Internet Society
Canada Chapter

Submission

of the

Internet Society Canada Chapter

to the

Standing Committee on Canadian Heritage

Study of Bill C-11: Online Streaming Act

May 31, 2022

Who we are

1. The Internet Society Canada Chapter (ISCC) is a not-for-profit corporation that engages in 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.

The Objectives of C-11

2. Bill C-11 has a number of objectives, and those need to be considered specifically. As we understand it, the following are the key objectives of C-11:

    a. To give recognition to and support to important constituent parts of Canadian society, and to highlight the importance of reflecting them within the Canadian broadcasting system: these include Indigenous societies and languages, French and English minority language communities, and LGBTQ+ and BIPOC communities;

    b. To require Internet streaming services to contribute to the financing and production of uniquely Canadian programming;

    c. To create a level regulatory playing field between online streaming services and traditional broadcasters.

ISCC's Position on C-11

3. ISCC's position on the objectives of C-11 are as follows:

    a. ISCC agrees with and supports the extension of Canada's broadcasting policy to the recognition and support of further elements of Canadian society. This initiative follows on and expands the recognition offered by the 1991 *Broadcasting Act* to the diversity of Canadian society and the need for that diversity to be reflected through the programming that is offered by our broadcasting system;

    b. ISCC supports a requirement that the major online streaming services, those that derive revenue from the Canadian market for Internet content, contribute to the creation of uniquely Canadian programs. Unfortunately, C-11, despite this objective, makes no effort to confine its application to the important streaming services: C-11 expands broadcasting regulation to all audio and audio-visual services on the Internet without regard to the size, importance or purpose of the content or its provider. ISCC is therefore forced to oppose the approach of C-11 –

an approach that fails to differentiate between a podcast produced in a residential basement and a major release motion picture featured on Netflix.

c. ISCC is fundamentally opposed to the regulation of the Internet as broadcasting: it is neither possible nor beneficial. Internet streaming services are simply not broadcasting. A level playing field between over-the-air broadcasters and online streaming services is illusory.

The Structure of this Submission

4. In the first part of this Submission, we elaborate our reasons for opposing the present incarnation of C-11. ISCC hopes that it may persuade those of open mind that C-11 is contrary to the interests of Canadian consumers, Canadian creators, and Canadian culture and identity writ large.

5. In the second part of this Submission, we make suggestions for changes that may limit the harm that C-11 poses to both Internet based services and to Canadian users of the Internet. Our intent is twofold. First, to protect the interest of Canadians who use the Internet to communicate, to learn, to gain exposure to differing views, and to be entertained according to their personal tastes and interests. Second, we seek to safeguard the interests of those who choose to use the Internet for the free expression of their culture, beliefs and opinions – including those of Canada's digital-first creators.

Bill C-11 is Fundamentally Flawed

Internet Streaming is Not Broadcasting

6. The term "broadcasting" has a defined meaning. Either there are a set of attributes that make broadcasting a defined concept, a limited set of things or systems, or broadcasting has the widest possible generality. In the latter case, broadcasting could devolve into any form of communication that Parliament says it is, without regard to the actual attributes and properties of the subject matter. In short, by this reasoning, Parliament could declare email to be broadcasting. Or a written letter could be "broadcasting" and its contents regulated by the state. We shall make the case that the bill, as written, so broadly expands the idea of what is "broadcasting" that it has escaped any previous rationale that justified regulation by government. In short, Bill C-11, by extending the definition of broadcasting to include vast amounts of the Internet has expanded the definition of "broadcasting" beyond sense or reason.

7. Broadcasting, as the word suggests, and as people have understood it, is a technology that involves one person (the broadcaster) speaking to many thousands (the audience). The direction of traffic is one way. The audience has limited choices in what it could hear or view, or when and where to hear or view it. The audience, apart from the ability to change channels (very limited in the heyday of radio and television) or to shut of the receiver, was captive. Broadcasting regulation had two purposes: to protect the airwaves

from harmful interference; and to protect the public audiences from the misuse by broadcasters of their near monopoly power to imperil public morals, transgress social norms, or attempt to influence political opinion.

