Internet Society Canada Chapter

Intervention

Application by the Fair Play coalition to the CRTC pursuant to sections 24, 24.1, 36, and 70(1)(a) of the *Telecommunications Act* to disable on-line access to copyright infringing websites

Who we are

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

Executive Summary

2. This submission is made in opposition to the application to the CRTC by the Fair Play coalition (hereafter called also Fair Play or the coalition). The Fair Play application proposes that the CRTC exercise its powers under the *Telecommunications Act* to provide a remedy for copyright infringement by directing Internet access service providers to block websites that are alleged to **blatantly, overwhelmingly or structurally** (emphasis from p. 1 of the Fair Play application) infringe copyright by streaming or permitting the downloading of works under copyright protection.
3. One point must be emphasized: this is not an application in respect of telecommunications – it is an application in respect of copyright infringement. If the application were to be allowed, the remedy would apply only to those websites that are found to host copyright infringement by way of unauthorized streaming or downloading of copyright material. It would not serve to enhance the telecommunications system that serves Canadians, but rather restrict certain forms of communication.
4. ISCC does not doubt that the kind of copyright infringement described by the coalition poses significant challenges to the rights held by authorized distributors of copyright material, and agrees that appropriate remedies would be desirable. However, ISCC believes that the present application seeks a remedy that the CRTC cannot grant. It further observes that – even if the CRTC could grant the remedy – there are significant policy reasons why it should not do so.
5. ISCC submits that the CRTC lacks the jurisdiction to exercise its powers in the manner requested. The CRTC has no jurisdiction to make a finding of copyright

infringement: a finding that is reserved to the courts of the provinces and the Federal Court of Canada.

6. Injunctive relief is one of the basic remedies that are provided for in the *Copyright Act.* A website blocking order is in the nature of an injunction requiring compliance by third parties (ISPs). The Fair Play application provides no evidence, nor even an allegation, that website blocking injunctive remedies cannot be obtained from the courts. Neither the application nor the legal opinion examines either the legality or feasibility of "rolling" blocking orders, which Fair Play seeks to add to its arsenal of remedies. These are serious deficiencies.

7. The application is deficient in other key respects:

    a. It doesn't address the impact of potential blocking orders on innocent third parties who share an IP address with an infringing content provider.

    b. Neither does the application address the impact of such orders on innocent Canadian Internet users who wish to communicate with or receive services from a website that is blocked collateral to a website blocking order.

    c. It fails to consider who will pay the costs of implementing website blocking. ISCC understands that the costs may be significant, particularly for small service providers.

    d. Fair Play has not addressed who would be expected to compensate innocent third parties harmed by an overbroad website blocking order.

    e. The application does not explain how the remedy can be effective. IP addresses are not stable nor permanent and have only temporary associations with a person or corporate entity. Blocking a particular IP address does not ensure that the offending conduct will not continue at another IP address.

    Any serious application seeking to establish website blocking as a routine remedy must responsibly consider these issues.

8. ISCC believes that the effort to bring copyright remedies within the objectives of the *Telecommunications Act* will so expand the mandate of the CRTC that it could be called upon to use its powers in a host of ways that would turn the CRTC into a form of ombudsman of all social or cultural ills visited upon Canadians via the Internet.

9. ISCC believes there are particular dangers in using the *Telecommunications Act* to support the objectives of the *Broadcasting Act*. The CRTC has adopted the position that audio-visual content providers on the Internet are broadcasters who, but for the *Digital Media Exemption Order*, would be subject regulation under the *Broadcasting Act*. ISCC rejects this position in law, and further believes the CRTC should not accept the proposition that the *Telecommunications Act* can, beyond limited specific exceptions provided for in that act, serve the attainment of the objectives of the *Broadcasting Act*.

