*, s. 1055(1) and 1055(3)(1); Latvia, *Copyright Law*, Article 69(1)(7); Lithuania, *Law on Copyrights and Related Rights*, Article 78(1); Luxembourg, *Copyright, Related Rights and Databases Act*, Article 81(1); Malta, *Enforcement of Intellectual Property Rights (Regulation) Act*, Article 8(1)(a); Mexico, *Ley Federal del Derecho de Autor*, Precepto 177; Romania, *Law No. 365 of 7 June 2010 on Electronic Commerce*, Article 16; Slovakia, *Copyright Act*, Article 56(1)(c); and Slovenia, *Copyright and Related Rights Act 1994*, Article 170.

¹⁷¹ This is again Japan: see Sookman Intervention at page 13.

¹⁷² This also should address PIAC's creative claim that Canada should not adopt the proposed regime because "Reciprocal protections implemented through international agreements are the foundations of Canadian copyright law. By implementing surplus protections unilaterally, Canada would not only not be receiving reciprocal protections for Canadian content, but would also give up a key bargaining chip..." (PIAC Intervention at paragraph 74). Given that these regimes are commonplace, Canada does not need to demand reciprocal protections. In fact, the piracy problem in Canada is if anything currently an international trade irritant, with Canada routinely among the countries on the USTR's Special 301 watch list and last month added to the priority watch list in the unusual company of Algeria, Argentina, Chile, China, Colombia, India, Indonesia, Kuwait, Russia, Ukraine, and Venezuela. Whatever one thinks of the validity of Canada's inclusion on this list, it is impossible to deny that it has a negative impact on Canada's position in international trade negotiations particularly in the current climate surrounding NAFTA. See Office of the United States Trade Representative, *2018 Special 301 Report*. See also the CCC Intervention at page 5 (indicating that Canada lags behind trading partners on innovation policy indexes, in part due to inadequate measures to combat online piracy).

¹⁷³ See *CRTC Three-Year Plan 2017-2020* under the heading "What does it mean to be an administrative tribunal?".

147. It is undoubtedly true that there are currently more countries with regimes that rely on courts than countries with regimes that rely on expert administrative tribunals, although there are more countries in the latter category than interveners acknowledge.¹⁷⁴ At the same time, some countries, such as France, that so far have had a purely court-based model are currently considering complementary administrative models.¹⁷⁵

148. In any event, this is largely a difference in form rather than substance. As one intervener explained:

Under both approaches, sites are typically blocked as the result of an initial application by aggrieved rights holders, which can be varied once ISPs are notified of additional domains, URLs, or IP addresses that are to be subject to the initial blocking order. Procedures to seek site-blocking against a copyright-infringing site tend to be similar under both the judicial and administrative approaches, and regardless of the legal system in the country (e.g. common law or civil law). These regimes typically require proof that the site infringes copyright in a sufficiently serious way to justify an order blocking access to it.¹⁷⁶

149. Both internationally and in Canada it is irrelevant whether the process is undertaken by a court and/or an administrative tribunal, and there is no basis to suggest that an administrative process would be more susceptible to challenge on due process and freedom of expression grounds than one relying on courts.

150. With respect to international practice, in response to the claims made by some interveners regarding the use of administrative models in other countries, and to ensure the record available to the Commission accurately reflects the realities of these regimes, the coalition commissioned reply reports from experienced counsel in both Portugal and Italy. In Portugal, the administrative regime was not challenged and has not "raise[d] any particular concerns from a freedom of expression/free speech perspective."¹⁷⁷ In Italy, there were certain jurisdictional and constitutional challenges but all were dismissed and the legality of the administrative regime was subsequently confirmed by the legislature.¹⁷⁸

151. Domestically, the Supreme Court has been definitive that administrative bodies are well-equipped, and often better-equipped, to provide due process and ensure

¹⁷⁴ Italy, Portugal, Greece, South Korea, Mexico, Malaysia, and Indonesia all rely on administrative agencies. See Sookman Intervention at page 15.

¹⁷⁵ Chris Cooke, "French culture minister proposes web-block list in new anti-piracy push" *Complete Music Update* (26 April 2018).

¹⁷⁶ MPA-Canada Intervention at paragraph 11.

¹⁷⁷ See Appendix E.

¹⁷⁸ See Appendix F.

appropriate respect for constitutional values such as freedom of expression. Applying the principle articulated by the Supreme Court to the regulation of telecommunications service providers proposed by the coalition, the Commission "has, by virtue of experience and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values and will generally be in the best position to consider the impact of the relevant *Charter* guarantee on the specific facts of the case."¹⁷⁹ As Telus notes, "[t]he Commission has experience in considering matters of freedom of expression and the courts have traditionally shown deference to the Commission in this regard."¹⁸⁰

152. Whether a country adopts for this type of regime a judicial model, administrative model, or both is a policy choice in the context of the existing legal and regulatory framework within that country. In Canada, administrative agencies carry on a wide range of functions, the Commission in particular is regularly called upon to make procedurally fair policy and quasi-judicial decisions that could potentially touch on *Charter* values, and the Commission has stated explicitly that it has the sole authority to deal with disabling access to websites. In these circumstances, it is reasonable to expect that Canada would choose to adopt an administrative regime.