8. The current broadcasting world consists of approximately 4000 licensees regulated by the CRTC. There is an implicit bargain between the holders of broadcasting licences and their regulator: the licensee will obey the myriad rules imposed by the regulator – in return the regulator will protect the economic interests of the licensee. This regulatory bargain is still reflected in paragraph 3(1)(b) of the Broadcasting Act.

9. Traditional broadcasters benefit from a host of regulatory and legislative measures that have created a walled-garden around traditional broadcasters and their supply chains. Its benefits include simultaneous substitution, tax penalties for Canadians advertising on US stations, genre protection, regulatory barriers to entry (no licence will be issued where a new station might result in the economic failure of an existing licensee). Licences are issued, and their ownership transferred, by means or regulatory beauty contents, with each participant trying to show how perfectly their promises of performance will meet the regulatory agenda of the CRTC.

10. This tightly regulated world was blown apart by the Internet. C11 seeks to reverse the effects of this technological and business revolution. By declaring all audio- and audio-visual content on the Internet to be broadcasting, the closed system of few voices -which is the basic idea of broadcasting - can be made perpetual. It is a kind of reverse takeover of the Internet. The tiny Canadian broadcasting system – tiny on the scheme of things – can take on the world of the Internet by the mere trick of redefining “broadcasting”.

11. Where broadcasting was one voice speaking to many, the Internet permits variable means of speaking. The vast bulk of audio and audio-visual content on the Internet is accessible only on demand. The audience is not captive. There are always other voices to be heard. Except for live streaming, the listener or viewer chooses what, when and where to hear it. When speaking of the so-called web giants – the streamer does not choose what will be heard or viewed. The individual audience member is in a private relationship with the transmitter of the content. In effect, each audience member self-curates the programming they will consume. Expressive power is in the consumer. Audio and audio-visual material on the Internet is narrowcasting in its purest form – the precise opposite of broadcasting.

12. Of course, this only true if “broadcasting” has a real and true definition grounded in fact. C-11 does its best to eliminate any technological, business, or other attributes that make broadcasting definable. In C-11, broadcasting is a “program” and a program is full-motion visual, audio or audiovisual communication. It can be encrypted, and therefore available only to those with decoders. It can include those who earn revenues from their communications or those who communicate without prospect of revenue. Non

commercial user generated content is outside regulation, but if the content generates revenue directly or indirectly, it is within the CRTC's regulatory powers.

Impact of C-11 on the Internet

13. ISCC readily agrees that there may be aspects of Internet streaming or content that merit public policy attention – and even regulation. What we contend is that broadcasting regulation of Internet content services is wholly inappropriate and will prove harmful to Canadians who access Internet content, the providers of Internet content, and those who create Internet content.

14. C-11 is based on the tragic illusion that all audio and audio-visual content on the Internet is a program, and that any person who transmits a program on the Internet is a broadcaster rather than a communicator. For this misconception we fault the report of the Broadcasting and Telecommunications Legislative Review Panel. It conceived the Internet to be another form of broadcasting – rather than as a unique and unparalleled development. When all you have is a hammer, everything looks like a nail. When the only problem communications policy has to solve is how to subsidize Canadian television production, then the Broadcasting Act – suitably modified - can embrace and absorb the Internet. And for a certain class of broadcasting enthusiast, this approach may actually seem viable. To the ISCC, it seems absurd and dangerous.

15. The fatal ambiguity of C-11 is that it pretends to be about "broadcasting", roughly as people have always understood the term. By emptying the definitions of broadcasting and "programs" from specific content and their technological context, the authors and supporters of C-11 have not had to address reality. C-11 is a radical departure from the principles and purposes of broadcasting regulation. It brings a massive range of free communication under the umbrella of the CRTC, and treats Internet creators and content providers as if they were traditional broadcasters. In seeking to protect the interests of those who supply content and services to traditional broadcasters, it jeopardizes the interests of broad swaths of Canadian culture that has had no place in the regulated broadcasting industry.

