

**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**

**CRTC Application 8663-A182-201800467
Application to disable on-line access to piracy sites**

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A. Overview

1. I am a law professor at the University of Ottawa where I hold the Canada Research Chair in Internet and E-commerce Law and serve as a member of the Centre for Law, Technology and Society. I focus on the intersection between law and technology with an emphasis on digital policies. I submit these comments in a personal capacity representing only my own views.
2. If an appearing hearing is scheduled, I wish to appear before the Commission to make a presentation.
3. Having carefully studies the FairPlay Coalition proposal (“Coalition Proposal”) and the relevant data, laws, and regulations, I believe the Coalition Proposal is disproportionate, harmful, inconsistent with international standards, violates Canadian norms, and does not come close to meeting the Commission’s requirements for approval of website blocking.
4. This submission’s analysis of the Coalition Proposal is divided into five parts, prefaced by an Executive Summary.
5. Part one identifies why the Coalition Proposal is a disproportionate response to piracy concerns. It notes that the evidence does not support claims that Canadian piracy rates are particularly severe relative to global standards nor that they are having a significant negative impact on digital services, film and television production, and the creation of Canadian content. It also discusses some of the shortcomings of the MUSO Piracy Report that is heavily relied upon by the Coalition. This part also explains why Canada already has tough anti-piracy laws in the *Copyright Act* and why international data suggests that website blocking is not as effective the Coalition claims.
6. Part two discusses why the Coalition Proposal is inconsistent with international standards. This part includes an extensive review of countries that have permitted website blocking for the purposes of protecting intellectual property. It finds that the Coalition

Proposal would put Canada at odds with almost every other country that has permitted blocking since the data is unequivocal: the overwhelming majority require a court order for site blocking. Moreover, it examines global human rights laws and concludes that the Coalition Proposal may also violate human rights norms.

7. Part three examines why the Coalition Proposal is likely to lead to significant harms. Based on the experience in other jurisdictions, website blocking is very likely to lead to over-blocking of legitimate content, websites, and services. Indeed, the submission identifies numerous instances around the world in recent years where anti-piracy blocking resulted in over-blocking of legitimate sites. This part also discusses why the steady expansion of the block list - including broader definitions of piracy and the targeting of non-intellectual property infringement allegations - seems like an inevitability.
8. Part four assesses why the Coalition Proposal is inconsistent with Commission's policy priorities. For example, the Coalition Proposal is likely to lead to reduced competition for Internet access services in Canada, resulting in increased consumer Internet access costs. The Coalition Proposal is also harmful to privacy protections and runs counter to net neutrality norms and principles.
9. Part five highlights why the Coalition Proposal is inconsistent with the Commission's Policy Direction and the *Telecommunications Act* policy objectives. It also notes the danger that the Coalition Proposal would turn the Commission into an Internet content regulatory agency, counter to its longstanding reluctance to regulate Internet content.

B. Executive Summary

The Coalition Proposal is a Disproportionate Response to Piracy Concerns

10. The Coalition argues that piracy in Canada is a growing threat, relying on data from MUSO to suggest that current activities “makes it difficult if not impossible to build the successful business models that will meet the evolving demands of Canadians, support Canadian content production, and contribute to the Canadian economy.” This submission argues that website blocking represents a significant reform with major costs and implications for freedom of expression, net neutrality, affordable and competitive consumer Internet access, and the balanced enforcement of intellectual property rights. Without a compelling case that piracy in Canada is particularly severe – and evidence that the proposed solution will have a major impact on piracy rates – the risks and costs associated with the Coalition Proposal will outweigh any perceived benefits.

11. The MUSO report shows that Canadian piracy rates actually declined during the study period. Moreover, there are very questionable assumptions that call into question the validity of the data and highlight why the definition of “piracy sites” is subject to considerable manipulation.

12. The Coalition Proposal must not only make the case that there is a significant Canadian piracy problem, but also that piracy is having an enormous impact on the business and creative sectors. Yet the Canadian data on the digital economy and Canadian creative sector show a thriving industry.

13. According to the latest data from the Canadian Media Producers Association, the total value of the Canadian film and television sector exceeded \$8 billion last year, over a billion more than has been recorded in any year over the past decade. In fact, last year everything increased: Canadian television, Canadian feature film, foreign location and service production, and broadcaster in-house production.

14. The Canadian data on digital business models also points to a steady stream of success stories that refute claims that it is difficult if not impossible to create successful business models in Canada. Online video services, which the Coalition suggests are harmed by streaming sites, are experiencing rapidly expanding revenues, now generating more than \$1 billion per year. In fact, two Canadian online video services – CraveTV and Club illico – are estimated to have earned \$373 million last year, up from just \$13 million four years earlier.
15. Canada has some of the world’s toughest anti-piracy legal provisions, which Coalition members have actively used in recent years. The Coalition is effectively arguing that it needs more laws or legal tools to target non-Canadian sites that may be accessed by Canadians. However, Canadian law already provides for injunctive relief in appropriate circumstances with the Supreme Court of Canada’s *Equustek* decision one of the more recent manifestations of courts issuing orders to non-parties in support of intellectual property rights.
16. The Coalition argues that blocking “regimes have been widely adopted internationally because they have been proven to work.”¹ The submission cites data from several countries including the UK, Portugal, and South Korea. However, a closer look at the data reveals that website blocking is far less effective than its proponents claim. Even if the piracy claims were taken at face value, studies from around the world indicate only limited impact from site blocking in the longer term.

The Coalition Proposal Is Inconsistent with Global Standards

17. The Coalition has tried to downplay the absence of a court order from its proposal by suggesting that many countries have site blocking rules and that relying on alternate systems is commonplace. Its application states that at least 20 countries have site

¹ Fairplay Canada, *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* (29 January 2018) at para 68, online: <static1.squarespace.com/static/5a68f49af6576e4326f50337/t/5a6f33bd24a694fb93a51111/1517237184069/FairPlay+Canada+CRTC+Report+2018-01-29+EN.pdf>.

blocking, some with courts (the UK) and some without (Portugal). An examination of website blocking around the world reveals the inference that non-court ordered blocking is commonly used is inaccurate.

18. Research shows that of the 22 countries that have site blocked for copyright purposes, 20 use or have used court orders (the exceptions are Portugal (which is voluntary) and Italy (which permits both)). Of course, there are many notable countries, including the United States, Japan, Switzerland, Mexico (whose Supreme Court ruled blocking is disproportional) and New Zealand, that have no record of site blocking for copyright purposes at all.
19. As currently framed, the Coalition Proposal may also violate human rights norms. Website blocking or other measures to limit access to the Internet raises obvious freedom of expression concerns that has sparked commentary from many international governmental organizations.
20. International human rights rules and declarations leave the Coalition Proposal vulnerable to challenge in at least two respects. First, the absence of court orders remains a fatal flaw, placing Canada at odds with the majority of countries that have adopted any form of copyright-related website blocking. Second, the proportionality of the measures relative to harm also leaves it subject to challenge.

The Coalition Proposal is Likely to Lead to Significant Harms

21. The Coalition Proposal downplays concerns about over-blocking that often accompanies site blocking regimes by arguing that it will be limited to “websites and services that are blatantly, overwhelmingly, or structurally engaged in piracy.” Yet the blocking activity is likely to expand beyond a narrow scope in at least three ways: over-blocking of legitimate sites, expanded coverage of “piracy” sites and services, and the inclusion of content beyond intellectual property issues.

22. The danger of over-blocking legitimate websites raises serious freedom of expression concerns, particularly since experience suggests that over-blocking is a likely outcome of blocking systems.
23. A fulsome review reveals that blocking orders frequently lead to over-blocking, potentially affecting tens of thousands or even hundreds of thousands of legitimate websites. Given the hundreds of ISPs in Canada with varying technical capabilities, mandated website blocking as proposed by the Coalition would likely lead to over-blocking of legitimate sites.
24. The expansion of the definition of piracy sites is also likely to occur. Once the list of piracy sites is addressed, it is very likely that the Coalition will turn its attention to other sites and services such as virtual private networks (VPNs). The use of VPNs, which enhance privacy but also allow users to access out-of-market content, has been sore spot for the companies for many years. VPN services are already targeted by IP lobby groups such as the International Intellectual Property Alliance and can be expected to face demands for blocking. Beyond VPNs, it would not be surprising to find legitimate services streaming unlicensed content as the next target.
25. If the Commission were to create a system for mandated website blocking of intellectual property issues, there is simply no doubt that it would quickly face requests for far more. For example, the first request for mandated website blocking involved a request in 2006 from Richard Warman to block two foreign-based hate sites. The Commission refused to issue the order, noting that it did not think it had the legislative power under Section 36 to issue blocking orders. With the floodgates opened, hate speech sites would quickly give way to online gambling and other regulated activities as blocking targets.

The Coalition Proposal Is Inconsistent with Commission Policy Priorities

26. A mandated blocking system applied to all ISPs in Canada would have an uneven impact: larger ISPs will face new costs but may find it easier to integrate into existing systems,

whereas hundreds of smaller ISPs would face significant new costs that would affect their marketplace competitiveness. In fact, larger ISPs might ultimately benefit from higher fees passed along to subscribers and reduced competition. By harming the competitiveness of many smaller providers, the Coalition Proposal may jeopardize efforts to extend affordable Internet access to all Canadians.

27. Estimating the costs of the site blocking plan is made more difficult by the lack of detail in the Coalition Proposal. However, the experience elsewhere suggests that it could run into the millions of dollars. Larger ISPs in the UK disclosed their approximate costs in a 2014 case. For example, Sky Broadband spent over 100,000 pounds (costs described as “six figures”) to develop a website blocking system solely for IP right infringing website injunctions in 2011 and spent thousands more each month on monitoring costs. British Telecom spent over a million pounds on a DNS web-blocking system in 2012 and required more than two months of employee time on implementation. EE spent more than a million pounds on its website blocking system and over 100,000 pounds every month for operations.
28. The Coalition cites privacy protection as a reason to support its plan, noting the privacy risks that can arise from unauthorized streaming sites. There are obviously far better ways of protecting user privacy from risks on the Internet than blocking access to sites that might create those risks, however. Rather than enhancing privacy protection, the Coalition Proposal puts it at greater risk, with the possibility of VPN blocking, incentives to monitor customer traffic similar to the now-controversial practices arising from the case involving Facebook and Cambridge Analytica, and the potential adoption of invasive site blocking technologies.
29. Given that the starting principle for net neutrality is the right for users to access content and applications of their choice, blocking content is prima facie a net neutrality violation.
30. The Coalition argues that net neutrality is limited to “lawful content” and that its plan therefore falls outside the rules. In its application, however, it does not cite the Canadian

rules since Canada's net neutrality framework was never explicitly limited in application to content that is "lawful."

The Coalition Proposal is Inconsistent with the Policy Direction and the Telecommunications Act

31. Despite years of insistence by Coalition members that the Commission follow the CRTC policy direction, the Coalition has now proposed regulatory intervention that could not be more inconsistent with that direction.
32. With courts around the world concluding that site blocking is a disproportionate remedy, evidence that it is likely to lead to over-blocking, and risks that it violates net neutrality and privacy rights, the Coalition Proposal fails to meet the policy direction's requirement of "efficient and proportionate" regulation.
33. The Commission has made it clear that it will only permit blocking in "exceptional circumstances" and only where doing so would further the objectives found in the *Telecommunications Act*. The Coalition Proposal must therefore do more than simply raise concerns with respect to copyright law or cultural policies found in the *Broadcasting Act* objectives. Rather, it must convince the Commission that website blocking would further the telecommunications policy objectives.
34. The Coalition Proposal cites three objectives in support: that piracy "threatens the social and economic fabric of Canada" (subsection a), that the telecommunications system should "encourage compliance with Canadian laws" (subsection h), and that website blocking "will significantly contribute toward the protection of the privacy of Canadian Internet users" (subsection i).
35. The Coalition Proposal is exceptionally weak on all counts. There is no compelling evidence that piracy on telecommunications networks is threatening the social and economic fabric of Canada. Indeed, claims that Canada is a piracy haven are not

supported by the data. The argument on encouraging compliance with the law is even weaker as the Commission has already stated that compliance with other legal or juridical requirements does not justify site blocking.

36. Not only does the Coalition Proposal fail to make the case that it furthers the *Telecommunications Act* objectives, but there is a far better argument that it undermines them. For example, Subsection (a) references the “orderly development throughout Canada” of the telecommunications system. The creation of a blocking system applied to hundreds of ISPs and wireless carriers of all sizes across the country would undermine that goal as it would likely lead to the implementation of differing blocking technologies, inconsistent over-blocking of legitimate content, and a non-neutral Internet in Canada.
37. The regulatory framework for telecommunications – whether in the Act’s objectives, the government’s policy direction, or in the Supreme Court’s clear separation of broadcasting and telecom – all point to policy priorities premised on efficiency, affordability, and competitiveness. To engage in content regulation on the Internet is incompatible with those priorities and would turn the Commission into an Internet content regulatory authority, opening the door to licensing or regulating Internet streaming services, traffic that runs through ISP networks, and web-based content wherever it may be located.
38. Supporters of the Coalition Proposal downplay these concerns, arguing that it is a narrowly tailored approach to address piracy. This submission identifies why the blocking system is likely to lead to over-blocking and expanded scope of coverage for both IP and non-IP issues. But even more fundamentally, implementing blocking under Coalition Proposal without a court order under the auspices of the CRTC turns the Commission (and by extension the government) into a regulator of Internet content in direct contradiction to the telecommunications legislative framework and the Commission’s stated approach to online content.