153. Ultimately, what the interveners raising this issue are objecting to is not the appropriateness of an administrative approach in general but the Commission's jurisdiction to adopt such an approach under the existing legal framework in Canada. That issue is dealt with in section 10.2, below, and should not be confused with the more general question of whether an administrative agency like the Commission could appropriately oversee this type of regime.

8.3 Consistent with Human Rights and Free Expression

154. A small number of interveners have also attempted to suggest that disabling access to piracy sites in general and the coalition's proposal in particular could be inconsistent with international human rights norms around freedom of expression.¹⁸¹ It is an understatement to say it would be surprising if this were true, given how common these types of regimes are among liberal democratic countries and the fact that no intervener has been able to point to a single legal determination by a competent authority indicating that any of them is inconsistent with human rights norms.

¹⁷⁹ *Doré v. Barreau du Québec* 2012 SCC 12.

¹⁸⁰ Telus Intervention at paragraph 21.

¹⁸¹ Most notably, Professor Michael Geist has a section in his intervention titled "The Coalition Proposal is Inconsistent with International Human Rights Norms", although in that section he is actually unwilling to go beyond saying it "may" violate or is "subject to challenge". See Geist Submission at pages 35-38 and the detailed response in Sookman Intervention at pages 56-68.

155. The alleged concerns in this area are most thoroughly raised by US professor David Kaye, who holds an appointment through the UN as Special Rapporteur on Freedom of Expression.¹⁸² Professor Kaye does not claim that the Proposal is incompatible with international human rights norms but "[u]rge[s] the CRTC to ensure that any measure it adopts to deal with online piracy addresses [certain] concerns and is consistent with Article 19 of the Covenant and related human rights standards."¹⁸³ The proposed regime does indeed address the identified concerns and is entirely consistent with the Covenant.¹⁸⁴

156. First, the regime is easily consistent with the three-part test that Professor Kaye lays out for actions that could impact freedom of expression to comply with the Covenant:

- *Provided for by law*: Analogous to section 1 of the *Charter*,¹⁸⁵ the purpose of this requirement is to ensure that the basis for the restriction is "accessible to the public," "formulated with sufficient precision," and does not "confer unfettered discretion".¹⁸⁶ Canadian administrative tribunals routinely impose regulatory obligations with consequences for freedom of expression without any suggestion that they are not prescribed by law. A regime established by the Commission by regulation pursuant to its powers under the *Telecommunications Act* and including formal orders for each site made after a hearing process and evaluated against established criteria goes well beyond this requirement.
- *Protect legitimate aims*: The effective enforcement of Canadian laws in respect of conduct undertaken on telecommunications networks and the promotion of Canada's telecommunications policy objectives are certainly legitimate aims. But in case there was any doubt, Professor Kaye acknowledges that promoting "human rights as recognized in the Covenant and more generally in international human rights law" are a legitimate aim; the right of copyright holders to protect their property is a well-established right and is recognized as a human right.¹⁸⁷

¹⁸² Intervention of David Kaye (29 March 2018) [Kaye Intervention]. This intervention represents Professor Kaye's personal opinion, not an opinion from the UN or any of its bodies or Commissioners. See, United Nations, *Human Rights Office of the High Commissioner, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, available at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx/>. Professor Kaye does not claim to have any technical expertise, and his opinions on technical issues such as the means available to counter internet piracy and whether web site blocking would necessarily result in over-blocking must be assessed accordingly.

¹⁸³ Kaye Intervention, at paragraph 34.

¹⁸⁴ *International Covenant on Civil and Political Rights*, Article 19(3).

¹⁸⁵ *The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 [Charter] at s. 1.

¹⁸⁶ Kaye Intervention.

¹⁸⁷ See the *Interventional Covenant on Economic, Social, and Cultural Rights*, Article 15(1) ("The States Parties to the present Covenant recognize the right of everyone... To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author") and Sookman Intervention at pages 58-59.

- *Necessary*: This requirement ensures the measure "target[s] a specific objective and do[es] not unduly intrude upon the rights of targeted persons." As described above, the proposed regime sets a high bar, with the specific objective of targeting only sites that are blatantly, overwhelmingly, or structurally engaged in piracy. It does not unduly intrude on "rights of targeted persons" because operators of these types of pirate sites do not have any freedom of expression right to blatantly infringe copyright whether offline or online, a point set out with reference to authoritative Canadian sources in Appendix A to our intervention and not contested by Professor Kaye.