16. C-11 is not about broadcasting: it is about protecting the economic interests of a niche of Canada's music and video industries. In doing so, it imposes an economic and regulatory burden on all Canadian users of the Internet – consumers and creators alike. It is not about bringing "broadcasting" regulation up to date. It is not even about "streaming". It is about controlling content on the Internet, the persons who transmit content on the Internet, and what reaches the persons who access Internet content.

17. With the adoption of C-11 the population of regulated entities will expand to potentially millions. The reach of C-11 is not limited by Canada's borders. The Bill deems a person or entity that makes any transmission of programs over the Internet to be an online undertaking. Thus, any individual who posts audio or audio-visual material on a website that is available to the public is perforce subject to the broadcasting jurisdiction of the CRTC. This would include podcasts or vlogs, home handyman or homemaker tips

videos, church services conducted over Zoom, as well as virtually all user generated and digital first content on social media platforms.

18. Instead of introducing an actual Online Streaming Act – one that would have considered the unique nature of Internet delivered content and the functioning of the markets for that content – C-11 tries to stuff the most vibrant and adaptive marriage of technology and culture within the stultifying embrace of the regulated broadcasting system. Bill C-11 seeks to prolong and reinforce the supply-side dynamics of broadcasting regulation. C-11 fails to affirm or even acknowledge the primacy of the audience and its right to choose the programming that suits it.

19. Bill C-11 seeks to turn the Internet into a mere extension of the Canadian broadcasting system – a dying artifact of 20th Century technologies.

The Level Playing Field

20. There is no prospect that the benefits enjoyed by traditional broadcasters (see paragraph 9) will be extended to online streaming services (nor should they be!). By definition, a system that will impose burdens upon Internet streaming services without extending to them the benefits of the regulatory system will not create a level playing field. It is farcical to suggest that any possible regulatory outcome of the adoption of C-11 will result in a leveling of the regulatory playing field. C-11 is an attempt to tip the playing field to the advantage of the players who have benefited most from the existing regulatory framework.

C-11 Captures Ordinary Canadians

21. While s. 2.3 of Bill excludes some instances of streaming services that would otherwise be caught by the Act, they do not go nearly far enough in ensuring the legislation focuses on services that are truly of consequence in the digital marketplace. For instance, neither charities nor religious organizations are exempt. Nor does s. 2.3 shelter the online activities of individuals, whether professional or amateur.

22. Social media platforms are far from the only places on the Internet where entities and individuals may transmit audio or audio-visual content on the Internet. Individual and community websites abound with such content. Neither s. 2.3 nor 4.1 addresses the much broader regulatory reach of C-11.

User Generated Content

23. Computer based technologies empower individuals to create video and sound productions in the same way they write emails or talk on telephones. We use the term User Generated Content (UGC) for this. It includes the cute baby and cute pet videos, the capture of newsworthy events like tornados and car crashes, civil unrest and a host of other situations and context. Here, however, we wish to address more specifically user generated content that consists of artistic performances such as song, dance, acting, mime and every variant imaginable. This form of artistic expression is most commonly

uploaded to social media platforms, of which there are a growing number. It is this content that is the basis for a burgeoning media economy that is built on the Internet and has no relationship to the world of traditional broadcasting.

24. The main virtue of UGC is that it has extremely low barriers to entry. It also has virtually unlimited and costless export potential. At its most basic level, anyone with a smartphone can record a performance and post it to a social media platform. UGC creators do not necessarily need studios, production facilities, elaborate camera and recording equipment, specialized operators, postproduction professionals, scriptwriters, composers and the other trappings of traditional sound and audio-visual production. As a result, almost anyone with minimal savvy can create content.

25. The ease of entry has some interesting impacts. First, traditionally disadvantaged groups have the ready means to participate in the creation of Internet content. New Canadians, Canadians of diverse ethnocultural backgrounds, racialized communities, indigenous Canadians, persons with disabilities, and persons of diverse sexual orientation and gender identities and expressions all have found a place on social media platforms, and reach both broad and niche audiences worldwide.