C. The Coalition Proposal is a Disproportionate Response to Piracy Concerns

39. The Coalition argues that piracy in Canada is a growing threat, relying on data from MUSO to suggest that current activities “makes it difficult if not impossible to build the successful business models that will meet the evolving demands of Canadians, support Canadian content production, and contribute to the Canadian economy.”

40. It is important to emphasize that critiquing the data on piracy does not make one “pro-piracy.” No one denies that infringing activity takes place, whether in Canada or elsewhere. Rather, website blocking represents a significant reform with major costs and implications for freedom of expression, net neutrality, Internet access competitiveness and affordability, as well as the balanced enforcement of intellectual property rights. Without a compelling case that piracy in Canada is particularly severe – and evidence that the proposed solution will have a major impact on piracy rates – the risks and costs associated with the Coalition Proposal will outweigh any perceived benefits.

i. Canadian Studies on Piracy Rates

41. The most recent Canadian government backed report on piracy is the Circum Network study from 2016.² The Coalition submission cites the report in support of the claim that Internet providers should play a role in combatting piracy. Yet the report contained few recommendations and did not find much enthusiasm among Canadian stakeholders for investing in anti-piracy activities, which may help explain why existing tools are not actively used.³ The report states that “Canadian representatives of rights holders consulted as part of this study tended not to give online piracy fighting a high priority. While they condemn unauthorized access to intellectual property and while some rights holders indicated actively reacting, they generally considered that their scarce resources

² Canada, Canadian Heritage, *Examination of the “Follow-the-Money” Approach to Copyright Piracy Reduction*, by Circum Network Inc. (Ottawa: Canadian Heritage, 2016), online: <cdn.michaelgeist.ca/wp-content/uploads/2016/08/circumftmreport.pdf>.

³ See Part C(vi), *below*.

are better invested in other battles and counted on global organizations to pursue the fight.”⁴ In fact, there was even disagreement among those rights holders that supported government action. While some wanted law enforcement to escalate the piracy issue, others preferred to focus primarily on education efforts.

42. Those views are echoed in other reports. For example, a 2017 report from the Canada Media Fund noted that “some industry watchers have gone so far as to suggest that piracy has been ‘made pointless’ given the possibility of unlimited viewing in exchange for a single monthly price”, a reference to the commercial success of services such as Netflix and other online video streaming services that now generate more than \$1 billion per year in Canada in revenue.⁵

43. In addition to the commercial success in Canada that refute claims that it is near-impossible to establish successful business models, the data consistently shows that Canada is not a global leader when it comes to piracy. For example, Music Canada recently reported that Canada is well below global averages in downloading music from unauthorized sites (33 per cent in Canada vs. 40 per cent globally) or stream ripping from sites such as YouTube (27 per cent in Canada vs. 35 per cent globally).⁶

44. The lower Canadian piracy rates are also reflected in data from CEG-TEK, one of the most prolific anti-piracy companies and users of the notice-and-notice system, which reported in 2015 that there were “massive changes” in the Canadian market after the new copyright legal rules were established.⁷ In fact, it noted that the biggest decrease in piracy occurred on Bell’s network:

- Bell Canada – 69.6% decrease

⁴ *Supra* note 2 at s 4.4.

⁵ Canada Media Fund, “Adjust Your Thinking – The New Realities of Competing in the Global Media Market”, by Leora Kornfield for *CMF Trends* (Ottawa: CMF, 30 November 2017) at 8, online: <trends.cmf-fmc.ca/media/uploads/reports/Adjust_Your_Thinking_-_The_New_Realities_of_Competing_in_a_Global_Media_market_-_CFM_Trends.pdf>.

⁶ Music Canada, “The Value Gap: Its Origins, Impacts and a Made-in-Canada Approach”, (Toronto: Music Canada) at 23, online: <musiccanada.com/resources/research/the-value-gap-report/>.

⁷ “Six Strikes And You’re (Not Even Close To) Out; Internet Security Task Force Calls for End of Copyright Alert System” *PR Newswire* (12 May 2015), online: <www.prnewswire.com>.

- Telus Communications – 54.0% decrease
- Shaw Communications – 52.1% decrease
- TekSavvy Solutions – 38.3% decrease
- Rogers Cable – 14.9% decrease⁸

45. Similarly, the Business Software Alliance reports that Canada is at its lowest software piracy rate ever, well below global and European averages.⁹

ii. The MUSO Report: Declining Piracy Rates and Questionable Assumptions

46. The Coalition Proposal ignores this data, putting its eggs primarily in one basket: a MUSO study on the state of Canadian piracy (Sandvine data that 7% of North American households subscribe to unauthorized services leaves 93% not subscribing to such services, which does not advance their argument nor does it involve Canadian-specific data).¹⁰ The MUSO study comes up with a big number – 1.88 billion visits to piracy sites in Canada.¹¹ Yet a closer look at the study shows that Canadian piracy rates declined during the study period. Moreover, there are very questionable assumptions that call into question the validity of the data and highlight why definitions of “piracy sites” is subject to considerable manipulation.

47. The report itself plainly states that Canadian piracy rates declined during the study period. It points to the trends in the first six months vs. the last six months:

⁸ *Ibid.*

⁹ Business Software Alliance (BSA), “Seizing Opportunity through License Compliance: BSA Global Software Survey” (May 2016), online: <globalstudy.bsa.org/2016/downloads/studies/BSA_GSS_US.pdf>.

¹⁰ MUSO, “Global TV Piracy Insight Report 2017: Canada Country Level Report” online: <static1.squarespace.com/static/5a68f49af6576e4326f50337/t/5a6f31a1ec212d3a1503db00/1517236645551/FairPlay+Canada+2018-01-29+Exhibit+1.pdf>

¹¹ *Ibid* at 3.

Metric	Trend
Piracy Sites Visits (Overall)	-5.4%
Streaming Sites	-2.89%
Web Download Sites	-1.37%
Public Torrent Sites	-26.78%
Private Torrent Sites	-8.38%

48. In other words, for every type of site measured by MUSO, Canadian traffic declined during the study period.

49. Beyond the decline in piracy visits, the study is subject to questionable assumptions that raise questions about the validity of the data. Underlying the MUSO data is website traffic information from SimilarWeb, which samples traffic in countries around the world. There have been several studies that found that SimilarWeb is prone to over-estimating website traffic, which could mean the overall number is inflated.¹²

50. Even if the visits are accurate, the MUSO data captures many sites that fall outside the types of piracy sites that meets the Coalition Proposal standard. The company takes its own proprietary list of 23,000 piracy sites and uses the SimilarWeb data as the basis for concluding the number of piracy visits. Yet the sample sites used by MUSO highlight the challenge in identifying what constitutes a piracy site. For example, the list of web download sites includes addic7ed.com, a site that contains user-generated sub-titles for television shows and movies. The site includes completed sub-titles and works in progress that allow users to contribute to the translations and sub-titles. It does not contain full video or audio. The legality of user-generated sub-titles may be open for

¹² Rand Fishkin, “The Traffic Prediction Accuracy of 12 Metric from Compete, Alexa, SimilarWeb, & More” (2 June 2015), *SparkToro* (blog), online: <sparktoro.com/blog/traffic-prediction-accuracy-12-metrics-compete-alexa-similarweb/>; Ioana Lupec, “We analyzed 1787 eCommerce websites with SimilarWeb and Google Analytics and that’s what we learned” (22 November 2017), *Omniconvert* (blog), online: <[/blog.omniconvert.com/we-analyzed-1787-ecommerce-websites-similarweb-google-analytics-thats-we-learned.html](http://blog.omniconvert.com/we-analyzed-1787-ecommerce-websites-similarweb-google-analytics-thats-we-learned.html)>.

debate (sub-titles can be used for lawfully acquired videos) but few would think of this kind of site as “blatantly, overwhelmingly, or structurally engaged in piracy.”

51. The MUSO list also contains multiple sites that can be used to capture the video from sites such as YouTube. Stream ripping is a concern for the music industry, but these technologies (which are also found in readily available commercial software programs) also have considerable non-infringing uses, such as for downloading Creative Commons licensed videos also found on video sites.¹³

52. Where the site used in the database is widely viewed as a “piracy” site, the data does not always support claims that website blocking is an effective tool for reducing site visits. For example, MUSO identifies putlocker.is as sample streaming site. The site is on the blocklist in both Australia and the United Kingdom (both established through court rulings, not the administrative process envisioned by the Coalition).¹⁴ SimilarWeb has the latest data for site visits to Putlocker.is with Canada ranking below both Australia and the UK as a traffic source, despite inclusion on a blocklist in the latter two countries.¹⁵ Canada is also declining faster as a traffic source than Australia, the UK, and the United States (which is easily the top source of traffic).

53. None of this data is meant to justify infringing activity. However, claims that Canada is a piracy haven are not supported by the data. If anything, the data supports the view that Canadians are rapidly shifting away from unauthorized sites toward legal alternatives as better, more convenient choices come into the market.

iii. Piracy Having Little Impact on Thriving Digital Services and TV Production

¹³ “123 Media Stream Rip & Record - Mac|Windows”, online: Best Buy <<https://www.bestbuy.com/site/123-media-stream-rip-record-macwindows/5837003.p?skuId=5837003>>; Youtube Help, “Creative Commons”, online: Google Support <<https://support.google.com/youtube/answer/2797468?hl=en>>.

¹⁴ “Australia blocks another 59 popular pirate sites”, *BBC News* (18 August 2017), online <www.bbc.com>; “List of websites blocked in the United Kingdom”, online: Wikipedia, the Free Encyclopedia <en.wikipedia.org>.

¹⁵ “putlocker.is: Traffic by countries”, online: SimilarWeb <www.similarweb.com/website/putlocker.is#overview>.

54. The Coalition Proposal must not only make the case that there is a significant Canadian piracy problem, but also that piracy is having an enormous impact on the business and creative sectors.
55. The Coalition Proposal tries to meet that standard by claiming that Canadian piracy “makes it difficult if not impossible to build the successful business models that will meet the evolving demands of Canadians, support Canadian content production, and contribute to the Canadian economy.” Yet the Canadian data on the digital economy and Canadian creative sector show a thriving industry.¹⁶

iv. Supporting Canadian Content Production

56. According to the latest data from the Canadian Media Producers Association, the total value of the Canadian film and television sector exceeded \$8 billion last year, over a billion more than has been recorded in any year over the past decade.¹⁷ In fact, last year everything increased: Canadian television, Canadian feature film, foreign location and service production, and broadcaster in-house production.
57. If the standard the Commission is to consider involves support for Canadian content production, the situation has never been better. Spending on Canadian content production hit an all-time high last year at \$3.3 billion, rising by 16.1%. Notably, the increased expenditures do not come from broadcasters, who lead on the website blocking proposal and whose relevance continues to diminish year-by-year. In fact, the private broadcasters now contribute only 11% of the total financing for English-language television production. Their contribution is nearly half of what it was just three years ago (now standing at \$236 million) in an industry that is growing. Yet despite the private broadcaster decline, money is pouring into the sector from distributors (who see benefits of global markets) and foreign financing (which has grown by almost \$200 million in the

¹⁶ See Part C(i), *above*.

¹⁷ “Economic Report on the Screen-Based Media Production Industry in Canada”, (Ottawa: Canadian Media Producers Association, 2017), online: <www.primetimeinottawa.ca/wp-content/uploads/2018/02/Profile-2017.pdf>.

past four years) leading the way. The sector remains heavily supported by the public, with federal and provincial tax credits now accounting for almost 30% of financing.