157. Second, all of the potential concerns raised by Professor Kaye are addressed by the proposal or, if the Commission disagrees, can readily be addressed in the context of the proposed follow-up proceeding. None should give the Commission any hesitation in proceeding with the proposed regime:

- *Content-specific*: The concern that "[p]ermissible restrictions generally should be content-specific" is meant to explain that shutting down entire telecommunications systems, social networks, or similar platforms to "block the [legal] communications of often millions of individuals" is impermissible.¹⁸⁸; The proposed regime does not include any "generic ban" but targets only websites based on their specific content, and in particular based on that content being blatantly, overwhelmingly, or structurally engaged in piracy. Exactly these types of sites are targeted by these types of regimes in most of Canada's peer countries.
- *Legitimate uses*: In Professor Kaye's view it is critical for the Commission "to consider the human rights functions of certain websites, applications and services that may be illegitimately blocked... [including] tools such as virtual private networks (VPNs), proxy services, anonymizing networks and software, and peer-to-peer networks."¹⁸⁹ As explained above, the proposed regime is not intended to and would not be allowed by the Commission to be used to block legitimate use of VPNs or other anonymizing software, or entire technical protocols such as torrents. Rather, it would only target specific piracy sites that blatantly, overwhelmingly, or structurally engage in piracy.
- *Independent body*: The requirement that blocking orders should be made by "a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences" is reasonable and contradicts interveners who claim that only courts can perform this function. The Commission, which would establish this regime and make all orders under it,

¹⁸⁸ See *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (6 September 2016) at paragraphs 21 and 22.

¹⁸⁹ Kaye Intervention at paragraph 15.

easily meets this standard.¹⁹⁰

- *Due process and the IPRA*: Professor Kaye expresses concern about the timelines established for the process, the fact that hearings are not mandatory and conducted in-person, the potential that the IRPA may not issue written reasons for its recommendations or maintain the record of its proceedings, and the independence of the IPRA given its structure. The coalition certainly contemplated in the Application that the IPRA would issue a written recommendation and place the record of its proceeding on file with the Commission.¹⁹¹ We also believe the timelines, process (including optional oral hearing), and availability of judicial oversight¹⁹² meet or exceed Canadian procedural fairness requirements, as set out in Appendix A to our intervention, and that consistent with other organizations with which the Commission is familiar the structure of the IRPA would ensure its independence.¹⁹³ However, if the Commission disagrees on these issues, the coalition specifically identified them for further consideration during the proposed follow-up proceeding.¹⁹⁴ No intervener has suggested that such issues could not readily be addressed in that proceeding.

158. Finally, Professor Kaye claims without evidence or authority that disabling access to a website "is almost always a disproportionate means" because it "will not only restrict allegedly infringing activity, but also cut off access to all legitimate content on that website or uses of that application." This generalization is no doubt true in the kinds of cases he is ordinarily involved in, such as Turkey shutting down Twitter and YouTube in advance of elections, Tajikistan blocking messaging services and social media sites during protests, and Bangladesh, Brazil, Burundi, the DR Congo, India, and Pakistan shutting down all Internet and text messaging services on grounds of "national security and public order."¹⁹⁵ However, it has no application to the proposed regime, which by its nature is narrowly targeted to sites determined to be blatantly, overwhelmingly, or structurally engaged in piracy.

159. The international jurisprudence on this point, to which Professor Kaye tellingly makes no reference, is decisive that regimes like the one proposed fully comply with

¹⁹⁰ See *CRTC Three-Year Plan 2017-2020* under the headings "Who we are and what we do" and "What does it mean to be an administrative tribunal?".

¹⁹¹ See paragraph 91 of the Application.

¹⁹² Under the proposed regime, a person whose website has been identified as a piracy site or any other appropriate party that wishes to object to or amend the Commission's approval of additions to the list of piracy sites can do so by making an application under section 62 of the Act. Alternatively, that party could seek leave to appeal the Commission's decision or judicial review of the Commission's decision in the Federal Court of Appeal.

¹⁹³ The Electronic Frontier Foundation also made this latter point. See *Intervention of the Electronic Frontier Foundation [EFF Intervention]* at pages 5-6.

¹⁹⁴ See paragraph 99 of the Application.

¹⁹⁵ See *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (6 September 2016) at paragraph 21.

human rights laws and norms¹⁹⁶ and that this remains true even if a site that is blatantly, overwhelmingly, or structurally engaged in piracy has some legal content.¹⁹⁷ In Appendix B, the experts from Wiggin provide excerpts from six of these cases in six different European courts (in addition to the UK), all of which reach the conclusion that disabling access to piracy sites is proportionate and consistent with freedom of expression. The fact that Professor Kaye ignores all this jurisprudence and instead relies entirely on documents prepared by advocacy organizations and merely given the official-sounding names the *Manila Principles on Intermediary Liability*¹⁹⁸ and *Article 19*¹⁹⁹ undermines the credibility of the entirety of his evidence.