26. Canadian artists have been exceptionally successful in creating content that attracts large number of followers on social media – many earning their primary income from revenue derived from social media.

27. C-11 poses a threat to the vibrant world of UGC. Things like Canadian content rules, discoverability rules and recommendation requirements are likely to by-pass this new and expanding creative community. The application of broadcasting rules to UCG will undermine the stated policy objectives of the Broadcasting Act, and potentially harm the very disadvantaged groups that Canadian policy seeks to promote.

28. ISCC opposes the imposition of the Broadcasting Act to user generated content for the same reasons we would oppose its extension to emails and telephone calls: it is simply inappropriate.

CanCon Rules Ignore Genuine Canadian Content

29. ISCC supports the creation of Canadian music and video production. It supports requiring the major Internet streaming services to contribute to the creation of Canadian music and video productions. In doing so, however, ISCC urges an expansion of the definition of Canadian content to ensure that productions that are based on authentic Canadian themes, on works by Canadian writers and composers, that are set in authentic Canadian locales and portray identifiably Canadian characters can obtain certification as Canadian productions.

30. Instead of enlarging the scope for new and culturally distinct Canadian programing, Bill C-11, through subsection 11.1(1.1), attempts to freeze in place the existing system that puts industrial criteria above cultural criteria. It seeks to lock Canadian content into a

supply side system sheltered from market engagement with its consumers. It is a system where producers must please the regulator rather than their audience.

31. ISCC believes any new definition of Canadian content must permit streaming services to own and exploit the intellectual property rights to content that they have funded, so long as that content meets the cultural imperatives required for certification.

Discoverability and Recommendation ("Showcasing")

32. C-11 is not content with preserving the trappings of the existing CanCon regime: it seeks to add new tools – discoverability and recommendation – to the inventory of privileges to be extended to the production industry. That industry relies on the obligations imposed upon broadcasters to create a captive clientele. The Internet has freed that clientele. The production industry seeks to interrupt the nexus between the consumer and the content he or she prefers – to put an algorithmic thumb on the scales of individual preference.

33. Both discoverability and recommendation (showcasing) pose technical and legal issues that threaten to cause harm to the mechanisms by which individuals seek the programming they desire and the expressive rights of those who may be forced to recommend Canadian programs against their better judgment.

34. The discoverability requirement must fail because there is no single system for identifying Canadian content – certified or otherwise. Nor does the proposal address forms of content that are dissimilar to that for which the film and certification regimes were created.

35. The proposed requirement that Internet streaming services "recommend" or "showcase" Canadian content is not a legally neutral or sustainable requirement. The decision to recommend a program is one of taste, expertise, business interest and judgment. It is an expression of opinion about a work. In effect, C-11 seeks to force streaming services to recommend content contrary to their best judgment. This amount to forced speech and is contrary to the freedoms guaranteed by section 2 of the *Canadian Charter of Rights and Freedoms*.

36. ISCC opposes the imposition of both discoverability and recommendatory obligations on Internet based streaming services – whether composed of user generated content or gated streaming services.

C-11 Can be Improved: Key Amendments

37. ISCC proposes a number of amendments to C-11 that would resolve its most serious flaws. In the following paragraphs, we highlight the issue and have suggested some technical wording that may be helpful to the Committee in its study of Bill C=11.

38. The primary flaw in C-11 is in its broad capture of all programs and all services on the Internet. This over capture, that then requires a process of exemption to winnow out the minnows from the whales is unnecessary and dangerous. ISCC proposes that the requirement to contribute to the funding of Canadian programs be limited to streaming

services that derive revenues from the Canadian market in excess of $150 Million. This is a simple and easy to administer test and does not require boiling the oceans to find the submarines.

Clause 2, subsection (3) is amended by adding the following:

Exclusion – Small Online Undertakings

2.4 This Act does not apply to an online undertaking whose revenues in Canada from paid subscriptions and embedded advertising do not exceed $150 Million.