58. The increase in foreign investment in production in Canada is staggering. When Netflix began investing in original content in 2013, the total foreign investment (including foreign location and service production, Canadian theatrical, and Canadian television) was \$2.2 billion. That number has more than doubled in the last five years, now standing at nearly \$4.7 billion. While much of that stems from foreign location and service production that supports thousands of jobs, foreign investment in Canadian television production has also almost doubled in the last five years.
59. The increasing irrelevance of private broadcasters for financing Canadian television production is particularly pronounced in the fiction genre (ie. drama and comedy shows). This is easily the most important genre from an economic perspective, with \$1.29 billion spent last year. Private broadcasters only contributed \$59 million or five percent of the total. By comparison, foreign financing was \$285 million. In sum, the data confirms that there has never been more money invested in film and television production in Canada.

v. Supporting Digital Business Models

60. The Canadian data on digital business models also points to a steady stream of success stories that refute claims that it is difficult if not impossible to create successful business models in Canada. Online video services, which the Coalition suggests are harmed by streaming sites, are experiencing rapidly expanding revenues, now generating more than \$1 billion per year. In fact, two Canadian online video services – CraveTV and Club illico – are estimated to have earned \$373 million last year, up from just \$13 million four years earlier.
61. Bell CEO George Cope confirmed the success during a recent quarterly conference call, stating:

*Crave strategy continues to work for us number of customers up 22% year-over-year, allowing us to have a product that you can view through traditional linear TV or and over-the-top environment.*¹⁸

62. The positive data sparked a question from Drew McReynolds about the rate of cord cutting:

*on cord cutting, cord shaving trends overall, you are obviously doing quite well on Crave and Alt TV, wondering if you're seeing in the TV market a real structural acceleration, let's say over the last 6 to 12 months or is it more of a steady acceleration or steady kind of rate of cord cutting, cord shaving?*¹⁹

63. Cope's response:

*It seems steady to me – clearly we have not seen some acceleration, but we notice a growing share and we got to be in, you know we absolutely have to be in that space in the market place, so we actually saw some growth and you know from a pay sub perspective, but we haven't seen a sudden acceleration and you can – the industry will now take the total TV net adds and be able to see that you know the decline in, and I don't think that rate has accelerated*²⁰

64. Simply put, Canada is now one of the world's leading markets for online video services with Coalition members indicating that that has not been accompanied by an acceleration of cord cutting from conventional services. According to the Reuters Institute Digital News Report 2017, Canada ranks among the top countries for consumers paying for

¹⁸ “BCE's (BCE) CEO George Cope on Q4 2017 Results - Earnings Call Transcript”, (8 February 2018), online: Seeking Alpha <seekingalpha.com/article/4144751-bces-bce-ceo-george-cope-q4-2017-results-earnings-call-transcript?part=single>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

online video services.²¹ There are now approximately 20 subscription streaming services in Canada and surveys indicate that more than half of all English-language households subscribe to Netflix.²² In fact, the data indicates that a higher percentage of Canadians pay for online video services than consumers in countries with site blocking such as Australia and the U.K.

65. Canada is not a market where digital business models cannot succeed due to piracy. Rather, the data confirms Canadians' willingness to pay for well-priced, convenient services, which has presumably prompted CBS to expand its streaming service to Canada, following on Amazon's recent streaming video entry.²³ Record earnings, a top tier global ranking for subscribers, and new market entrants are the sign of a thriving market, not one struggling to survive due to piracy.

66. The Canadian success story is not limited to online video as the online music market has experienced similar growth. According to industry data, the Canadian music market is growing much faster than the world average (12.8% in 2016 vs. 5.9% globally), streaming revenues more than doubled last year to US\$127.9 million (up from US\$49.82 million) growing far faster than the world average, the Canadian digital share of revenues of 63% is far above the global average of 50%, and Canada has leaped past Australia to become the 6th largest music market in the world.²⁴ The numbers are big for music creators as well. SOCAN, Canada's largest music copyright collective,

²¹ Reuters Institute for the Study of Journalism (RISJ), "Reuters Institute Digital News Report 2017", by Nic Newman et al (Oxford: RISJ, 2017), online: <[agency.reuters.com/content/dam/openweb/documents/pdf/news-agency/report/risj-digital%20news%20report%202017.pdf](https://www.reuters.com/content/dam/openweb/documents/pdf/news-agency/report/risj-digital%20news%20report%202017.pdf)>.

²² Susan Krashinsky Robertson, "Netflix leads streaming services in Canada", *The Globe and Mail* (20 October 2017), Online: <<https://www.theglobeandmail.com/report-on-business/industry-news/marketing/netflix-leads-streaming-services-in-canada/article36678928/>>.

²³ Pete Evans, "CBS to launch streaming service internationally, starting in Canada next year", *CBC News* (8 August 2017), online: <<http://www.cbc.ca/news/business/cbs-all-access-streaming-canada-1.4238595>>; Raju Mudhar, "Amazon launches Prime Video in Canada", *The Toronto Star* (14 December 2016), online: <https://www.thestar.com/business/tech_news/2016/12/14/amazon-prime-video-now-available-in-canada.html>.

²⁴ International Federation of the Phonographic Industry (IFPI), "Global Music Report 2017: Annual State of the Industry" (2017), online: <www.ifpi.org/downloads/GMR2017.pdf>.

recently reported that its Internet streaming revenues rose 46% last year, nearly hitting \$50 million annually.²⁵ In 2013, that number was only \$3.4 million.²⁶

67. Nordicity recently issued a detailed look at trends in the creative industries, summarizing the situation in the following manner:

*In 2016, it was noted that OTT (over-the-top video) takes a piece of subscriber revenues from BDUs, as well as from pay/specialty broadcasting services. Newly recognized is both the disruptive impact on television and also the opportunity for content producers.*²⁷

68. The opportunity for creators is the theme of Canadian Heritage Minister Melanie Joly's vision for the sector, which focuses on encouraging investment in Canada and sales to foreign markets. The data suggests great success in this regard, demonstrating that the Coalition's claims about the impossibility of building successful business models due to piracy bear little resemblance to the reality of the Canadian market.

vi. Canadian Copyright Already Provides Powerful Anti-Piracy Tools

69. As Innovation, Science and Economic Development Minister Navdeep Bains correctly noted upon the release of the Coalition Proposal:

We understand that there are groups, including Bell, calling for additional tools to better fight piracy, particularly in the digital domain. Canada's copyright system has numerous legal provisions and tools to help copyright owners protect their intellectual property, both online and in the physical realm. We are committed to maintaining one of the best

²⁵ The Society of Composers, Authors and Music Publishers of Canada (SOCAN), "SOCAN achieves record revenues" (31 January 2018), online: <www.socan.ca/news/socan-achieves-record-revenues>.

²⁶ SOCAN, "Reinvention: Annual Report 2013" (2013), online: <www.socan.ca/files/pdf/SOCAN_AnnualReport_2013.pdf>.

²⁷ Nordicity, "The Digital Media Universe in Canada: Measuring the Revenues, the Audiences, and the Future Prospects" (2018), online: <www.digitalmediaatthecrossroads.ca/pdfs/NordicityReport2018.PDF>.

*intellectual property and copyright frameworks in the world to support creativity and innovation to the benefit of artists, creators, consumers and all Canadians.*²⁸

70. Bains was right to note that Canada already has many legal provisions designed to assist copyright owners. In fact, Canada has some of the world’s toughest anti-piracy legal provisions, which Coalition members have actively used in recent years.²⁹ This includes lawsuits against set-top box distributors, mod-chip sellers, and websites such as TVAddons.³⁰ Some of these lawsuits have resulted in massive damage awards running into the millions of dollars.

71. Further, Canadian copyright law has also been used to shut down websites whose primary purpose is to enable infringement with rights holders relying on an “enabler provision” contained in the 2012 copyright reforms that can be used to target online sites that provide services primarily for the purpose of infringement. It states:

*It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.*³¹

72. The factors to determine whether the provision applies include:

- *whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;*

²⁸ Rose Behar, “Bell, Rogers Media among Coalition urging CRTC for anti-piracy system” (29 January 2018), online: MobileSyrup <mobilesyrup.com/2018/01/29/bell-rogers-and-more-come-together-to-urge-crtc-for-anti-piracy-website-blocking-system/>.

²⁹ Michael Geist, “Why Canada is Now Home to Some of the Toughest Anti-Piracy Rules in the World...And What Should Come Next” (7 March 2017), *Michael Geist* (blog), online: <www.michaelgeist.ca/2017/03/why-canada-is-now-home-to-some-of-the-toughest-anti-piracy-rules-in-the-world-and-what-should-come-next/>.

³⁰ *Nintendo of America Inc v King*, 2017 FC 246; *Bell Canada v Lackman*, 2018 FCA 42.

³¹ *Copyright Act*, RSC 1985, c C-42, s 27(2.3).

- *whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;*
- *whether the service has significant uses other than to enable acts of copyright infringement;*
- *the person’s ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;*
- *any benefits the person received as a result of enabling the acts of copyright infringement; and*
- *the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.*³²

73. This powerful legal tool is made even stronger by the existence of statutory damages in Canada that can lead to millions in liability for infringement. In fact, Canada is in the minority of countries that even has statutory damages as most require evidence of actual damages.³³ The combination of specific provisions to target sites that facilitate infringement with the possibility of enormous damage awards means that Canada already has tough copyright laws in place to combat piracy.

74. The Coalition is effectively arguing that it needs more laws or legal tools to target non-Canadian sites that may be accessed by Canadians. However, Canadian law already provides for injunctive relief in appropriate circumstances with the Supreme Court of Canada’s *Equustek* decision one of the more recent manifestations of courts issuing orders to non-parties in support of intellectual property rights.³⁴

75. There is no guarantee that courts will issue such an injunction – courts around the world have consistently identified the challenge of balancing protection of intellectual property rights with the implications of site blocking on freedom of expression – but a

³² *Ibid*, s 27(2.4)(a)-(f).

³³ Michael Geist, “Putting Copyright Statutory Damages in Perspective” (3 December 2010), *Michael Geist* (blog), online: <www.michaelgeist.ca/2010/12/stat-damages-post/>.

³⁴ *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [2017] 1 SCR 824.

comprehensive, impartial court review with full due process is precisely what should be required before the power of the law is used to block access to content on the Internet. Copyright owners are seeking to create their own system at the Commission without direct court involvement or policy review by Parliament. Before entertaining such a possibility, they should surely be required to test the effectiveness of existing law.

vii. Website Blocking is Far Less Effective Than Its Proponents Claim

76. The Coalition unsurprisingly argues that blocking “regimes have been widely adopted internationally because they have been proven to work.”³⁵ The submission cites data from several countries including the UK, Portugal, and South Korea. However, a closer look at the data reveals that website blocking is far less effective than its proponents claim.

77. The reports and studies on the effectiveness of website blocking often contain conflicting data. For example, INCOPRO, which sells site blocking services including lists of sites to block (and therefore has an obvious vested interest in promoting their effectiveness) has issued several studies on blocking.³⁶ A 2017 INCOPRO study on the effectiveness of Australian website blocking points to reduction in piracy rates but also examined usage of a list of 250 unauthorized sites:

*Usage of the top 250 sites in Australia decreased by 4% (204,843) when comparing March 2017 to October 2016. Usage of the same sites reduced by 13% for the global (excluding Australia) group and by 10.8% for the global control group.*³⁷

78. The study attributes the fact that Australian declines with site blocking were lower than global averages by acknowledging that “there may have been an increase in the usage of some unblocked sites as a result of the most popular site being blocked.” INCOPRO released a new report on Australia in February 2018 that claims continued declines in

³⁵ *Supra* note 1.

³⁶ INCOPRO, “Global Site Blocking”, online: <www.incoproip.com/services/global-site-blocking>.

³⁷ Australian Screen Association (ASA), “Site Blocking Efficacy: Australia” by INCOPRO (May 2017), online: <www.incoproip.com/wp-content/uploads/2017/08/Australian-Site-Blocking-Efficacy-Report-Final-v.2.pdf>.

piracy rates, but still contained evidence that even blocked sites show growth in Australia.³⁸ For instance, the report references new blocked sites such as HDMoviesWatch.net. According to SimilarWeb, Australia remains the top traffic source for site with its share increasing, not decreasing.³⁹

79. The likely shift of users to other sites or services unless massive blocking systems are deployed has been replicated in studies around the world. For example, a UK study by Danaher et al found little impact when the Pirate Bay was blocked with authors concluding that effectiveness depended on far broader blocking efforts.⁴⁰ A Dutch study on blocking the Pirate Bay went even further. Despite the expectation of reduced piracy rates:

no such effect is found. Instead, the percentage downloading films & series, games and books from illegal sources in the preceding six months increased between May and November/December 2012, while downloading music from illegal sources remained constant. This implies that any behavioural change in response to blocking access to TPB has had no lasting net impact on the overall number of downloaders from illegal sources, as new consumers have started downloading from illegal sources and people learn to circumvent the blocking while new illegal sources may be launched, causing file sharing to increase again⁴¹

80. Many studies suffer from technical shortcomings given the inability to actually track the impact of users shifting to VPNs in order to preserve their privacy and evade blocking efforts. For example, the INCOPRO studies contain a key exclusion:

³⁸ Australian Screen Association (ASA), “Site Blocking Efficacy – Key Findings: Australia” by Incopro (February 2018), online: <https://www.creativecontentaustralia.org.au/_literature_210629/2018_Research_-_Incopro_Study>.

³⁹ “hdmovieswatch.net”, online: SimilarWeb <<https://www.similarweb.com/website/hdmovieswatch.net>>.

⁴⁰ Brett Danaher, Michael D. Smith & Rahul Telang, “The Effect Of Piracy Website Blocking On Consumer Behaviour” (2015), DOI: <10.2139/ssrn.2612063 >.

⁴¹ Joost Poort et al, “Baywatch: Two approaches to measure the effects of blocking access to The Pirate Bay” (2014) 34 Telecom Policy 383 at 391.