9.0 TELECOMMUNICATIONS POLICY & THE POLICY DIRECTION

9.1 Consistent with Net Neutrality

160. As set out in the Application, the coalition supports net neutrality and the free flow of legal content on the Internet. Its proposal is designed to ensure ISPs remain neutral intermediaries who never exercise control over or influence the purpose or meaning of the content they carry, but simply implement legal obligations imposed by the Commission. No intervenor has pointed to any authority for the notion that net neutrality prevents the government from implementing measures addressing the carriage of illegal goods or content.²⁰⁰

161. Nevertheless, a number of intervenors continue to assert that the proposal is contrary to net neutrality. While this assertion is not typically explained or justified,²⁰¹ it

¹⁹⁶ See e.g. *UPC Telekabel Wien* (CJEU case no. C-314/12), *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) (17 October 2014), *aff'd* [2016] EWCA Civ 658 (06 July 2016), *Twentieth Century Fox v. Sky UK*, [2015] EWHC 1082, *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc (No. 1)*, [2011] EWHC 1981 (Ch), [2012] Bus LR 1471, Belgium: Court of Appeal Antwerp, 26 September 2011, No. 3399 Rep. 2011/8314, France: Tribunal de Grandes Instances de Paris, 28 November 2013, No. 11/60013; Paris Court of Appeal judgment of 15 March 2016 [No 040/2016]. Norway: Warner Bros. Entertainment Norge AS and others v Telenor Norge AS and others, Oslo District Court, 01/09/2015, case number 15-067093TVI-OTIR/05, Iceland: STEF, samband tónskálda/eig flutningsréttar [Performing Rights Society of Iceland] v Fjarskipti hf., District Court of Reykjavik, 14. October 2014, Netherlands: 2012 District Court order quoted in *Stichting BREIN v Ziggo BV*, THE HAGUE COURT, Commercial Law Division, Case/Docket Number District Court C/09/535341/KG ZA 17-891, Sept 22, 2017, Germany: FCJ judgment of 26 November 2015, Case No. I ZR 174/14 and case no. I ZR 3/14; Constantin Film Verleih GmbH v.; Vodafone Kabel Deutschland GmbH, 7 O 17752/17, Germany, Regional Court of Munich (1 February 2018).

¹⁹⁷ See e.g. the cases mentioned *ibid.* and *Bell Canada et al. v. Adam Lackman dba TVAddons.ag*, 2018 FCA 42.

¹⁹⁸ See <https://www.manilaprinciples.org/organization-signatories>.

¹⁹⁹ The "*Right to Share*" principles document relied upon by Mr Kaye, is published by advocacy organization Article 19 based on a series of consultations with individuals including, the Canadian representative Michael Geist. The *Article 19* document positions on copyright are inconsistent with existing Canadian copyright law and principles as well as Copyright treaties and conventions to which Canada is a member. See, for example, ss3.2(d), 5.2, 7.2. Principle 9 relied on by Mr Kaye and which permeates his intervention, is inconsistent with international law and practice including decisions of courts throughout the European Union. See the authorities cited *supra*. See, "The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age", available at <https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>.

²⁰⁰ Indeed, the Supreme Court decided nearly a century ago that the benefits of common carriage do not extend to the carriage of unlawful goods: see *Major v. Canadian Pacific Railway*, 64 SCR 367.

²⁰¹ These intervenors instead typically point to unrelated past policy debates or decade-old events occurring in an entirely different context. See e.g. Geist Submission at 129 (referring to old traffic management practices);

can only mean one of two things: (1) that the proposed regime is inconsistent with the statutory provisions that form the legal basis of Canada's net neutrality rules or (2) that the proposed regime is inconsistent with net neutrality as it is understood more broadly. Both propositions are demonstrably false.

162. With respect to Canada's net neutrality rules, all parties appear to agree with the Commission that these are based on sections 27(2) and 36 of the *Telecommunications Act*.²⁰² Neither prohibits the Commission from implementing the proposed regime.

163. Section 27(2) is not even engaged. As the Commission has previously explained, for an undue preference provision to apply the relevant party "must take some action to give itself a preference or to inflict a disadvantage on another party;" it does not apply simply because actions taken by government or a regulator might be said to have that effect.²⁰³ Even if section 27(2) was engaged, it is self-evident that complying with a requirement imposed by the Commission to disable access to a specified piracy site could never be an "unjust", "unreasonable", or "undue" action on behalf of the carrier.

164. This interpretation of section 27(2) has been confirmed by the Federal Court of Appeal. In a case regarding the retrospective application of the Wireless Code it explained:

Assuming for the sake of this argument that undue discrimination does not require a specific intention to discriminate, it must nonetheless result from a deliberate choice by a carrier. To suggest that wireless service providers would engage in undue discrimination as a result of phasing in the implementation of the Code according to the CRTC's direction is absurd.²⁰⁴

165. Similarly, it cannot be suggested that the proposed regime is contrary to section 36. Section 36 specifically does not apply to conduct approved by the Commission. Under the proposal, ISPs would only be able to disable access to a site after approval by the Commission under sections 36 (and pursuant to a requirement imposed by the Commission under section 24).

FRCP Intervention at 94 (referring to a policy proposal made in the context of the Commission's proceeding on differential pricing practices).

²⁰² Chris Seidl, Executive Director, Telecommunications, Canadian Radio-television and Telecommunications Commission, Speech to the Standing Committee on Access to Information, Privacy and Ethics (6 February 2018) [Seidl Testimony].

²⁰³ Broadcasting Decision CRTC 2012-442 at paragraph 31.