Overview

10. ISCC shares the concerns of the applicant Fair Play coalition with respect to systematic violations of copyright laws. Creators are entitled to control the use of their copyright works and to compensation for the use of those works. ISCC supports effective and proportionate remedies to assist copyright owners to control the use of their works and to recover compensation for the use of those works.
11. However, even accepting the gravity of the copyright infringing activity, the Fair Play application is fraught with legal, technical and policy issues that render it insupportable from a legal perspective and undesirable from a technical and policy perspective.
12. In this submission, ISCC will set out why the Fair Play application cannot be entertained or adopted by the CRTC. This preliminary jurisdictional issue should – in itself – dispose of the present application.
13. ISCC recognizes that even if this application is denied, the issues raised, and the resort to website blocking, will continue to be subject to debate and policy consideration. As the Fair Play application makes clear, there have been widespread efforts in various countries to come to terms with online copyright infringement. This application therefore presents an appropriate occasion for ISCC to raise its concerns, both with respect to this particular application, as well as to the broader context of website blocking as an instrument of copyright law enforcement.
14. Other parties have questioned the coalition's assertions that the impact and scale of online copyright infringement justifies the proposed intervention. They have asserted that the available data suggest that the increased availability and adoption of legitimate, affordable, online services offering video, music, books and other cultural products is curtailing Canadians' access to infringing alternatives. Their surmise is that the observed decline in resort to infringing sites is due to a number of factors, including: a willingness to pay affordable prices for access to content, and general awareness of the risks and dangers associated with pirate alternatives such as malware, identity theft and other problems.
15. While ISCC shares the concerns of other intervenors with respect to methodology used to derive the alleged scope of the infringement, it is not necessary for the purposes of this submission to challenge the assertions as to the seriousness of the infringement issues made by the Fair Play coalition. We take no position whether the copyright infringement issue is as grave as Fair Play has stated it to be. ISCC, rather, believes that a combination of legal, policy and technical issues act, singly or in combination, to make acceptance of the application contrary to law and to public policy.
16. While ISCC shares with the Fair Play coalition a desire to see effective remedies for breach of copyright, including the use of injunctive powers where appropriate,

the application should fail for a number of legal and policy reasons, which will be outlined further in this intervention.

Preliminary Legal Issues

Jurisdictional Issue

17. The entire structure of investigation, consideration of eviden ce, and recommendation by IPRA, and the ultimate relief granted bythe CRTCas proposed by the Fair Play coalition rests on a crucial legal finding: the CRTC, before ordering ISPs to block a website, must find that there has been a breach of copyright. The CRTC has no legal authority to make such a finding. Indeed, s. 41.24 of the *Copyright Act* and s. 20(2) of the Federal Courts Act grants jurisdiction to the Federal Court and the courts of the provinces to provide all remedies for the infringement of copyright.[1]
18. This exclusive grant of jurisdiction to the courts ought to be sufficient to end any further consideration of the Fair Play coalition's application.
19. Should the CRTC have any doubt as to its lack of jurisdiction in this regard, the CRTC should, as a preliminary matter, refer the issue of its capacity to make findings of copyright infringement to the Federal Court of Appeal for an authoritative determination.
20. It is trite law that a statutory body has only those powers that have been granted to it by Parliament. The CRTC has no legislative mandate to make copyright infringement determinations. If Parliament wishes the CRTC to intercede in questions of copyright infringement, Parliament can enact legislation to provide such jurisdiction to the CRTC.

Legal Necessity

21. The Federal Court of Canada and the superior courts of the provinces have jurisdiction over copyright matters, and have broad powers to provide relief, including a full range of injunctive powers, and the ability to proceed on a summary judgment basis.
22. If website blocking orders are not within the jurisdiction of the courts, then the remedy for copyright holders is to seek an appropriate amendment to the *Copyright Act* to provide such a remedy.
23. The Fair Play application fails to explain why the relief it seeks cannot be obtained through the courts. In *Google Inc. v. Equustek Solutions Inc.*,[2] the Supreme Court of Canada upheld an interlocutory order requiring Google to de-index, worldwide, the web pages of the defendant, making those pages virtually unfindable to persons looking for the allegedly infringing products. This would

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[1] R.S.C. 1985, c. C-42, as amended and R.S.C. 1985, c. F-7, as amended.
[2] 2017 SCC 34.

suggest that the courts currently have wide-ranging injunctive powers, and will use them to assist rights holders.