*General purpose VPN and proxy services have been excluded because they allow users to access any website of their choice. As a result, it cannot be definitively concluded that they are being used to access unauthorised sites.*⁴²

81. In addition to INCOPRO's vested interest in claiming that site blocking is effective, the reliability of the data is therefore questionable given that it does not account for users who rely on VPNs for their Internet usage. In other words, any shift to general VPN-based access of sites is not included in the company's data, thereby potentially significantly overestimating the impact of site blocking.

82. In fact, there are no shortage of studies and court rulings that conclude site blocking has little impact:

- The UK's OFCOM's 2010 study on site blocking concluded "any injunction scheme operated under sections 17 and 18 of the DEA is unlikely to give rise to a sufficient level of actions to have a material impact on levels of copyright infringement."⁴³
- The UK's 2017 online copyright infringement tracker found no change in the percentage of users accessing unauthorized content online from the prior year.⁴⁴
- A similar consumer study in Australia obtained the same results with 2017 levels of infringement remaining the same from the prior year.⁴⁵

⁴² *Supra* note 36 at 8.

⁴³ UK, Ofcom, "Site Blocking" to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act (London: Ofcom, 2010), online: <www.ofcom.gov.uk/__data/assets/pdf_file/0022/12838/1-186872101-attachment1.pdf?lang=en>.

⁴⁴ UK, Intellectual Property Office, *Online Copyright Infringement Tracker: Latest wave of research (March 2017) Overview and key findings* by Kantar Media (London: Intellectual Property Office, 14 July 2017), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/628704/OCI_-tracker-7th-wave.pdf>.

⁴⁵ Austl, Commonwealth, Department of Communications and the Arts, *Consumer Survey on Online Copyright Infringement 2017: A marketing research report June 2017* by Kantar Public (Canberra: Australian Government Publishing Service, 2017), online: <www.communications.gov.au/documents/consumer-survey-online-copyright-infringement-2017-marketing-research-report>.

- A 2015 study by the Council of Europe states plainly that “blocking is not very effective in general.”⁴⁶
- Italy is often touted as an example for site blocking, yet piracy rates of movies has only declined by 4% since 2010 and the rate of television piracy has increased significantly over the same period.⁴⁷
- In Spain, one study found piracy rates dropping by 4%, but some sectors saw an increase and MUSO report ranked Spain as the 4th highest country in the world for piracy ranking, despite the existence of website blocking.⁴⁸
- The ineffectiveness of Pirate Bay blocking led a Dutch court to lift a court ordered block in 2014, concluding “the block is not justified and will no longer be enforced.”⁴⁹
- A 2015 European Commission sponsored study that tracked the effect of shutting down a popular German video streaming site found only short-lived reductions in piracy levels as users gravitated to other sources.⁵⁰
- A 2017 comment from the Council of Europe Commissioner for Human Rights noted “blocking measures are easy to bypass, even for not very technically skilled people.”⁵¹

83. The ineffectiveness of website blocking was perhaps best illustrated by the example discussed from the MUSO report relied upon by the Coalition in which Putlocker.is, which is identified by MUSO as sample streaming site, is on the blocklist in

⁴⁶ EC, Swiss Institute of Comparative Law, *Comparative study on blocking, filtering and take-down of illegal internet content* (Strasbourg: EC: 2017) at s 2.1.4.1, online: <edoc.coe.int/en/internet/7289-pdf-comparative-study-on-blocking-filtering-and-take-down-of-illegal-internet-content-.html>.

⁴⁷ Andy, “MPAA Chief Praises Site-Blocking But Italians Love Piracy – and the Quality”, *Torrentfreak* (6 June 2017), online: <<https://torrentfreak.com/mpaa-chief-praises-site-blocking-but-italians-love-pirate-quality-170606/>>.

⁴⁸ “Observatory 2016: Piracy down 4%” (25 April 2017), online: La Coalición <lacoalicion.es/2017/04/25/piracy-down-4/>.

⁴⁹ Martin Gijzemijter, “‘Ineffective’ Pirate Bay ban lifted by Dutch court”, *ZDNet* (28 January 2014), online: <<http://www.zdnet.com/article/ineffective-pirate-bay-ban-lifted-by-dutch-court/>>.

⁵⁰ Luis Aguiar, Jörg Claussen & Christian Peukert, “Online Copyright Enforcement, Consumer Behaviour, and Market Structure” (2015) JRC Institute for Prospective Technological Studies Working paper, online: <ec.europa.eu/jrc/sites/jrcsh/files/JRC93492_Online_Copyright.pdf>.

⁵¹ Human Rights comment, “Arbitrary Internet blocking jeopardises freedom of expression”, (26 September 2017) online: <https://www.coe.int/en/web/commissioner/-/arbitrary-internet-blocking-jeopardises-freedom-of-expression?desktop=true>

both Australia and the UK (both established through court rulings, not administrative hearings)⁵², yet SimilarWeb reports that site visits to Putlocker.is are greater in both Australia and the UK than in Canada.⁵³

84. Site blocking is touted by the Coalition as a proverbial silver bullet to its piracy concerns. Even if the piracy claims were taken at face value, studies from around the world indicate only limited impact from site blocking in the longer term. Given the many negative effects of site blocking discussed below, the risks far outweigh the benefits.⁵⁴

D. The Coalition Proposal Is Inconsistent with Global Standards

i. Website Blocking Without a Court Order Is Inconsistent with International Norms

85. One of the most obvious problems with the Coalition Proposal – indeed one that is fatal – is the absence of court orders for website blocking. The attempt to avoid direct court involvement in blocking decisions means the Coalition Proposal suffers from an absence of full due process, raising a myriad of legal concerns. If adopted, the Coalition Proposal would put Canada at odds with the vast majority of countries that have permitted blocking since the data is unequivocal: the overwhelming majority require a court order for site blocking.

86. The Coalition has tried to downplay the absence of a court order from its proposal by suggesting that many countries have site blocking rules and that relying on alternate systems is commonplace. Its application states that at least 20 countries have site blocking, some with courts (the UK) and some without (Portugal). An examination of website blocking around the world reveals the inference that non-court ordered blocking is commonly used is inaccurate.

⁵² *Supra* note 14.

⁵³ *Supra* note 15.

⁵⁴ See Parts E(i)-(ii), *below*.

87. Just how rare is non-court ordered blocking? Working with Amira Zubairi, a University of Ottawa law student, we examined 22 countries that have or have had some form of copyright-related website blocking. Some groups say that there are 27 countries with website blocking,⁵⁵ but we excluded five countries due to widespread censorship in their blocking systems that do not lend themselves to a reasonable comparison with a copyright-specific blocking system: Saudi Arabia (which features government-backed Internet blocking),⁵⁶ Indonesia (which has blocked 800,000 sites),⁵⁷ Malaysia (which regularly uses the power to block legitimate sites),⁵⁸ Turkey (which uses real-time large scale blocking of sites including Wikipedia)⁵⁹ and South Korea (which uses censors to block access to thousands of web pages).⁶⁰
88. Our research shows that of the 22 countries that have site blocked specifically for copyright purposes, 20 use or have used court orders (the exceptions are Portugal (which is voluntary) and Italy (which permits both)). Of course, there are many notable countries, including the United States, Japan, Switzerland, Mexico (whose Supreme Court ruled blocking is disproportional) and New Zealand, that have no record of site blocking for copyright purposes.⁶¹

⁵⁵ Nigel Cory, “How Website Blocking is Curbing Digital Piracy Without ‘Breaking the Internet’”, (22 August 2016), online: Information Technology & Innovation Foundation, online: <www2.itif.org/2016-website-blocking.pdf>.

⁵⁶ Ernesto Van Der Sar, “Saudi Arabia Government Blocks the Pirate Bay (and More)”, *TorrentFreak* (2 April 2014), online: <<https://torrentfreak.com/saudi-arabia-government-blocks-pirate-bay-140402/>>.

⁵⁷ “Indonesia blocks 800,000 websites”, *The Jakarta Post* (7 January 2010), online: <<http://www.thejakartapost.com/news/2010/01/07/indonesia-blocks-800000-websites.html>>.

⁵⁸ “Freedom on the Net 2017: Malaysia Country Profile”, online: Freedom House <freedomhouse.org/report/freedom-net/2017/malaysia>.

⁵⁹ “Turkish Authorities block Wikipedia without giving reason”, *BBC News* (29 April 2017), online: <<http://www.bbc.com/news/world-europe-39754909>>; Turkey Blocks, “Mapping Internet Freedom in Real Time”, online: <turkeyblocks.org>.

⁶⁰ Adam Clark Estes, “South Korea’s Internet is More Oppressive Than You Think” (11 February 2014), *Gizmodo* (blog), online: <gizmodo.com/south-koreas-internet-is-more-oppressive-than-you-thin-1520771960>.

⁶¹ Ernesto Van der Sar, “Pirate Site Blockages Violate Free Speech, Mexico’s Supreme Court Rules”, *TorrentFreak* (25 April 2017), online: <<https://torrentfreak.com/pirate-site-blockades-violate-free-speech-mexicos-supreme-court-rules-170425/>>.

Comparative Analysis of Copyright Website Blocking Oversight

Country	Court/No Court	Cases/Experience
Argentina	Court	The Argentinean National Communications Commission ordered ISPs to block access to the Pirate Bay after a Buenos Aires court issued an injunction. ⁶²
Australia	Court	Rights holders can apply to the Federal Court for an injunction directing ISPs to block access to websites that infringe copyrighted content when: the geographical origin of the website is outside of Australia, and when the website has the primary purpose of infringing or facilitating the copyright infringement. The Australian system is under review. ⁶³
Austria	Court	Austrian courts can issue injunctions that can be imposed on ISPs to prohibit them from allowing customers to access certain websites. In 2016, an appellate court removed a block on the Pirate Bay, however, ruling that rights holders had failed to exhaust all available remedies. ⁶⁴
Belgium	Court	In 2011, a Belgian appellate court overturned a lower court ruling that found that blocking was disproportionate to allow for the blocking of the Pirate Bay. ⁶⁵
Chile	Court	Chile adopted a new law in 2010 regulating ISP liability for online copyright infringement. The law requires a court order before ISPs are required to take down allegedly

⁶² Panam Post Staff, “Argentina First in Latin America to Block The Pirate Bay” *Panam Post* (2 July 2014), online: < <https://panampost.com/panam-staff/2014/07/01/argentina-first-in-latin-america-to-block-the-pirate-bay/>>.

⁶³ Corrine Reichert, “Piracy site-blocking laws under review”, *ZDNet* (14 February 2018), online: < <http://www.zdnet.com/article/piracy-site-blocking-laws-under-review/>>.

⁶⁴ Andy, “Pirate Bay Blockade Lifted By Austrian Court”, *TorrentFreak* (23 June 2016), online: < <https://torrentfreak.com/pirate-bay-blockade-lifted-by-austrian-court-160623/>>.

⁶⁵ enigmax, “Belgian ISPs Ordered to Block The Pirate Bay”, *TorrentFreak* (4 October 2011), online: < <https://torrentfreak.com/belgian-isps-ordered-to-block-the-pirate-bay-111004/>>.

copyright-infringing material from websites, block access to an allegedly infringing website, disclose customer information, or terminate customers' Internet accounts.⁶⁶

Denmark	Court	In 2015, a Danish court ordered the blocking of 12 sites. Denmark was the first country to order the blocking of the Pirate Bay. ⁶⁷
Finland	Court	Section 60(c)(1) of the Finland Copyright Act allows courts to issue an injunction to discontinue and order intermediaries to discontinue the making of allegedly copyright infringing material available to the public where requirements set out in the provision are fulfilled. In 2011, a Helsinki court ordered the blocking of the Pirate Bay. ⁶⁸
France	Court	Article L. 336-2 of the French Intellectual Property Code allows rights holders to seek a court order to have ISPs implement measures to stop or prevent online copyright infringement. ⁶⁹
Germany	Court	In November 2015, the German Supreme Court in Karlsruhe ruled ISPs might be responsible for blocking websites offering illegal music downloads, but only if copyright holders showed they had first made reasonable attempts to stop such piracy by other means. ⁷⁰
Greece	Court	Copyright holders can apply for injunctions against intermediaries who facilitate access to third party infringers (Article 64A of the Copyright Law), such as websites that

⁶⁶ "Chile", online: Global Chokepoints <globalchokepoints.org/countries/chile.html>.

⁶⁷ Ernesto Van der Sar, "Popular Torrent and Streaming Sites Blocked in Denmark", *TorrentFreak* (27 March 2015), online: <<https://torrentfreak.com/popular-torrent-and-streaming-sites-blocked-in-denmark-150327/>>.

⁶⁸ Petteri Günther, "Blocking Websites: A Finnish View" (3 July 2012), online: Legal Knowledge Portal <legalknowledgeportal.com/2012/07/03/blocking-websites-a-finnish-view/>.

⁶⁹ Bertrand Liard & Clara Hainsdorf, "French Courts Ordered to Block and Delist 16 Streaming Websites" (10 January 2014), online: White & Case <www.whitecase.com/publications/article/french-courts-ordered-block-and-delist-16-streaming-websites>.