²⁰⁴ *Bell Canada v. Amtelecom Limited Partnership*, [2016] 1 FCR 29, 2015 FCA 126 at paragraph 48. The Court of Appeal's affirmation of this common sense conclusion should eliminate any of the concerns PIAC attempts to create at paragraphs 113 to 120 of its intervention.

166. With respect to the broader understanding of net neutrality, interveners have not contested our evidence that both the former US Open Internet Order and the EU net neutrality rules do not apply to unlawful content. Those rules reflect the common understanding of net neutrality. Indeed, it is telling that the only substantive response to this point in the opposing interventions was from Professor Michael Geist, who could identify only two countries – India and Colombia – that he claims do not exclude unlawful content from their net neutrality regimes.²⁰⁵ Not only are these not at all persuasive examples compared to the United States and EU, they are not even correct – India's net neutrality regime does not prevent ISPs from being required to disable access to piracy sites²⁰⁶ and in Colombia the net neutrality regime does not prevent ISPs from being required to disable access to unregistered gambling sites.²⁰⁷

167. In any event, the coalition is not suggesting that ISPs be permitted to disable access to content unilaterally even if they believe it to be unlawful. The proposed regime does not, as interveners like the Electronic Frontier Foundation seem to think, "put[] ISPs in the role of courts, deciding which content is lawful."²⁰⁸ To the contrary, decisions under the regime are made exclusively by the Commission on the recommendation of the IPRA. As set out in the Application:

In accordance with the principles of net neutrality and in particular the principle that ISPs themselves function and will continue to function as common carriers, under the coalition's proposal ISPs would not be required to monitor piracy nor could they unilaterally determine which websites are added to the list of piracy sites. Instead, the role of ISPs would be restricted to implementing a legal requirement to prevent access to piracy sites... as directed by and identified by the Commission.²⁰⁹

168. In other words, ISPs would have no ability to act unilaterally or to determine which sites are and are not treated as piracy sites under the regime. This is entirely in keeping with the principled, flexible approach to net neutrality that the Commission has adopted and that has widely been considered a success.²¹⁰

²⁰⁵ Geist Submission at paragraphs 135 and 137. This is despite having claimed to review blocking rules in 27 countries: see Geist Submission at paragraph 87.

²⁰⁶ This is done pursuant to the Code of Civil Procedure, Order 30 Rule 1, Order 39 Rules 1 and 2. See e.g. *Shreya Singhal vs U.O.I.* on 24 March 2015, summarized at "Court Rules Whole Site Blocking Justifiable in Piracy Fight" *TorrentFreak* (2 August 2016).

²⁰⁷ "Este viernes comienza el bloqueo de 325 páginas de azar ilegales," *El Tiempo*, (30 June 2017) <http://bit.ly/2truT7u>; "Coljuegos prepara bloqueo a Poker Stars en el país," *El Tiempo*, (27 March 2017). According to the Freedom House *Freedom on the Net* 2017 report on Colombia, it appears that Colombian law does indeed recognize that net neutrality does not apply to illegal sites: Freedom House, "Colombia: country profile" *Freedom on the Net* (2017) (contrasting proposed blocking of gambling sites, where the "regulator found that the sites were operating without authorization" and blocking was allowed, with the proposed blocking of Uber, "which is not illegal," and therefore could not be blocked).

²⁰⁸ EFF Intervention at page 3.

²⁰⁹ Application at paragraph 76.

²¹⁰ See Seidl Testimony and subsequent questions and answers.

9.2 The Commission has Jurisdiction

169. As set out in our Application, "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. 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."²¹¹

170. The Commission, as Canada's telecommunications regulator with "comprehensive regulatory powers" including "the ability to impose *any* condition on the provision of a service,"²¹² has the jurisdiction to ensure this system is appropriately responsive to the widespread reliance on and use of telecommunications networks to access piracy sites.

9.2.1 Sections 24 and 24.1

171. Consideration of the Commission's jurisdiction must begin with a plain reading of the relevant jurisdiction-conferring provisions, which in this case are sections 24 and 24.1 of the *Telecommunications Act*. These provisions state: "The offering and provision of any telecommunications service by [an ISP] are subject to any conditions imposed by the Commission." The Commission has previously indicated its belief that under sections 24 and 24.1 it can make it a condition of offering service that a carrier block specific content.²¹³

172. Faced with this clear wording and established precedent, PIAC attempts to argue that subsections (a) through (d) of section 24.1 (which was added in 2014) somehow narrowed these broad, longstanding Commission powers such that they are "restricted to protecting the interests of telecommunications users".²¹⁴

173. This argument fails. First, it is inconsistent with the commonly accepted uses of these sections, which also address other interests.²¹⁵ Second, it is inconsistent with the policy objectives set out in section 7, only three of which refer directly or indirectly to users (with the remaining six addressing broader public interests served by the telecommunications system, such as enhancing the social and economic fabric of

²¹¹ Application at paragraph 2.

²¹² *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 SCR 764, 2009 SCC 40 at paragraphs 32 and 36 (emphasis in original).