24. Strangely, while *Equustek* is cited in the legal opinion of McCarthy Tetrault[3], it is not for the power of the courts to craft effective remedies, it is cited only to highlight the "anti-online copyright infringement objectives of the Canadian legal system". The obvious point to be taken from *Equustek* is not that the courts support the objectives of intellectual property protection – but that the courts are prepared to exercise their powers to provide effective remedies. The coalition must explain why the current legal regime must be by-passed on the road to an intellectual property protection Nirvana.
25. Injunctive relief is one of the foundational remedies provided for in the *Copyright Act*[4]. The Fair Play application fails to explain why those injunctive powers cannot be used to remedy the online copyright infringement problems that it cites as the basis for seeking to use the CRTC to issue website blocking orders.
26. The coalition neither documents that it has applied to the courts for injunctive relief – nor that such relief has been refused. It is hard to reconcile the urgency with which the Fair Play coalition says its suggested remedy is required with its apparent indifference to seeking judicial remedies which are freely available.

Rolling Injunctions

27. At paragraph 87 of its application, the Fair Play coalition suggests not merely that the CRTC issue website blocking orders, but that the CRTC could then "quickly or automatically extend the site blocking requirement to additional locations on the Internet to which the same online copyright infringement site is located in order to prevent pirate operators from undermining its decision". In other jurisdictions this has been referred to as a "rolling injunction".
28. ISCC is unaware that such rolling injunctions having been issued by Canadian courts. The issue is not addressed in the McCarthy Tetrault opinion. The onus is on Fair Play to demonstrate both the legality and efficacy of rolling injunctions
29. Clearly, if the rolling injunction is to be introduced into Canadian law, the CRTC should ensure that it has the power to issue such an order.
30. If the Canadian courts have not made use of such a remedy, the CRTC's power to issue a rolling injunction should be made the subject of a reference to the Federal Court of Appeal.

[3] At p. 27.

[4] *Copyright Act*, s. **34 (1)** Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

Absence of Legal Authority and Necessity

31. The ISCC considers that the onus is on the applicants to demonstrate that:

    a. the remedy is one in relation to a matter over which the tribunal has jurisdiction;

    b. no other remedy is available; and,

    c. the remedy is otherwise lawful.

    The Fair Play application fails on all three counts.

32. The Fair Play application should be rejected by the CRTC as failing to establish a jurisdictional and legal basis for its application.

Policy, Technical and further Legal Concerns

Impact on Third Parties

33. A website blocking order is, by its nature, a very crude and undifferentiated tool. It operates by blocking an IP address associated with an infringing activity. It is indifferent as to whether legal activities may be associated with the same IP address. In that sense, website blocking is analogous to using a shot gun to fire at a target in a crowd. The target will likely be hit, but so also will many innocent persons in the proximity. This element of overkill is troubling from both a legal and a policy perspective.

34. As has been addressed in a number of submissions made by other interveners, the blocking of a particular IP address can lead to the blocking of communications to and from legitimate sites that share the same IP address. Network Address Translators essentially hide potentially thousands of IP addresses behind a common point of contact. Individuals and small business normally are assigned dynamic IP addresses, with a new IP address being assigned to every unique session.

35. The dynamic and temporary aspects of IP addresses, and the ease with which an infringing site can move to a new IP address renders website blocking a very limited and inefficient remedy. It can do great harm to others while the infringers move smoothly on to new addresses. To ask the CRTC to enter upon website blocking is to invite the CRTC into a game of legal Whack-a-Mole, where every time it brings the mallet down, the infringing activity pops up at a new address.

36. Website blocking is not a subtle tool: a particular website address may serve up to hundreds of clients. A web host may serve as the home for an infringing streaming site, but may at the same time host a knitting website, a sports car club, a news site dedicated to uncovering human rights abuses, or engaging activists who share environmental concerns. An order blocking a website hosting innocent

activity will suppress legitimate activities and intrude on the businesses and lives of those affected. This is the phenomenon of "over blocking", which has been noted in jurisdictions where website blocking has become a tool of copyright enforcement.