⁷⁰ Theresia Reinhold, "German Supreme Court rules in favour of 'blocking' websites" (16 December 2015), online: European Digital Rights <edri.org/german-supreme-court-rules-in-favor-of-blocking-websites/>.

are used for dissemination of music and film. In 2015, an Athens Court ruled that barring access to torrent sites is disproportionate and unconstitutional, while hindering the ISPs' entrepreneurial freedoms.⁷¹

Iceland	Court	In October 2014, the Reykjavík District Court ordered two ISPs (Hringdu and Vodafone) to block the Pirate Bay. ⁷²
India	Court	India courts have issued orders for ISPs to block access to sites such as the Pirate Bay. ⁷³
Ireland	Court	In April 2017, nine ISPs were ordered to block access to three websites. ⁷⁴ In January 2018, the Commercial Court in Dublin ordered eight sites blocked. ⁷⁵
Italy	Both	Italian courts can issue blocking orders. In addition, the broadcast and telecommunications regulator Authorities for Guarantees Communication (AGCOM) has the power to issue website blocking injunctions. ⁷⁶
Netherlands	Court	Under Article 26d of the Copyright Act, and Article 15e of the Neighbouring Rights Act, district courts can issue an injunction to prevent copyright and other rights' infringements through the services of intermediaries, by ordering the intermediaries to cease services used for infringements. The Supreme Court is

⁷¹ Ernesto Van der Sar, "Torrent Site Blockades Are Disproportional, Greek Court Rules", *TorrentFreak* (21 January 2015), online: < <https://torrentfreak.com/torrent-site-blockades-are-disproportional-greek-court-rules-150121/>>.

⁷² "Freedom on the Net 2017: Iceland", online: Freedom House <freedomhouse.org/report/freedom-net/2015/iceland>.

⁷³ "India unblocks The Pirate Bay and other sharing sites", *BBC News* (22 June 2012), online: < <http://www.bbc.com/news/technology-18551471>>.

⁷⁴ Oisin Feeney, "Three pirate websites are being blocked in Ireland" *Buzz.ie* (3 April 2017), online: < <https://www.buzz.ie/news/three-pirate-websites-blocked-in-ireland-232062>>.

⁷⁵ John Kennedy, "Movie industry victory as eight piracy sites blocked in Ireland", *Silicon Republic* (16 January 2018), online: < <https://www.siliconrepublic.com/enterprise/movie-piracy-ireland-legal-action-isps>>.

⁷⁶ Ernesto Van der Sar, "Blocking Pirate Sites Without a Trial is Allowed, Italian Court Rules", *TorrentFreak* (3 April 2017), online: < <https://torrentfreak.com/blocking-pirate-sites-without-a-trial-is-allowed-italian-court-rules-170403/>>.

currently considering whether blocking is a proportionate sanction.⁷⁷

Norway	Court	In 2015, Norway Oslo District Courthouse ruled that all ISPs and access providers must block the TLDs of a number of torrent tracers like the Pirate Bay. Six different torrent trackers/pirating websites were blocked. ⁷⁸
Portugal	No Court, Voluntary Process	A voluntary process was formalized through an agreement between ISPs, rights holders, and the Ministry of Culture and the Association of Telecommunication Operators, which allows copyright holders to add new sites to a blocklist without any intervention or oversight from a court. ⁷⁹
Russia	Court	Courts can order ISPs and web-hosts to permanently block websites that provide access to infringing content. ⁸⁰
Singapore	Court	Section 193DDA(1) establishes under the Singaporean Act (Copyright Act) that courts can award an injunction against an ISP if the services of the ISP have been or are being used to access an online location to commit or facilitate copyright infringement, and the online location is a flagrantly infringing online location. In February 2016, Singapore’s High Court ordered local ISPs including Singtel, StarHub, and M1 to disable access to SolarMovie.ph. ⁸¹

⁷⁷ Chris Cooke, “The Pirate Bay will be web-blocked in the Netherlands once again”, *Complete Music Update* (25 September 2017), online: < <http://www.completemusicupdate.com/article/the-pirate-bay-will-be-web-blocked-in-the-netherlands-once-again/>>.

⁷⁸ Paul Resnikoff, “For the First Time in Norwegian History, Pirate Sites Are Being Blocked”, *Digital Music News* (2 September 2015), online: < <https://www.digitalmusicnews.com/2015/09/02/norwegian-court-orders-sweeping-blocks-against-the-pirate-bay-other-torrent-sites/>>.

⁷⁹ Maryant Fernández Pérez, “Portugal: ‘Voluntary’ agreement against copyright infringements” (12 August 2015), online: European Digital Rights <edri.org/portugal-voluntary-agreement-against-copyright-infringements/>.

⁸⁰ Andy, “New Russian Anti-Piracy Law Could Block Sites ‘Forever’”, *TorrentFreak* (25 April 2015), online: < <https://torrentfreak.com/new-russian-anti-piracy-law-could-block-sites-forever-150425/>>.

⁸¹ Andy, “Singapore Court Orders Country’s First Pirate Site Blockade”, *TorrentFreak* (16 February 2016), online: < <https://torrentfreak.com/singapore-court-orders-countrys-first-pirate-site-blockade-160216/>>.

Spain	Court	In March 2012, the Spanish government approved the Sinde Law that requires websites with pirated material to be blocked within 10 days. ⁸² The legislation created a government body that has the power to force ISPs to block sites. Rights holders can report websites hosting infringing content to a government commission. A court ultimately rules on whether to block the site. ⁸³
Sweden	Court	In March 2017, a Swedish court ordered an ISP to block file-sharing websites. ⁸⁴ On February 13, 2017, the Swedish Patent and Market Court (part of the Svea Court of Appeals), in a judgment of final instance, issued a decision requiring the ISP, B2 Bredband to block access to the file-sharing sites the Pirate Bay and Swefilm.
United Kingdom	Court	Copyright owners can use Section 97A of the Copyright, Designs and Patents Act 1988 to secure mandatory blocking orders against copyright infringing websites, which must be enforced by major ISPs like BT, Sky Broadband, and Virgin Media. ⁸⁵

89. The comparative data confirms that website blocking for copyright purposes is still quite rare. In those countries that have had it, the most common case involves a court action targeting the Pirate Bay. Moreover, the use of courts highlights how due process concerns are addressed. Courts in several countries, including Mexico, Austria, and Greece, have ruled that site blocking is disproportionate, noting that copyright owners may have failed to exhaust other potential remedies. In fact, in February 2018, the Supreme Court of

⁸² Jose Elias Rodriguez, “Spain’s anti-piracy law may already be obsolete”, *Reuters* (26 March 2012), online: < <https://www.reuters.com/article/net-us-spain-piracy/spains-anti-piracy-law-may-already-be-obsolete-idUSBRE82P0JV20120326>>.

⁸³ Andy, “Spanish Court Orders First Pirate Music Site Block”, *TorrentFreak* (7 April 2015), online: < <https://torrentfreak.com/spanish-court-orders-first-pirate-music-site-block-150407/>>.

⁸⁴ Elin Hofverberg, “Sweden: Internet Service Provider Ordered to Block Access to File-Sharing Sites”, *The Library of Congress* (9 March 2017), online: < <http://www.loc.gov/law/foreign-news/article/sweden-internet-service-provider-ordered-to-block-access-to-file-sharing-sites/>>.

⁸⁵ *Supra* note 43.

Canada established a higher threshold for the takedown of content online, shifting away from the 2017 *Google v. Equustek* decision and signalling the importance of having courts consider all rights when seeking to block access to content online.⁸⁶

90. The Coalition Proposal is inconsistent with the vast majority of countries around the world. Notwithstanding assurances that there are many systems that do not depend on court orders, the reality is that the majority of countries with a free and open Internet only engage in the possibility of website blocking with a court order. The failure to include one – indeed the very point of the Coalition proposal seems to be to avoid the court process – would put Canada at odds with almost all our allies and likely be subject to an immediate legal challenge given our rules on openness, net neutrality, and due process.

ii. The Coalition Proposal is Inconsistent with International Human Rights Norms

91. As currently framed, the Coalition Proposal may also violate human rights norms. Website blocking or other measures to limit access to the Internet raises obvious freedom of expression concerns that has sparked commentary from many international governmental organizations. Frank LaRue, the former U.N. Rapporteur on Freedom of Expression, was one of several experts on freedom of expression, including representatives from the Organization for Security and Co-operation in Europe, the Organization of American States, and the African Commission on Human and Peoples' Rights, who issued a joint declaration in 2011 on freedom of expression and the Internet. It states the following on blocking:

*Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.*⁸⁷

⁸⁶ *R v Canadian Broadcasting Corp*, 2018 SCC 5.

⁸⁷ OAS, Inter-American Commission on Human Rights, *Joint Declaration on Freedom of Expression and the Internet*, (2011) at s 3(a), online: < <https://www.osce.org/fom/78309?download=true>>.

92. The Coalition Proposal is inconsistent with international standards given the absence of a court order for such an “extreme measure.” In 2012, a further declaration from LaRue and the IACHR-OAS Special Rapporteur on Freedom of Expression states:

*all restrictions on freedom of expression, including those that affect speech on the Internet, should be clearly and precisely established by law, proportionate to the legitimate aims pursued, and based on a judicial determination in adversarial proceedings. In this regard, legislation regulating the Internet should not contain vague and sweeping definitions or disproportionately affect legitimate websites and services.*⁸⁸

93. The Coalition Proposal falls short, both with respect to proportionality and in the absence of a judicial determination. In fact, in 2017, Stanford University researchers conducted an extensive review of website blocking within the context of human rights, reaching the following conclusion:

OAS countries would likely violate their human rights obligations if they held intermediaries liable for failing to block entire sites or services in cases where no court order has been issued, as this might characterize an indirect interference on freedom of expression, prohibited by Article 13, 3 of the ACHR.

*Moreover, in most cases the judiciary is the best-equipped institution to determine whether the particular content at issue has actually violated the law, as well as whether these measures are a necessary, proportionate, and an appropriate response. In states that do not require judicial authorization for SSB [site and service blocking], government actors and ISPs may be able to block content directly without the judiciary’s legal analysis or oversight.*⁸⁹

⁸⁸ OAS, Inter-American Commission on Human Rights, *Joint Declaration by the UN Special Rapporteur for Freedom of Opinion and Expression and the ICAHR-OAS Special Rapporteur on Freedom of Expression*, (2012), online: < <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=848>>.

⁸⁹ Subhajit Banerji et al, “The ‘Right to Be Forgotten’ and Blocking Orders under the American Convention: Emerging Issues in Intermediary Liability and Human Rights”, online: (2017) The Stanford Center for Internet and

94. The Council of Europe’s 2017 comparative study on blocking, filtering, and take-down of illegal Internet content raises many of the same concerns.⁹⁰ In relation to copyright related blocking, it cites to an OSCE report:

*It is recalled that the courts of law are the guarantors of justice which have a fundamental role to play in a state governed by the rule of law. In the absence of a valid legal basis the issuing of blocking orders and decisions by public or private institutions other than courts of law is therefore inherently problematic from a human rights perspective. Even provided that a legal basis exists for blocking access to websites, any interference must be proportionate to the legitimate objective pursued.*⁹¹

95. International human rights rules and declarations leave the Coalition Proposal vulnerable to challenge in at least two respects. First, the absence of court orders remains a fatal flaw, placing Canada at odds with the majority of countries that have adopted any form of copyright-related website blocking.⁹² Given the lack of court orders and the implications for freedom of expression, it is unsurprising that the Coalition Proposal is opposed by every major civil liberties group in Canada including the Canadian Civil Liberties Association, the B.C. Civil Liberties Association, the Rocky Mountain Civil Liberties Association, and Canadian Journalists for Freedom of Expression.

96. Second, the proportionality of the measures relative to harm also leaves it subject to challenge.⁹³ As previously noted, there is only weak evidence on state of Canadian piracy and the claims of harm.⁹⁴ Even if the harm is accepted, it must be set out against

Society at 66 <[law.stanford.edu/wp-content/uploads/2017/09/The-Right-to-Be-Forgotten_-and-Blocking-Orders-under-the-American-Convention-Emerging-Issues-in-Intermediary-Liability-and-Human-Rights_Sep17-.pdf](http://law.stanford.edu/wp-content/uploads/2017/09/The-Right-to-Be-Forgotten-and-Blocking-Orders-under-the-American-Convention-Emerging-Issues-in-Intermediary-Liability-and-Human-Rights_Sep17-.pdf)>.

⁹⁰ *Supra* note 46.

⁹¹ Yaman Akdeniz, “Freedom of Expression on the Internet: Study of Legal Provisions and Practices Related to Freedom of Expression, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States” (15 December 2011) at 183, online: <www.osce.org/fom/80723?download=true>.

⁹² See Part D, *above*.

⁹³ Pekka Savola, “Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers”, online: (2014) 5:2 JIPITEC <www.jipitec.eu/issues/jipitec-5-2-2014/4000/savola.pdf>.