²¹³ Compliance and Enforcement and Telecom Notice of Consultation CRTC 2017-405 (17 November 2018) at paragraph 27 (dealing with certain unwanted telephone calls).

²¹⁴ PIAC Intervention at paragraph 126.

²¹⁵ For example, these sections were used to impose conditions related to negotiations and contractual arrangements between national and new entrant wireless carriers in Telecom Decision 2014-398 and Telecom Regulatory Policy CRTC 2015-177 and related to arrangements between competing wireline carriers serving MDUs in Telecom Decision CRTC 2003-45.

Canada).²¹⁶ Third and most importantly, it fails to recognize that content creators, producers, legal rightsholders, distributors and broadcasters, and consumers who choose to access content legally, are all telecommunications users whose interests are relevant under the Act. Indeed it is troubling that PIAC has equated the interests of all users with the interests of the subset that access piracy sites.

174. Some interveners have also pointed to section 41 and related provisions to imply a narrower scope for sections 24 and 24.1.²¹⁷ In fact, section 41 merely illustrates the breadth of the powers with respect to ISPs and other telecommunications service providers granted to the Commission under the scheme of the Act, compared to the much narrower powers granted with respect to users of telecommunications facilities. In particular, service providers are presumptively regulated and subject to "any condition" imposed by the Commission. In contrast, users are presumptively unregulated and the scope for regulation is limited to prohibiting or regulating the use of telecommunications facilities for unsolicited telecommunications to the extent necessary to prevent undue inconvenience or nuisance.

175. The Commission's determination that it can require service providers to block content pursuant to a section 24 condition does not, as PIAC claims, "make s. 41 redundant."²¹⁸ The two provisions address entirely different subjects, with section 24 giving the Commission the power to impose conditions on service providers and section 41 giving the Commission the power to apply regulation to users of telecommunication services.

9.2.2 Section 36

176. Section 36 confirms the Commission's jurisdiction to implement the proposed regime. First, it confirms that disabling access to specified sites is consistent with the scheme of the Act – otherwise, the Commission would not be given the power to approve it. Second, it confirms that it is the Commission that should be engaged to determine the sites to which access should be disabled. The Commission has interpreted section 36 the same way.²¹⁹

177. Rather than dealing with these points, some interveners have attacked a straw man argument. In particular, they cite a 2006 Commission letter that states "section 36 of the Act would not allow [the Commission] to require Canadian carriers to block the web sites [in question]". We agree – that power is found in section 24 (which was not

²¹⁶ The three are 7(b), 7(h), and 7(i). Of course, telecommunications users and all Canadians ultimately benefit from a strong telecommunications system but it is clear that the Commission can implement policies the proximate purpose of which is a more orderly and responsive telecommunications system.

²¹⁷ See e.g. PIAC Intervention at paragraphs 162 and following.

²¹⁸ PIAC Intervention at paragraph 168.

²¹⁹ Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016); Telecom Decision CRTC 2016-479.

cited in the application addressed in that letter), not section 36. Moreover, the basis for the Commission's decision on that application was that it would not be appropriate to grant interim, *ex parte* approval under section 36 without the knowledge or participation of ISPs. No such issue arises in the present Application, which is supported by ISPs serving the vast majority of Canadian subscribers.

9.2.3 Relationship to the Copyright Act

178. A number of interveners make arguments to the effect that "this is not an application in respect of telecommunications – it is an application in respect of copyright"²²⁰. The implication of these arguments is that a fact situation – such as the widespread use of telecommunications networks for piracy – has a single "essence" and can only be addressed under one statute.

179. That claim is contrary to the approach dictated by the Supreme Court, which explains that because the *Telecommunications Act*, *Radiocommunication Act*, *Copyright Act*, and *Broadcasting Act* are part of an interrelated scheme, "[a]lthough the Acts have different aims, their subject matters will clearly overlap in places... two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict."²²¹

180. The coalition's proposal addresses a different aspect of the piracy problem than the *Copyright Act*. In particular, it addresses a telecommunications issue (i.e., the responsiveness of the telecommunications system to widespread reliance on and use of ISP networks to access piracy sites) and imposes an obligation on ISPs with respect to their carriage function (i.e., to take steps not to carry certain specified traffic in their capacity as service providers, while "tak[ing] no part in the selection, origination, or packaging of content."²²²). Thus, if the proposed regime does not conflict with the *Copyright Act* then that Act is not an obstacle to the Commission's jurisdiction to implement it.

181. Opposing interveners acknowledge that there is no operational conflict between the proposed regime and the *Copyright Act*,²²³ but generally raise three alleged policy or purpose conflicts. As explained below, each of these alleged conflicts rests on a misunderstanding of the nature of the proposed regime and the balance established in the *Copyright Act*.

²²⁰ ISCC Intervention at paragraph 3. See also CMCRP Intervention at paragraph 40 ("the coalition is pursuing what are essentially copyright concerns").

²²¹ *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* [2012] 3 SCR 489 [Cogeco] at paragraph 37.

²²² *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 SCR 142.