37. No matter how ostensibly fair and public any process leading to a blocking order may be, it is unlikely that innocent third parties will have effective notice of the peril an application for a blocking order may pose to their business or leisure activities. In the case of hosting services in foreign countries, it is doubtful if most innocent third parties, even if they had notice, would be able to intervene in a process taking place on an expedited basis before a Canadian court – let alone before a Canadian administrative tribunal.
38. While the real target of a blocking order likely has ample work-around plans to keep a step ahead of enforcement action, the affected third parties may suffer temporary or long terms loss or disruption of their lawful use of Internet resources. This is no minor concern: the right to free expression will have been violated, competing legal and commercial rights will have been compromised, and possibly the security of individuals put at risk. The unintended consequences of website blocking must be addressed as a matter of first priority.
39. ISCC notes that neither the Fair Play application, nor its supporting legal opinion, mentions the impact of website blocking on innocent third parties. As a result, the CRTC has been presented with no ameliorative proposals to mitigate the damage to third parties or to avoid it altogether.
40. The impact on third parties also impacts the legal arguments made in the McCarthy Tetrault legal opinion in respect of the relationship of the proposal to the *Canadian Charter of Rights and Freedoms*[5]. The opinion looks only at whether the *Charter* rights of the owners of copyright-infringing sites would be affected by an order. However, the opinion does not consider the freedom of expression rights of third parties who may be harmed – even irreparably harmed – by a website blocking order. Since the Fair Play coalition has failed to address the impact of its proposals on innocent third parties, the CRTC must take into account the *Charter* implications of denying Canadians the right to communicate with or receive communications from websites that happen to share an IP address with a site that facilitates copyright infringement.
41. A further matter that should be considered is compensation for innocent third parties whose business may be affected by website blocking. For instance, would it be proper for the CRTC to direct that the party seeking a website blocking order to hold harmless and make whole innocent third parties who may suffer loss as a result of a website blocking order?
42. ISCC submits the Fair Play application and its accompanying legal opinion are deficient in their analysis of third party impacts, and that, quite apart from the overriding unlawfulness of the proposed scheme, it unsafe for the CRTC to adopt the proposal without a far more rigorous look at the implications of their proposal

[5] Opinion, pp 51-56.

for third parties and the *Charter* rights of affected Canadians. It is for the coalition to establish that the proposal minimizes the impacts on third parties and avoids elevated risks of *Charter* breaches. The Fair Play application and legal opinion do neither.

Costs of Implementation of Website Blocking

43. The Fair Play application does not address who is to pay for the implementation of website blocking orders by third party telecommunications service providers. ISCC understands that, particularly with respect to small telecommunications service providers, the process of implementing a website block may be labour-intensive and thus expensive.
44. ISCC notes that the rights holders who have most to gain from effective website blocking are the vertically integrated carriers. These same carriers are competitors of the small telecommunications service providers who provide Internet access services. Unless the question of compensation for the implementation is squarely addressed, vertically integrated carriers could use website blocking orders as a means of increasing competitor costs. Any website blocking scheme must not be gamed so as to advantage rights holders to the detriment of competing telecommunications service providers.
45. It is imperative that any proposed website blocking proposal address both the cost and technical feasibility of implementing website blocking orders. The Fair Play application does neither, and must not be entertained by the CRTC.

Inquiry Act Powers

46. The Fair Play application suggests that proposed Piracy Review Agency (IPRA) should be appointed as an inquiry officer under s. 70(1) of the *Telecommunications Act*. That status would imbue IPRA with powers to compel testimony, issue subpoenas, order the production of documents, and even to make findings of civil contempt of court. ISCC is not sure that, in a situation where most likely targets are outside of Canada, such powers are necessary or appropriate.
47. The Fair Play coalition must make out the case for why IPRA should have such powers, explain how they are to be used, and explain how abuse of such powers would be avoided.
48. More fundamentally, s.70 (1) is limited to “any matter…within the Commission’s jurisdiction *under this Act*”(emphasis added). As addressed above, under jurisdictional issues, the CRTC lacks jurisdiction over copyright matters. It has no authority to appoint IPRA or any other entity to investigate or report on online copyright infringement – let alone to endow them with judicial powers.

Comparisons that do not stand up to scrutiny

49. The coalition compares its proposed regime to measures taken in other countries, to anti-online copyright infringement provisions in the *Radiocommunication Act*, and to measures taken by the CRTC under the *Telecommunications Act* to protect consumers. These comparisons are intended to legitimize the proposed regime in the context of international and domestic law and regulation. But the comparisons do not stand up to scrutiny.