⁹⁴ See Part C, *above*.

the likelihood of over-blocking, violating net neutrality rules, and its ineffectiveness as an anti-piracy solution.⁹⁵ Courts in other countries have ruled that blocking systems may be disproportionate (Greece, the Netherlands).⁹⁶ The Council of Europe report notes that “lower German courts have refused to follow the ECJ’s lead because of the limited effectiveness of blocking measures, which might be a problem, on the level of human rights, in terms of proportionality and transfer of judicial power to ISPs.”⁹⁷ In light of the serious flaws with the Coalition Proposal, a similar conclusion might well be reached in Canada.

E. The Coalition Proposal is Likely to Lead to Significant Harms

97. The Coalition Proposal downplays concerns about over-blocking that often accompanies site blocking regimes by arguing that it will be limited to “websites and services that are blatantly, overwhelmingly, or structurally engaged in piracy.” Yet the blocking activity is likely to expand beyond a narrow scope in at least three ways: over-blocking of legitimate sites, expanded coverage of “piracy” sites and services, and the inclusion of content beyond intellectual property issues.

i. Likely Over-blocking of Legitimate Websites and Services

98. The danger of over-blocking legitimate websites raises serious freedom of expression concerns, particularly since experience suggests that over-blocking is a likely outcome of blocking systems. The Council of Europe Commissioner for Human Rights issued a report in 2014 on the rule of law on the Internet in the wider digital world, noting:

blocking is inherently likely to produce unintentional false positives (blocking sites with no prohibited material) and false negatives (when sites with prohibited material slip through the filter). From the point of view of freedom of expression, the most problematic

⁹⁵ See Parts E(i) and F(iii), *below*, and C(vii), *below*.

⁹⁶ *Supra* note 71; *supra* note 77.

⁹⁷ *Supra* note 46.

*is widespread over-blocking: the blocking of access to sites that are not in any way illegal, even by the standards supposedly applied.*⁹⁸

99. One of the best-known cases of over-blocking arose in Canada in 2005, when Telus unilaterally blocked access to a pro-union website without a court order during a labour dispute.⁹⁹ In doing so, it simultaneously blocked access to an additional 766 websites hosted on the same computer server.¹⁰⁰ The blocked sites included an engineering company, an Australian-based site promoting alternative medicine, a U.S. company that recycled electronics parts, and a fundraising site for breast cancer research. Today, Telus is largely dismissive of the blocking incident with an executive recently telling a House of Commons committee that “if you believe that this is the end of the world and the Internet as we know it, Godspeed. I think actually it is what it is.”¹⁰¹ Indeed, it is what it is: a Canadian telecom company violating what are now recognized as net neutrality rules by blocking hundreds of websites without a court order.

100. Yet the real danger is that this is not ancient history. Working with University of Ottawa law students Tanvi Medhekar and Matt Westwell, we identified numerous instances around the world in recent years where anti-piracy blocking resulted in over-blocking of legitimate sites. For example, in 2013, UK ISPs blocked access to around 200 legitimate websites including Radio Times.¹⁰² The blocking occurred as a result of a court order targeting two file sharing websites. There have been many similar instances in the UK including the 2012 blocking of the Promo Bay and the 2015 blocking of CloudFlare

⁹⁸ Council of Europe, Commissioner for Human Rights, *The rule of law on the Internet and in the wider digital world*, (2014) at 13, online: <rm.coe.int/16806da51c>.

⁹⁹ “Telus cuts subscriber access to pro-union website”, *CBC News* (24 July 2005), online: <<http://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166>>.

¹⁰⁰ Tom Barrett, “To Censor Pro-Union Web Site, Telus Blocked 766 Others”, *The Tyee* (4 August 2005), online: <<https://thetyee.ca/News/2005/08/04/TelusCensor/>>.

¹⁰¹ House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Meeting No. 91* (February 2018) (Chair: Bob Zimmer) at 1010, online: <<https://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/meeting-91/evidence>>.

¹⁰² Shona Ghosh, “Sky blocks news site after DNS exploit”, *Alphr* (12 August 2013), online: <<http://www.alphr.com/news/broadband/383587/sky-blocks-news-site-after-dns-exploit>>.

customers.¹⁰³ In fact, OFCOM, the UK regulator, anticipated the over-blocking issue in a 2010 study that noted:

*We believe that IP address based site blocking is not granular and is likely to lead to over-blocking. This may undermine the confidence in any site-blocking scheme, and create significant liability risks for service providers. The over blocking property is a by-product of sites sharing IP addresses.*¹⁰⁴

101. The report noted risks of over-blocking with all technical approaches to site blocking. The UK experience has been replicated in other countries. For example, Argentina blocked access to over a million blogs after a court ordered blocking of two sites.¹⁰⁵ Further, when Argentina blocked access to the Pirate Bay in 2014, it simultaneously blocked access for the entire country of Paraguay, which relies on Argentina and Brazil for its Internet connectivity.¹⁰⁶ India blocked access to hundreds of sites, including Google Docs, after a court ordered blocking of a streaming site in 2014.¹⁰⁷ In 2012, as a result of an order by the Madras High Court to block copyright content, 38 Internet providers, including Airtel, blocked a range of websites including legitimate content on video sharing sites such as Vimeo.¹⁰⁸ Portugal, which the Coalition cites as a model, inadvertently blocked a U.S. video game developer in 2016.¹⁰⁹ Internet

¹⁰³ Ernesto Van der Sar, “UK ISPs Block Pirate Bay’s Artist Promotions”, *TorrentFreak* (2 December 2012), online: < <https://torrentfreak.com/uk-isps-block-pirate-bays-artist-promotions-121202/>>; Ernesto Van der Sar, “Pirate Bay Blockade Censors CloudFlare Customers”, *TorrentFreak* (24 April 2015), online: < <https://torrentfreak.com/pirate-bay-blockade-censors-cloudflare-customers-150424/>>.

¹⁰⁴ *Supra* note 43.

¹⁰⁵ Mike Masnick, “Argentine ISPs Block Over A Million Blogs In Response To Court Order To Block Two” (22 August 2011), online: Techdirt <www.techdirt.com/articles/20110822/04355515613/argentine-isps-block-over-million-blogs-response-to-court-order-to-block-two.shtml?threaded=true>.

¹⁰⁶ *Supra* note 62.

¹⁰⁷ “Delhi High Court Orders to Block Google Docs and Several Other Websites” (2014), online: NextBigWhat <www.nextbigwhat.com/delhi-high-court-orders-block-google-docs-several-websites-297/>.

¹⁰⁸ Mike Masnick, “Indian ISP Penalized For ‘Overblocking’ In Obeying Court Order To Try To Stop Infringement” (14 August 2012), online: Techdirt <www.techdirt.com/articles/20120814/00401920012/indian-isp-penalized-over-blocking-obeying-court-order-to-try-to-stop-infringement.shtml>; “When Copyright Tramples on the Right to Freedom of Expression” (2 July 2012), online: Software Freedom Law Centre < <https://sflc.in/when-copyright-tramples-on-the-right-to-freedom-of-expression>>.

¹⁰⁹ Mike Masnick, “Portuguese ‘Anti-Piracy’ Site Blocking Used Against US Video Game Developer” (20 January 2016), online: Techdirt <<https://www.techdirt.com/articles/20160120/07114033388/portuguese-anti-piracy-site-blocking-used-against-us-video-game-developer.shtml>>.

backbone provider Cogent blocked access in 2017 to sites not included on a Spanish court order and Russia blocked access to 40,000 legitimate sites as it took aim at 4,000 sites on a piracy block list.¹¹⁰ The year before, a Moscow court issued an order blocking 1222 websites but more than 11,000 legitimate sites were blocked in the process.¹¹¹

102. There are many examples of anti-piracy measures leading to over-blocking, but over-blocking can involve other content filtering. For example, the Australian Securities and Investment Commission, Australia's financial regulator, revealed that in 2013 it blocked access to 250,000 legitimate sites after previously blocking another 1200 websites (including the Melbourne Free University) in an attempt to block two websites it accused of fraudulent activity.¹¹² Further, one UK study found that one in five of the most visited sites on the Internet were being blocked by ISP filters.¹¹³

103. The Coalition Proposal cites a 2017 UK court decision for the proposition that "there is no evidence of over-blocking."¹¹⁴ Yet that decision only examined blocking arising from several instances involving soccer streaming and did not review the broader evidence on the impact of blocking orders. A more fulsome review reveals that blocking orders frequently lead to over-blocking, potentially affecting tens of thousands or even hundreds of thousands of legitimate websites. Indeed, the Council of Europe's Commissioner for Human Rights has warned that "blocking, notably when performed by software or

¹¹⁰ Ernesto Van der Sar, "Internet Backbone Cogent Blocks Cloudflare's New 'Pirate Site' IP-addresses", *Torrentfreak* (22 March 2017), online: < <https://torrentfreak.com/internet-backbone-cogent-blocks-cloudflares-new-pirate-site-ip-addresses-170322/>>; Timothy Geigner, "Russia Piracy Blocking: Four Thousand 'Pirate' Sites Blocked...Along With Forty Thousand Sites Worth of Collateral Damage" (7 September 2017), online: Techdirt <www.techdirt.com/articles/20170906/14302638160/russia-piracy-blocking-four-thousand-pirate-sites-blocked-along-with-forty-thousand-sites-worth-collateral-damage.shtml>.

¹¹¹ Ruslan Nurullaev, "Website blocking in Russia: Recent trends" (2017) 33:2 *Computer L & Sec Report*.

¹¹² Ben Grubb, "How ASIC's attempt to block one website took down 250,000", *The Sydney Morning Herald* (5 June 2013), online: < <https://www.smh.com.au/technology/how-asics-attempt-to-block-one-website-took-down-250000-20130605-2np6v.html>>; Jon Lawrence, "ASIC Blocks Scam Website and Takes 1,200 Innocent Sites Down With It" (16 May 2013), online: Electronic Frontiers Australia Inc <www.efa.org.au/2013/05/16/asic-blocks-1200-innocent-sites/>.

¹¹³ Juliette Garside, "Internet filters blocking one in five most-popular websites", *The Guardian* (2 July 2014), online: < <https://www.theguardian.com/technology/2014/jul/02/internet-filters-blocking-popular-websites-guido-jezebel>>.

¹¹⁴ *Union Des Associations Européennes De Football v British Telecommunications Plc & Ors* (2017), [2017] EWHC 3414 (Ch).

hardware that reviews communications, is inherently likely to produce (unintentional) false positives (blocking sites with no prohibited material) and false negatives (when sites with prohibited material slip through a filter).”¹¹⁵ Given the hundreds of ISPs in Canada with varying technical capabilities, mandated website blocking as proposed by the Coalition would likely lead to over-blocking of legitimate sites.

ii. The Likely Expansion of the Block List Standard for “Piracy” Sites

104. The Coalition’s definition for piracy sites is not found in legislation. Rather, it seeks to effectively draft its own legislative definitions for assessing whether a site or service is blatantly, overwhelmingly or structurally engaged in piracy. Regardless of the standard, the difficulty of identifying “pirate sites” should not be under-estimated. Consider the MUSO report that is the Coalition’s primary source of piracy evidence.¹¹⁶ As noted in the discussion on the evidence of piracy in Canada, MUSO has developed a proprietary list of 23,000 piracy sites which it uses as the basis for estimating the number of piracy visits in Canada.¹¹⁷ Yet the sample sites used by MUSO highlight the challenge in identifying what constitutes a piracy site, which is a difficult issue for developing reliable statistical data and an even bigger problem with respect to mandated website blocking.

105. The obvious question is whether the Coalition believes the sites included in the MUSO report meet its standard for blocking. If they do, the standard is far lower than what would be commonly understood as a site or service that is blatantly, overwhelmingly or structurally engaged in piracy. If they fall outside the standard, the validity of the MUSO report is called into question since its estimate of piracy visits in Canada include visits to those sites. In other words, either the scope of block list coverage is far broader than the Coalition admits or its piracy evidence is inflated by including sites that do not meet its piracy standard.

¹¹⁵ *Supra* note 51.

¹¹⁶ *Supra* note 10.

¹¹⁷ See Part C(ii), *above*.

106. Once the list of piracy sites (whatever the standard) is addressed, it is very likely that the Coalition will turn its attention to other sites and services such as virtual private networks (VPNs). This is not mere speculation. Rather, it is taking the Coalition at their word on how they believe certain services and sites constitute theft. The use of VPNs, which enhance privacy but also allow users to access out-of-market content, has been sore spot for the companies for many years. In 2015, Rogers executive David Purdy reportedly called for shutting down VPNs,¹¹⁸ while Bell executive Mary Ann Turcke specifically targeted VPN usage to access U.S. Netflix, telling an industry conference:

“It has to become socially unacceptable to admit to another human being that you are VPNing into U.S. Netflix. Like throwing garbage out your car window – you just don’t do it. We have to get engaged and tell people they are stealing. When we were young and made the error of swiping candy bars at the checkout of the grocery store, what did our parents do? They marched us back in, humiliated us, told us to apologize to the nice lady and likely scolded us on the way home.”¹¹⁹

107. In the aftermath of those comments, briefing notes for Canadian Heritage Minister Melanie Joly identified VPNs as an emerging copyright issue.¹²⁰ The comments equating VPN use to theft echo the remarks being made by the Coalition about piracy sites and services. Further, since the response to site blocking from some Internet users will surely involve increased use of VPNs to evade the blocks, the attempt to characterize VPNs as services engaged in piracy will only increase.¹²¹ VPN services are already targeted by IP

¹¹⁸ Karl Bode, “Rogers Exec Pouts About VPNs, Publicly Dreams of Canadian Ban” (2 March 2015), online: Techdirt <www.techdirt.com/articles/20150227/12343330164/rogers-exec-pouts-about-vpns-publicly-dreams-canadian-ban.shtml>.