39. Foreign language streaming services pose no threat to the traditional broadcasting system or those who create the content for that system. We recommend that streaming services that deliver services in languages other than French, English and indigenous languages that are habitually spoken in Canada should be exempt from the application of the Act.

Clause 2, subsection (3) is amended by adding the following:

Exclusion – Foreign Language Services

2.5 This Act does not apply in respect of an online undertaking whose programming is primarily transmitted in languages other than French, English or an indigenous language that is habitually spoken in Canada.

40. The Act should recognize that the Canadian broadcasting system should be moulded by the choices of individual Canadian rather than by regulatory imperatives and that market forces are beneficial in enabling Canadians to make programming choices

Subclause 3(3) is amended by adding after subparagraph #(1)(d)(i) of the Act:

(i.1) reflect and be responsive to the preferences and interests of its audiences;

(i.2) to the extent possible rely on market forces to ensure that Canadians obtain the programming of their choice;

41. User generated content uploaded to social media should not be subject to the Act. We would recommend the deletion of subsections 4.1(2), (3), and (4).

Clause 4 is amended by deleting subclauses (2), (3) and (4).

42. The Government has on a number of occasions stated its intention to make use of the power of direction over the CRTC to pre-empt regulatory processes – in particular with respect to limiting the application of the Act, and to defining what is a Canadian program. Act. Other areas are likewise ripe for the exercise of the directive power. Clause 8 of C-11 limits the ability of Parliament to provide oversight of the use of this extraordinary power. ISCC recommends that C-11 be amended to restore the kind of oversight that is provided by the current Act: a referral to a committee of each House of Parliament and the passage of at least 60 sitting days before a directive may be made final. By deleting Clause 8 of the Bill, the existing safeguards for Parliamentary oversight remain operative.

Clause 8 is deleted.

43. Remove the discoverability and recommendatory obligations from C-11. The discoverability requirement is contrary to the interests of individuals who want to see programming based on their personal choices and history of choices. It is also a form of forced speech that raises Charter issues. The recommendation ("showcasing") requirement is clearly a form of forced speech that violates section 2 of the Charter.

Clause 10 is amended by deleting in paragraph 9.1(1)(e) the words following the word "public" in line 2.

44. Online undertakings – domestic or foreign – should not be subject to the extraordinarily intrusive regulation of the broadcasting regime. Online undertakings should be exempt from the application of sections 9.1 and 10 of the Act, except to the extent required to determine the amount of revenues a service may have generated from the Canadian market.

Clause 11 is amended by adding after subclause 10)(2) the following:

> (2.1) Sections 9.1 and 10 do not apply to an online undertaking except for paragraphs 9.1(n) and (o) and paragraphs 10(1)(i) and (j).

45. There is a legitimate concern that foreign online undertakings who are required to pay into music, film or video funds may not be able to access those funds. ISCC believes that foreign online undertakings should be on an equal footing with their Canadian peers. This should be guaranteed by the legislation.

Clause 12 is amended by adding after subsection 10.1(8):

> (9) Where a foreign owned online undertaking is required under subsection (5) to pay an expenditure to a person or organization, or into any fund, that undertaking shall enjoy all the benefits available from any such person, organization or fund as if they were Canadian owned and controlled.

46. C-11 is a radical change to the regulation of communications. It targets for regulation as broadcasting the most vibrant and innovative engine of social and economic change that mankind has ever encountered. It is typical, when new legislation is introduced, that it be submitted to Parliamentary review, in order that it can be assessed whether the legislation is has been effective in addressing the issues that gave rise to it. C-11 lacks such a provision. ISCC recommends that there be a provision for Parliamentary committee review within 5 years of the coming into force of C-11.

That a new Clause 31.1 be added following Clause 31 of the Bill as follows:

Three-year review

93. As soon as feasible after the third anniversary of the day on which this section comes into force and after each subsequent third anniversary, a review of this Act and of its administration and operation is to be commenced by a committee of the Senate, of the House

of Commons or of both Houses of Parliament that may be designated or established for that purpose.

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