50. The Fair Play application reviews a number of international precedents for website blocking. Most such regimes involve some level of judicial authorization for website blocking (only one of the examples authorizes an administrative tribunal to issue website blocking orders). All are based on explicit legislative authority. The lesson to be taken from international experience is that website blocking should only be undertaken within a legislative mandate – normally through amendments to the *Copyright Act*.

51. With respect to the *Radiocommunication Act*, it is correct that Parliament established specific protections for encrypted satellite programming signals under that Act. Those provisions enable both criminal enforcement by law enforcement authorities, and civil action by rights holders, against the unauthorized decoding of encrypted subscription programming signals. In contrast to the Fair Play application, the statutory authority is plain. Likewise, these provisions engage judicial oversight through the issuance of warrants for search and seizure of equipment and by ensuring that matters are litigated before criminal or civil courts. These provisions are not in any way analogous to Fair Play's proposal to create a new agency (outside the purview of government) with CRTC oversight.

52. The coalition goes on to compare its proposed regime to a number of measures taken in the past by the CRTC under s. 24.1 of the *Telecommunications Act* to protect consumers. Specifically: "…several of the s. 24.1 illustrations are similar to the Proposed Regime in requiring ISPs to take measures to assist innocent parties with problems the TSP did not itself create but which they are well-positioned to address (i.e., protecting their privacy, providing access to emergency services and providing access to services for disabled persons)…" [6]

53. Ten specific examples are listed in the McCarthy Tetrault legal opinion attached to the coalition's application. These include measures dealing with subject matter as diverse as consumer safeguards, security deposits, teletypewriter relay services, national video relay service, alternate formats for the visually impaired, competing carrier access to multi-dwelling units, resale of high-speed Internet services, the establishment of the Commissioner for Complaints for Telecommunications Services, and the reliability of 9-1-1 networks. **Every one** of these examples is directed at one of two types of problems:

[6] Opinion, pp 17-18.

a. assisting individual Canadians in their dealings with telecommunications common carriers and/or service providers — often protecting consumers from poor service; or,

b. preventing dominant carriers from engaging in activities that may undermine competition and/or result in the abuse of market dominance.

These examples are not comparable in any way to the coalition’s proposed website blocking regime, which deals with matters entirely extraneous to the relations between consumers and carriers or the potential abuse of dominance of telecommunications common carriers.

54. The example of the Commissioner for Complaints for Telecommunications Services is particularly instructive. The CCTS is an agency that enables consumers to obtain redress in response to complaints about carriers themselves. It was established in response to an Order in Council issued under s. 14 of the *Telecommunications Act*, setting specific guidelines with respect to the creation of a consumer agency for complaints in the context of local telephone service deregulation. In other words, the CRTC was directed by government to engage telecommunications carriers in the creation of the CCTS. Again, there is no valid analogy between the establishment of the CCTS and the coalition’s proposed IPRA and website blocking regime.

Telecommunications Act Objectives

55. The Fair Play application makes much of the alleged underpinnings for its application in objectives 7(a), (g), (h), and (i) of the *Telecommunications Act*. ISCC rejects the interpretation placed by the coalition and its supporting legal opinion. To read the objectives in the manner suggested would necessarily lead the CRTC into a situation where its jurisdiction, through the *Telecommunications Act*, would assert itself into the virtually every domain of public policy – and supplant its jurisdiction for those created through acts of Parliament and entrusted to government departments under the oversight of ministers accountable to Parliament.

56. Just one illustration demonstrates how distorted is the coalition’s reading of the objectives of the *Telecommunications Act*. Paragraph 7(a) provides as follows:

> **7** It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty and that the Canadian telecommunications policy has as its objectives
>
> > **(a)** to facilitate the orderly development throughout Canada of *a telecommunications system* that *serves* to safeguard, enrich and strengthen the social

> and economic fabric of Canada and its regions… (emphasis added)

As the coalition would have it, the Act should be read as if the **objective** were to **strengthen** the social and economic fabric of Canada: a **direct** imperative for CRTC regulatory action. This would potentially see the CRTC intrude into virtually all aspects of Canadian economic and social policy. That is not the objective that has been set out by Parliament. The objective is to **oversee** the **development of a telecommunications system**. Having such a telecommunications system would **serve** to strengthen the broader social and economic good. In other words, the social and economic benefits are **indirect**: they arise from the quality of the telecommunications system – not from CRTC preoccupation with social and cultural policy writ large. To read the objective as the coalition would have it read is to distort both the objectives of telecommunications policy, and the important but limited role of the CRTC.