¹¹⁹ Paola Loriggio, “Netflix ‘stealing’ comment nets backlash for Bell Media chief”, *The Toronto Star* (4 June 2015), online: <https://www.thestar.com/business/tech_news/2015/06/04/netflix-stealing-comment-nets-backlash-for-bell-media-chief.html>.

¹²⁰ Michael Geist, “Government Docs Suggest Officials Thinking About Website Blocking, Targeting VPN Usage” (8 December 2015), *Michael Geist* (blog), online: <www.michaelgeist.ca/2015/12/government-docs-suggest-officials-thinking-about-website-blocking-targeting-vpn-usage/>.

¹²¹ Chris Hoffman, “Bypassing content filter: How to see the web they don’t want you to see” (12 March 2014), online: PCWorld <www.pcworld.com/article/2106647/bypassing-content-filters-how-to-see-the-web-they-dont-want-you-to-see.html>.

lobby groups such as the International Intellectual Property Alliance and can be expected to face demands for blocking (similar to the way Netflix and Hulu have cracked down on VPN use).¹²²

108. Beyond VPNs, it would not be surprising to find legitimate services streaming unlicensed content as the next target. With Bell characterizing accessing U.S. Netflix as stealing, the Coalition may call for blocking of content from foreign services without Canadian rights. In fact, that is precisely what Bell argued in 2015 in the context of U.S. television signals. Kevin Crull, then president of Bell Media, told a conference:

*Canada is the only country in the world that allows American networks to be retransmitted without restriction despite valid and exclusive copyrights held by domestic broadcasters...Do we need [the American over-the-air] networks? Are these signals necessary for Canadian viewers? No. Canadian networks buy the rights to 99 of the top 100 American shows. No viewer would be denied popular content.*¹²³

109. The Bell solution was simple: block U.S. signals on cable and satellite services. The argument in the Internet streaming service context will be the same, namely the rights of Canadian rights holders are undermined by the accessibility of unlicensed U.S. streams that constitute infringement in Canada. Given the past arguments against access to these sites and services, which Coalition members have called “stealing” and “theft”, the steady expansion of the block list seems like an inevitability, which is why the exclusion of Parliament in setting policy and the courts in reaching any determination with respect to blocking is a step in the wrong direction.

¹²² Letter from International Intellectual Property Alliance (IIPA) to Elizabeth Kendall, Acting Assistant United States Trade Representative for Innovation and Intellectual Property (8 February 2018) in response to 2018 Special 301 Review, online: <www.regulations.gov>; Ernesto Van der Sar, “Netflix Cracks Down on VPN and Proxy ‘Pirates’”, *TorrentFreak* (3 January 2015), online: <<https://torrentfreak.com/netflix-cracks-down-on-vpn-and-proxy-pirates-150103/>>; Jon Fingas, “Hulu attempts to block international viewers who use VPNs”, *Engadget* (26 April 2014), online: <<https://www.engadget.com/2014/04/26/hulu-blocks-vpns/>>.

¹²³ James Bradshaw, “Takes U.S. networks off Canadian airwaves, Bell Media urges”, *The Globe and Mail* (6 March 2015), online: <<https://www.theglobeandmail.com/report-on-business/take-us-networks-off-canadian-airwaves-bell-media-urges/article23343364/>>.

iii. The Likely Expansion of the Block List to Non-IP Issues

110. If the Commission were to create a system for mandated website blocking of intellectual property issues, there is simply no doubt that it would quickly face requests for far more. For example, the first request for mandated website blocking involved a request in 2006 from Richard Warman to block two foreign-based hate sites. Warman provided the Commission with expert evidence that the sites violated the Criminal Code. Yet the Commission refused to issue the order, noting that it did not think it had the legislative power under Section 36 to issue blocking orders:

*The Commission considers that the Application raises an extremely serious issue and has examined the Application very carefully. The Commission notes, however, that it is a creature of statute and can only exercise the powers granted to it by Parliament. **The Commission notes that section 36 of the Act would not allow it to require Canadian carriers to block the web sites**; rather, under section 36 of the Act, the Commission has the power to permit Canadian carriers to control the content or influence the meaning or purpose of telecommunications it carries for the public. The scope of this power has yet to be explored.¹²⁴*

111. With the floodgates opened, demands to block hate speech sites would quickly give way to blocking requests for online gambling and other regulated activities. The Commission has already preliminarily ruled that blocking such sites is not permitted absent approval under very strict conditions:

the Commission is of the preliminary view that the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet, whether or not this blocking is the result of an ITMP. Consequently, any such blocking is unlawful without prior Commission approval, which would only be given where it would further

¹²⁴ Letter from Diane Rhéaume, Secretary General of the CRTC, to J. Edward Antecol, Papzian Heisey Myers (24 August 2006) Telecom Commission Letter 8622-P49-200610510, online: <crtc.gc.ca/eng/archive/2006/lt060824.htm>.

*the telecommunications policy objectives. Accordingly, compliance with other legal or juridical requirements – whether municipal, provincial, or foreign – does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act.*¹²⁵

112. Some have pointed to Project Cleanfeed Canada, a longstanding blocking program of child pornography, as evidence that there is already some scope for site blocking.¹²⁶ It should be obvious that child pornography and unauthorized streaming sites are not comparable, but that has not stopped some from implying that support for child pornography blocking undermines opposition to intellectual property-based blocking. Leaving aside the obvious difference between protecting children as opposed to allegations of intellectual property infringement, the blocking of child pornography can be justified on the grounds that accessing child pornography is a criminal offence.¹²⁷ Not so for viewing a streaming video, whether authorized or unauthorized.

F. The Coalition Proposal Is Inconsistent with Commission Policy Priorities

i. The Coalition Proposal Is Likely to Reduce Competition and Increase Consumer Internet Access Costs

113. The Coalition includes several Internet providers, but there are no smaller, independent ISPs.¹²⁸ The absence of smaller ISPs that are essential to the government's aspiration for greater Internet access competition is unsurprising given the costs associated with site blocking that can run into the millions of dollars with significant investments in blocking technologies and services, employee time to implement blocking mandates, and associated service issues. A mandated blocking system applied to all ISPs in Canada would have an uneven impact: larger ISPs will face new costs but may find it

¹²⁵ Letter from Danielle May-Cuconato, Secretary General of the CRTC, to Distribution List and Attorneys' General (1 September 2016), online: <crtc.gc.ca/eng/archive/2016/lt160901.htm#fnb2-ref>.

¹²⁶ "Cleanfeed Canada", online: Cybertip.ca <www.cybertip.ca/app/en/projects-cleanfeed>.

¹²⁷ *Criminal Code*, RSC 1985, c C-46, s 163.1 (4.2).

¹²⁸ "About us", online: FairPlay Canada <www.fairplaycanada.com/about-us/>.

easier to integrate into existing systems (some already block child pornography images), whereas hundreds of smaller ISPs would face significant new costs that would affect their marketplace competitiveness. In fact, larger ISPs might ultimately benefit from higher fees passed along to subscribers and reduced competition. By harming the competitiveness of many smaller providers, the Coalition Proposal may jeopardize efforts to extend affordable Internet access to all Canadians.

114. The government has long emphasized the need to address Internet affordability concerns through greater competition. Earlier this year, Prime Minister Justin Trudeau told the House of Commons that “Canadians pay enough for their Internet.”¹²⁹ Minister Bains echoed the same concerns in a 2017 speech:

*Low-income Canadians spend a higher share of their household income on cellphone and Internet bills than high-income Canadians. So it's not surprising that only 6 out of 10 low-income households in Canada have Internet service. By contrast, virtually all households that earn \$125,000 annually have it. This digital divide is unacceptable. It represents a real barrier to continued prosperity for Canadians. Every child who's unable to do school assignments or download music online is one less consumer of your products and services. Each one of these children is potentially one less software developer for your industry – and one less job creator for our country.*¹³⁰

115. The increased ISP costs arising from equipment, employee time, and service provider obligations (blocking-related and monitoring services often come from the same companies actively promoting website blocking) bears a strong resemblance to the earlier Canadian debates over lawful access. In a 2005 bill, the government identified the need for specific technical capabilities and acknowledged that the requirements would create new costs. In fact, the government chose to establish a three-year grace period for smaller ISPs with less than 100,000 subscribers due to concerns “the costs would have an

¹²⁹ *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, No 257 (5 February 2018) at 1425 (Hon Geoff Regan).

¹³⁰ Hon Navdeep Bains, “Innovation, Science and Economic Development Canada” (Speech delivered at the 2017 Canadian Telecom Summit, 5 June 2017), online: <www.canada.ca/en/innovation-science-economic-development/news/2017/06/2017_canadian_telecomsummit.html?=&wbdisable=true>.

unreasonable adverse effect on the business of the service providers.”¹³¹ While that lawful access bill did not pass, several years later, independent ISPs warned that reviving mandated network requirements would have major cost implications that could result in some being forced to shut down.¹³²

116. Estimating the costs of the site blocking plan is made more difficult by the lack of detail in the Coalition Proposal. However, the experience elsewhere suggests that it could run into the millions of dollars.

117. First, the risks of blocking increase with certain blocking technologies. A 2010 Ofcom study identified the correlation between cheaper blocking systems and a greater likelihood of over-blocking (IP address blocking and shallow packet inspection blocking), while more targeted systems were more effective but also significantly more expensive for ISPs to implement (deep packet inspection is expensive, more targeted, and privacy invasive).¹³³

118. Second, larger ISPs in the UK disclosed their approximate costs in a 2014 case.¹³⁴ For example, Sky Broadband spent over 100,000 pounds (costs described as “six figures”) to develop a website blocking system solely for IP right infringing website injunctions in 2011 and spent thousands more each month on monitoring costs. British Telecom spent over a million pounds on a DNS web-blocking system in 2012 and required more than two months of employee time on implementation. EE spent more than a million pounds on its website blocking system and over 100,000 pounds every month for operations.

119. Canada already pays some of the highest fees for Internet and wireless access. The government has recognized universal, affordable access as a critical policy goal. While some Coalition members would stand to gain from blocking with higher fees passed

¹³¹ Shane Shick, “Lawful Access turns up the heat on ISPs” (15 November 2005), online: IT Business Canada <www.itbusiness.ca/news/lawful-access-turns-up-the-heat-on-isps/1176>.

¹³² Howard Solomon, “Surveillance law could close small ISPs: Lawyer” (16 November 2011), online: IT World Canada <www.itworldcanada.com/article/surveillance-law-could-close-small-isps-lawyer/45062>.

¹³³ *Supra* note 43.

¹³⁴ *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors*, [2004] EWHC 3354 (Ch).

along to subscribers and reduced marketplace competition, smaller ISPs would face a difficult economic challenge, with mandated website blocking risking the possibility of all Canadians facing higher monthly Internet bills and jeopardizing efforts to ensure universal, affordable Internet access.

ii. The Coalition Proposal Increases Privacy Risks

120. The Coalition cites privacy protection as a reason to support its plan, noting the privacy risks that can arise from unauthorized streaming sites. There are obviously far better ways of protecting user privacy from risks on the Internet than blocking access to sites that might create those risks, however. Further, with literally millions of sites that pose some privacy risk, few would argue that the solution lies in blocking all of them. In fact, it is the Coalition Proposal that poses significant privacy risks.

121. First, the use of virtual private networks is an increasingly important mechanism for users to safeguard their privacy online. Yet as noted above, targeting VPNs is a likely next step for the anti-piracy effort, particularly since the services have been sore spot for the companies for many years. The comments equating VPN use to theft echo the remarks being made today by the Coalition about piracy sites and services. Further, since the response to site blocking from some Internet users will surely involve using VPNs to evade the blocks, the attempt to characterize VPNs as services engaged in piracy will only increase.¹³⁵

122. Second, the identification of piracy sites and usage by subscribers depends in part upon snooping into Internet users' online activities, similar to the now discredited activities involving Facebook and Cambridge Analytica. Sandvine, whose piracy data is cited in the Coalition Proposal, openly acknowledges that "by inspecting unencrypted channels, communications service providers gain a more complete perspective on how subscribers

¹³⁵ *Supra* note 21.

are viewing pirated content.”¹³⁶ In other words, ISPs have incentives to track user activity by inspecting unencrypted communications to identify which sites are being visited.