²²³ This is most explicit in the CNOC Intervention at paragraph 44.

182. First, they allege that under the proposal the Commission would make findings of copyright infringement, in conflict with an intention that such findings be made only by the Federal Court or superior courts of the provinces.²²⁴

183. In fact, the proposed regime involves identifying sites to which ISPs should disable access as a matter of telecommunications policy. The Commission would apply a higher standard – blatantly, overwhelmingly, or structurally engaged in piracy – that is specifically tailored to an appropriate threshold for intervention under the *Telecommunications Act*. Such a Commission finding would be consistent with but does not result in a finding of copyright infringement or other remedy against the piracy site;²²⁵ rather, it triggers a regulatory obligation on behalf of a telecommunications service provider.

184. For this reason, such a finding is appropriately made by the Commission, whose expertise is balancing all of the relevant policy issues and stakeholder interests, rather than a court, whose expertise is specifically in assessing liability for infringement. Telus recognizes this same point in its intervention.²²⁶

185. Second, they allege a conflict similar to that in the *Cogeco* case, by creating a new copyright outside the *Copyright Act* or otherwise disturbing a deliberate balance established in the Act with respect to the role of ISPs.²²⁷

186. Unlike in *Cogeco*, the proposed regime does not extend copyright-like protection to works or signals from which that protection was explicitly withheld, nor does it invalidate any existing user right (because unlike fair dealing or retransmission of local signals, there is no user right to access piracy sites). Indeed, the argument that there is such a conflict is inconsistent with the argument made by the same interveners that existing legal remedies are already available against piracy sites and that courts could already grant an injunction requiring an ISP to disable access to a piracy site. It is therefore unsurprising that no intervenor has pointed to any provision in the *Copyright Act* that has a similar implication in the present circumstances as sections 21 and 31 did in *Cogeco*.

187. The existing jurisprudence about the *Copyright Act* comprehensively setting out copyrights, user rights, and liability for copyright infringement does not imply that the *Copyright Act* comprehensively sets out all the obligations of ISPs with respect to

²²⁴ ISCC Intervention at paragraph 17; CIPPIC/OM Intervention at paragraph 26; CNOC Intervention at paragraph 571; PIAC Intervention at paragraph 187.

²²⁵ If the Commission were making a finding of infringement under the *Copyright Act* the key indicia would be (i) direct application of the provisions of the *Copyright Act* (rather than the tailored threshold of blatantly, overwhelmingly, or structurally engaged in piracy) and (ii) ordering an infringement remedy against the alleged infringer (rather than imposing a regulatory obligation on a third party).

²²⁶ Telus Intervention at paragraph 9.

²²⁷ PIAC Intervention at paragraphs 188-199.

carriage. Such a proposition has never been advanced by a court, and for good reason – it would, absurdly, mean that the Commission would have the jurisdiction to require ISPs to disable access to identified site in all cases except where those sites were piracy sites. Piracy sites would, by this argument, be a unique exemption from the application of a telecommunications policy that the Commission would have the jurisdiction to apply to ISPs with respect to any other type of site.

188. Third, opposing interveners allege a conflict on the basis that there could be potential liability for ISPs under section 72(1) of the *Telecommunication Act* (if they fail to disable access to sites identified by the Commission) or at common law (if they inadvertently disable access to the wrong sites). These interveners claim that the *Copyright Act* intended to exempt ISPs from liability.²²⁸

189. Again, this overstates the scope of the *Copyright Act*. It is and would remain true that an ISP that failed to comply with its regulatory obligations would not be liable for copyright infringement. But nothing in section 31.1(1) of the *Copyright Act* suggests that Parliament intended to exempt ISPs from the consequences of not complying with other legal obligations imposed under a different statute or legal authority. By way of illustration, a similar exemption applies to search engines under the Act,²²⁹ but it would be absurd to suggest that the *Copyright Act* would allow Google to refuse to comply with a court order in a case like *Equustek* without incurring liability.

190. Moreover, an ISP could only theoretically be liable to a site to which they inadvertently disabled access, if at all, if they had been negligent in their implementation of their legal obligations.²³⁰ There is no evidence that any ISP has even faced a lawsuit for disabling access to a legitimate website, let alone that such a suit has succeeded.

9.2.4 Section 7 objectives

191. In our application we explained how the proposed regime would safeguard, enrich and strengthen the social and economic fabric of Canada and its regions (section 7(a)), respond to the social and economic requirements of users (section 7(h)), and contribute to the protection of privacy (section 7(i)).

192. Opposing interveners have generally denied that it will advance these objectives, and in some cases argued that it will undermine other objectives. In most cases these claims are simply restating factual disagreements that have been addressed above,

²²⁸ PIAC Intervention at paragraph 196; CNOOC Intervention at paragraph 71.

²²⁹ *Copyright Act*, section 41.27(1).