57. The explanation provided in the coalition's legal opinion[7] is replete with this confusion. Repeatedly, the coalition reviews the potential pernicious effects of online copyright infringement, and puts responsibility for curing all such ills in the lap of the CRTC as a telecommunications regulator. This would not just be mission creep: it would be mission leap. The limited jurisdiction of the CRTC to regulate telecommunications common carriers is being conflated with a universal power to rectify social and economic ills. Parliament has not provided the tools or guidance necessary for the CRTC to do so. In invoking the CRTC to take up such a role, the Fair Play coalition is attempting to substitute its own designs for those of Parliament.

58. In interpreting the *Telecommunications Act* as it has, and attributing to the CRTC virtually unlimited powers over telecommunications service providers to accomplish that interpretation, Fair Play fundamentally distorts the purposes of telecommunications regulation, and the role of the CRTC. If it is possible to read copyright infringement into the social and economic objectives of the *Act*, what would restrain the CRTC from pursuing criminal activity on the Internet, or misleading advertising, or pornography, or racism or sexism? If the CRTC were to accept the coalition's argument, how could it deny the exercise of its powers to other interest groups seeking protection from other harms – many of which are arguably as harmful as, or more than, copyright infringement?

59. The Fair Play application seeks a monumental expansion in the mandate of the CRTC and in the interpretation of the objectives of the *Telecommunications Act*. This expansion should be rejected.

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[7] Opinion, pp. 23-27.

Relationship of *Telecommunications Act* to *Broadcasting Act* Objectives

60. The Fair Play coalition, as reflected in its supporting legal opinion[8], argues that by a harmonious reading of the *Telecommunications Act* with the *Broadcasting Act*, the *Radiocommunication Act* and the *Copyright Act*, the CRTC should arrogate to itself the enforcement of the broader objectives of those acts as they relate to the infringement of the rights of copyright holders. This confounds the notion of harmony with a violation of the balances and powers crafted by Parliament for the enforcement of the separate statutes, each of which provides for extensive powers of enforcement and specifically crafted remedies. To insert into such a nuanced scheme an undefined and potentially unlimited oversight function for the CRTC is to invite consequences that cannot be foreseen, but that could lead to novel and dangerous applications of the powers of the CRTC.

61. More specifically, the CRTC, in its role as telecommunications regulator, is asked in s. 28(1) to consider the objectives of the *Broadcasting Act* when programs are transmitted by means of the satellite or terrestrial facilities of carriers. This limited capacity to look into the *Broadcasting Act* in order to assist a decision rooted in telecommunications policy is restricted to this one instance. Had Parliament wished the CRTC in its telecommunications regulatory capacity to consider more generally broadcasting policy objectives, it could easily have crafted enabling provisions tailored to that effect. Parliament did not do so, and the CRTC should reject any proposal that would upset the balance that Parliament has created.

62. Nothing in the Fair Play application or supporting documentation demonstrates that, even where the four acts are looked at together, a harmonious interpretation leads to a conclusion that the CRTC is either compelled to, or may choose to, use its telecommunications regulatory powers to enforce the other statutes. To do so would fly in the face of reason and common sense, and ignores the clear delineation of powers and of remedies that Parliament has prescribed.

Copyright Infringing Websites as "Broadcasters"

63. At page 8 of the McCarthy Tetrault opinion, copyright infringing websites are said to be a form of “broadcasting undertaking”. This is a reference to the position taken by the CRTC that websites transmitting audio-visual content over the Internet are “broadcasting” as defined by the *Broadcasting Act*, and so subject to its jurisdiction.[9] The CRTC has chosen to exempt such broadcasting from regulation through the Digital Media Exemption Order.[10]

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[8] Opinion, pp. 29-50.

[9] Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14, 17 May 1999.

[10] *Exemption Order for Digital Media Broadcasting Undertakings* – Broadcasting Order CRTC 2012-409, 26 July 20112

64. Accordingly, and inescapably, the Fair Play application, if granted, would result in the CRTC using its powers under the *Telecommunications Act* to order ISPs to block Canadians' access to services that the CRTC itself considers to be broadcasting. This is problematic for two reasons:

    a. The Fair Play application so intermingles the interests of rights holders with those of broadcasters that it comes dangerously close to converting telecommunications policy objectives into the implementation of broadcasting policy.

    Nor will it stop there.

    b. If the coalition can propose to use the *Telecommunications Act* to enforce copyright law, it can readily be foreseen that the CRTC might be asked to use its telecommunications powers to block websites that have audio-visual content that merely competes with the economic interests of domestic broadcasters.

    The reasoning of the present application would result in a potential restriction on access to web based content that would have nothing to do with copyright infringement.

65. ISCC rejects the CRTC's conclusion that online audio-visual content is broadcasting, as well as the further conclusion that it has the power to exempt such undertakings from regulation, and, potentially, to subject such websites to conditions that are akin to conditions of licence intended to implement broadcasting policy objectives. ISCC will likewise oppose any attempt to use website blocking in order to protect domestic broadcasters from non-infringing online content that competes with their economic interests.

Conclusion

66. As can be concluded from the above considerations, the Internet Society Canada Chapter believes:

    a. As a preliminary matter, the CRTC must reject the Fair Play application as a matter of law. The application can only be acceded to where the CRTC has the authority of find an infringement of the *Copyright Act*. As only the courts can make such a finding, the application must fail and should not be considered further. Any doubt as to the correctness of this view should be made the subject of a referral by the CRTC to the Federal Court of Appeal for a definitive legal determination.

    b. Even if the application's requested relief was within the jurisdiction of the CRTC to grant, it should be rejected. The coalition has neither established that the relief sought cannot be found in another forum (the judicial system), nor that the proposal for rolling injunctions is one that can be granted in Canada.

c. The lack of regard for the rights and interests of innocent third parties is a major deficiency in the Fair Play application. The fact that the supporting legal opinion has no regard for the *Charter* rights of innocent third parties compounds this deficiency. The CRTC is being encourage to exercise its powers in a manner that may harm third parties without any consideration of the attendant risks. This, alone, justifies rejection of the application.

d. The attempts to draw analogies between previous CRTC action on behalf of consumers and competitors and the current proposal reveals a lack of proportion and logic. The analogies are unpersuasive at best.

e. The attempt to broaden the objectives of the *Telecommunications Act* invites the CRTC into an never-ending series of engagements with interests who have legitimate concerns that are, however, beyond the powers of the CRTC on any reasonable reading. Website blocking for copyright infringement encourages website blocking for a host of worthy objectives that far exceed the scope of the present proposal.

f. The CRTC is permitted by statute to only incidentally consider the objectives of the *Broadcasting Act* in the performance of its duties. The Fair Play application is not one of those in which the CRTC as telecommunications regulator is enabled to act to achieve the objectives of the *Broadcasting Act* – let alone the objectives of the *Copyright Act*.

g. The Fair Play application is all about copyright and the competing rights of private sector players. The determination of rights is properly within the realm of the courts of justice. The CRTC is an administrative tribunal whose purpose is to use its powers to serve the public interest. It is not established to or organized to adjudicate private law rights. The remedy sought by the Fair Play coalition can only be achieved through the application or amendment of the *Copyright Act* and not through the *Telecommunications Act*.

67. The CRTC is being asked to embark on a course of action whose consequences are both large and unknowable. The technical aspects of the application are not enunciated, and there should be no assumption as to its technical feasibility or the safety of its impacts on the Internet infrastructure more generally. The CRTC should ensure that any decision it makes is founded upon a profound understanding of the technical implications of its decision, their feasibility and effectiveness, and the costs associated with any decision respecting website blocking.

68. If the Fair Play application is made the subject of a public hearing, ISCC would like to appear in person.

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