²³⁰ The ISP has no contractual relationship such sites and there is nothing in the *Telecommunications Act* or *Copyright Act* that creates liability. Accordingly, any claim would have to show that the ISP owed a duty of care to every site on the Internet (which is extremely unlikely) and that it was negligent in failing to meet that duty of care when implementing its regulatory obligations.

such as with respect to the impact of piracy,²³¹ the expected effectiveness of the proposed regime,²³² the likelihood and extent of over-blocking,²³³ and whether implementation would be practical for ISPs.²³⁴

193. Beyond this, interveners make two points. First, they claim that section 7(i) of the *Telecommunications Act* does not apply because sites other than piracy sites also contain malware. This is a straw man argument, as the coalition did not claim that the proposed regime would eliminate malware entirely nor does the Act contemplate anything more than "contribut[ing]" to the protection of privacy. It is uncontested that piracy sites disproportionately spread malware and incontestable that disabling access to them would "contribute to the privacy of persons."

194. Second, they make the similar arguments that the benefits under the regime must be related to connectivity²³⁵ and to users in their capacity as users of telecommunications services.²³⁶ The distinctions these arguments attempt to draw are artificial and cannot be sustained. For example, the responsiveness of telecommunications networks to their widespread use for harmful illegal purposes is a benefit related to the efficiency and orderliness of connectivity in Canada.

195. Similarly, protecting the economic interests of content creators and others that legally distribute content using telecommunications networks, and of consumers that access content legally using telecommunications networks, from the harms caused by illegal dissemination of content using those same networks, is clearly a benefit to Canadians in their capacity as telecommunications users. To ignore the telecommunications aspect is artificial to the point of inaccuracy.

9.2.5 Policy Direction

196. The proposed regime is consistent with the Policy Direction.²³⁷ With respect to section 1(a), by definition piracy is inconsistent with and cannot be constrained by market forces. Accordingly, the Application urges the Commission to adopt an approach that is efficient²³⁸ and proportionate,²³⁹ and for that reason has been adopted by dozens of Canada's partners around the world.

²³¹ Geist at paragraph 151.

²³² CNOC Intervention at paragraph 67.

²³³ Teksavvy Intervention at paragraph 14; Geist Submission at paragraphs 156 and 157.

²³⁴ Teksavvy Intervention at paragraph 14; Geist Submission at paragraph 158.

²³⁵ CIPPIC/OM Intervention at paragraphs 24 and 28.

²³⁶ CMCRRP Intervention at paragraph 55; PIAC Intervention at paragraph 286.

²³⁷ Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355

²³⁸ See the discussion in the next section.

²³⁹ See the discussion and extensive jurisprudence set out at paragraphs 158 and 159.

197. With respect to section 1(b), the proposed regime is a non-economic regulatory measure. By applying to all ISPs, while recognizing the potential need to make some provision for the costs of implementation for particularly small ISPs, the regime is both symmetrical and competitively neutral to the greatest extent possible.

9.3 The Commission is Best Placed to Implement the Regime

198. Within the existing legal and regulatory framework in Canada, it is the Commission that is best placed to implement the proposed regime.

199. In particular, the Commission has previously indicated both that it can require a telecommunications carrier to block specific content²⁴⁰ and that in any event it must be engaged before an ISP disables access to a website even pursuant to statute or court order.²⁴¹ In these circumstances, implementing the regime through the Commission avoids a potential conflict or duplicative proceedings.

200. At a more practical level, there are a number of factors in favour of the Commission implementing the regime:

- The Commission is the regulator of Canada's telecommunications carriers and networks, and it can appropriately tailor and situate this obligation within the suite of obligations that apply to those carriers and networks.
- The Commission and the IPRA in particular will have greater expertise in telecommunications networks and Internet piracy, making them better placed than generalist courts to make technical decisions regarding how to best disable access to piracy sites and avoid overblocking.
- Commission processes are typically more accessible, transparent, and efficient, particularly for small ISPs and individual Canadians.
- The Commission has the experience and expertise to examine the practical impacts of piracy and disabling access to piracy sites in all of the areas it regulates, and to balance the interests of all relevant stakeholders.²⁴²

201. Based on the record of the proceeding to date, the coalition is more confident than ever that approval of its Application will have a significant positive impact on the problem of widespread content theft by piracy on Canada's telecommunications

²⁴⁰ Compliance and Enforcement and Telecom Notice of Consultation CRTC 2017-405 (17 November 2018) at paragraph 27 (dealing with certain unwanted telephone calls).

²⁴¹ Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016); Telecom Decision CRTC 2016-479.

²⁴² Telus Intervention at paragraphs 8-11.

network, with minimal costs or unintended effects. We look forward to working with the Commission and other stakeholders in implementing this important proposal.²⁴³

*** END OF DOCUMENT ***

²⁴³ Given the number of interventions filed it not reasonably possible to send this Reply by email to each and every intervener, as the e-mail addresses are not or not readily available for them. We are sending the Reply by email to each of the interveners indicated as representing an organization. The Reply will also be posted on the Commission's website as part of the on-going proceeding and will be available to all interested parties. In this way the coalition has done what it can to reach directly all parties involved in this proceeding and although some could not be reached directly, the Reply is available for all interested parties on the Commission's website. No party will be prejudiced in its participation in the proceeding as a result.