123. In fact, the Coalition Proposal hints at monitoring subscriber activity to gauge the impact of piracy. After citing cord cutting data, it states:

*While it is impossible to determine precisely how many of these 1.1 million households are lost subscribers due to piracy, the experience of relevant members of the Coalition with their customers confirms that consumers who engage with piracy sites are many times more likely to cancel legal services or never subscribe to them in the first place than are those that do not engage with piracy sites.*¹³⁷

124. It is unclear how Coalition members are able to establish a linkage between website visits and cable/satellite subscription cancellations. Either statement is purely speculative or some Coalition members are actively monitoring Internet use and television subscription habits and linking the two sets of data together.

125. Third, certain website blocking technologies raise serious privacy concerns. An Ofcom review of site blocking noted:

*To be successful, any process also needs to acknowledge and seek to address concerns from citizens and legitimate users, for example that site blocking could ultimately have an adverse impact on privacy and freedom of expression.*¹³⁸

126. The privacy impact is particularly acute with respect to deep-packet inspection blocking. The Coalition Proposal does not identify specific blocking technologies, but studies have shown a correlation between cheaper blocking systems and a greater likelihood of over-

¹³⁶ Sandvine, *2017 Global Internet Phenomena Spotlight: Subscription Television Piracy* (Waterloo: Sandvine, 2017) at 7, online: <www.sandvine.com/hubfs/downloads/reports/internet-phenomena/sandvine-spotlight-subscription-television-piracy.pdf>.

¹³⁷ *Supra* note 1 at para 43.

¹³⁸ *Supra* note 43 At 7.

blocking (IP address blocking and shallow packet inspection blocking), while more targeted systems such as DPI were more effective but also the source of privacy concerns.

127. Rather than enhancing privacy protection, the Coalition Proposal puts it at greater risk, with the possibility of VPN blocking, incentives to monitor customer traffic, and the potential adoption of invasive site blocking technologies.

iii. The Coalition Proposal is Inconsistent with Net Neutrality Principles

128. Of all the claims that accompanied the launch of the Coalition Proposal, the most audacious is surely the repeated assurances that site blocking does not raise net neutrality issues. Given that the starting principle for net neutrality is the right for users to access content and applications of their choice, blocking content is prima facie a net neutrality violation.

129. The fact that the Coalition argues that its site blocking plan does not implicate net neutrality should not come as a surprise. Coalition members have spent more than a decade arguing that practically nothing is covered by net neutrality:

- In 2007, Bell began throttling Internet traffic without telling anyone.¹³⁹
- In 2009, Bell argued against net neutrality rules at the Commission, even rejecting some transparency obligations of its traffic management practices.¹⁴⁰
- In 2010, Bell was found to have throttled download speeds.¹⁴¹ It promised to fix the issue only after claiming that it did not violate net neutrality rules.

¹³⁹ Ryan Paul, “BitTorrent blocking goes north: Canadian ISP admits to throttling P2P” (5 November 2007), online: arstechnica.com/uncategorized/2007/11/bittorrent-blocking-goes-north-canadian-isp-admits-to-throttling-p2p/.

¹⁴⁰ Emily Chung, “Bell reveals internet throttling details to CRTC”, *CBC News* (14 July 2009), online: <<http://www.cbc.ca/news/technology/bell-reveals-internet-throttling-details-to-crtc-1.806898>>

¹⁴¹ Michael Geist, “Canada’s Net Neutrality Enforcement Failure” (8 July 2011), *Michael Geist* (blog), online: <www.michaelgeist.ca/2011/07/net-neutrality-enforcement-fail/>.

- In 2013, Bell faced a net neutrality complaint over its MobileTV service.¹⁴² It argued the service did not violate net neutrality rules. When the Commission ruled it did, it took the case to the Federal Court of Appeal. It lost.
- In 2016, Bell argued that differential pricing plans did not violate net neutrality rules.¹⁴³ The Commission ruled that they did.
- Earlier this year, Bell argued against enshrining specific net neutrality rules into Canadian law at a House of Commons committee, repeating warnings about a “risk to future innovation.”¹⁴⁴

130. In other words, whether at the Commission, in the courts, or at Parliament, Coalition members have consistently argued for the narrowest possible approach to net neutrality and its attempt to paint website blocking as outside net neutrality is only the latest iteration of its longstanding opposition.

131. In this case, the Coalition argues that net neutrality is limited to “lawful content” and that its plan therefore falls outside the rules. In its application, however, it does not cite the Canadian rules. That too is unsurprising, since Canada’s net neutrality framework was never explicitly limited in application to content that is “lawful.” The 2009 CRTC net neutrality decision says the following about blocking:

The Commission notes that the majority of parties are in agreement that actions by ISPs that result in outright blocking of access to content would be prohibited under section 36 unless prior approval was obtained from the Commission. The Commission finds that where an ITMP would lead to blocking the delivery of content to an end-user, it cannot be implemented without prior Commission approval. Approval under section 36 would only be granted if it would further the telecommunications policy objectives set out in

¹⁴² “Bell loses attempt to appeal ruling that found Mobile TV app violated net neutrality”, *CBC News* (21 June 2016), online: < <http://www.cbc.ca/news/business/bell-mobile-tv-crtc-appeal-1.3645060> >.

¹⁴³ Jordan Pearson, “Most of Canada’s Biggest Telecoms Want to End Net Neutrality”, *Motherboard* (31 October 2016), online: < https://motherboard.vice.com/en_us/article/bmv3da/canadas-biggest-telecoms-want-to-end-net-neutrality-crtc-hearing-differential-pricing >.

¹⁴⁴ *Supra* note 101 at 0855.

*section 7 of the Act. Interpreted in light of these policy objectives, ITMPs that result in blocking Internet traffic would only be approved in exceptional circumstances, as they involve denying access to telecommunications services.*¹⁴⁵

132. In other words, blocking may only be permitted under exceptional circumstances where it furthers the telecommunications policy objectives. There is no reference to lawful content. In fact, the word “lawful” does not appear in the decision. Some have seized on a reference to “illicit materials” in the Commission decision, but that clearly refers to network threats, not the content of the materials.¹⁴⁶

133. The exclusion of any reference to “lawful content” in the 2009 net neutrality framework is not a coincidence. Much of the hearing was devoted to an examination of Internet providers throttling access to some of the same sites and services that could now find themselves on the block list.

134. Since Canadian law does not help its argument, the Coalition instead relies on the U.S. Open Internet Order and European law. Other proponents cite an old 2006 Canadian report that referenced copyright, yet that report pre-dates the CRTC net neutrality rules, which did not adopt that language.¹⁴⁷ The U.S. law does indeed limit its applicability to “lawful content”, but the U.S. is in the process of suspending its net neutrality rules and Coalition members have loudly proclaimed that Canadian rules are different from those in the U.S. In February 2018, Bell told the House of Commons committee:

¹⁴⁵ *Review of the Internet traffic management practices of Internet service providers* (21 October 2009), 2009-657 at paras 121-122, online: CRTC <www.crtc.gc.ca>.

¹⁴⁶ Barry Sookman, “Why the CRTC should endorse FairPlay’s website-blocking plan: a reply to Michael Geist” (12 February 2018), *Barry Sookman* (blog), online: <www.barrysookman.com/2018/02/12/why-the-crtc-should-endorse-fairplays-website-blocking-plan-a-reply-to-michael-geist/>.

¹⁴⁷ Mark Goldberg, “Blatantly, overwhelmingly, or structurally engaged in piracy” (29 January 2018), *Telecom Trends* (blog), online: <mhgoldberg.com/blog/?p=1185>.

*It is important to appreciate that regardless to the changes to the net neutrality policies in the U.S., Canadians' access to and use of the Internet will remain governed by our domestic net neutrality rules, which are developed and overseen by the CRTC.*¹⁴⁸

135. Net neutrality blocking rules in other countries is often comprehensive with few exceptions. For example, TRAI, India's telecom regulator, released its net neutrality recommendations in November 2017.¹⁴⁹ Despite pressure from copyright owners for a copyright blocking exception, TRAI established a limited exception for blocking unlawful content with no exception for piracy:

*As regards the blocking of unlawful content, it was highlighted by stakeholders during the consultation process that any such blocking requests must be initiated only in accordance with the process established by law. Section 69A of the Information Technology Act, 2000 empowers the Central or a State Government to order the blocking of public access to information in a computer resource if it is necessary or expedient on any of the listed grounds. These grounds are: interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above. The rules to be followed in this regard have also been specified under the IT Act. The constitutionality of this provision was upheld by the Hon'ble Supreme Court in Shreya Singhal vs. Union of India on the grounds that it is a narrowly drawn provision with several safeguards.*¹⁵⁰

136. TRAI continues by noting that there is an exemption for an “order of a court or direction issued by the Government, in accordance with law, or action taken in pursuance of any international treaty must be regarded as a valid exemption.”¹⁵¹ This is far more restrictive than a system without a court order or specific law providing for blocking.

¹⁴⁸ *Supra* note 72 at 0855.

¹⁴⁹ India, Telecom Regulatory Authority of India, *Recommendations On Net Neutrality*, (New Delhi: TRAI, 28 November 2017), online: <www.trai.gov.in/sites/default/files/Recommendations_NN_2017_11_28.pdf>

¹⁵⁰ *Ibid* at para 4.16.

¹⁵¹ *Supra* note 149 at para 4.17.

137. In Columbia, the net neutrality law is even more explicit, adopting a no blocking rule:

*The providers of telecommunications networks and services that provide the Internet access service may not block, interfere, discriminate, or restrict the user's right to use, send, receive or offer any content, application or service through the Internet, without the express consent of the user.*¹⁵²

138. Despite claims that Europe's net neutrality rules support copyright-related blocking, the rules are designed to ensure full due process before permitting blocking. The EU's 2015 regulation states at Article 3(3)(a):

Providers of internet access services shall not engage in traffic management measures going beyond those set out in the second subparagraph, and in particular shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary, in order to:

*(a) comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers,*¹⁵³

139. In assessing how to interpret the provision, BEREC, the Body of European Regulators for Electronic Communications, commented in 2016 that “these issues would require an

¹⁵² Colombia, *Resolución 3502 de 2011 Comisión de Regulación de Comunicaciones* (16 December 2011) Diario Oficial 48285, online: <www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=45061#0>

¹⁵³ EC, *Commission Regulation (EU) 2015/2120 of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union*, [2005] OJ, L 310/1 at art 3(3)(a).

approach based on legislation, rather than being voluntary or self-regulatory.”¹⁵⁴ The emphasis on court orders or legislation – not voluntary or self-regulatory models – points to the need for due process that involves court or legislators.

140. After inapplicable U.S. laws or outdated reports are excluded, it becomes apparent that the Canadian net neutrality rules that have been strongly endorsed by the government do not include a specific limitation for “lawful content.” Moreover, global approaches point to the need for court oversight or specific legislative frameworks, neither of which are part of the Coalition Proposal. In other words, website blocking without the full due process that comes from court orders – as contemplated by the Coalition – violate Canadian net neutrality rules.

G. The Coalition Proposal is Inconsistent with the Policy Direction and the Telecommunications Act

i. The Coalition Proposal is Inconsistent with the Commission Policy Direction

141. In 2006, then-Industry Minister Maxime Bernier led the push for a new policy direction to the Commission on implementing Canadian telecommunications policy objectives. The direction states:

In exercising its powers and performing its duties under the Telecommunications Act, the Canadian Radio-television and Telecommunications Commission (the “Commission”) shall implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) the Commission should

(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and

¹⁵⁴ Body of European Regulators for Electronic Communications, *BEREC Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality rules*, (Latvia: BEREC, 2016) at 26.

*(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;*¹⁵⁵

142. In the years since its issuance, scarcely a proceeding goes by where Coalition members do not raise it with the Commission, cite it when asking the Commission to review and vary a previous ruling, reference it in cases at the Federal Court, or rely on it when petitioning Cabinet to vary a decision.¹⁵⁶

143. Yet despite years of insistence by Coalition members that the Commission follow the policy direction, the Coalition has now proposed regulatory intervention that could not be more inconsistent with that direction. Indeed, after invoking the policy direction at seemingly every opportunity, the Coalition Proposal suddenly goes silent with respect to the issue.

144. However, with courts around the world concluding that site blocking is a disproportionate remedy, evidence that it is likely to lead to over-blocking, and risks that it violates net neutrality and privacy rights, the Coalition Proposal fails to meet the policy direction's requirement of "efficient and proportionate" regulation. Moreover, the evidence on the current state of the Canadian marketplace reinforces that market forces are working as consumers embrace well-priced, convenient authorized services and the production industry thrives with record-setting investment. The data leaves little doubt that there is no market failure that requires a heavy-handed regulatory approach which promises to yield years of litigation over its very existence.

¹⁵⁵ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, s 1(a)(i)-(ii).

¹⁵⁶ *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Revised co-location floor space rates* (7 May 2013), 2013-217, online: CRTC <www.crtc.gc.ca>; *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application to review and vary part of Telecom Decision 2007-35* (5 May 2008), 2008-38, online: <www.crtc.gc.ca>; *Bell Canada v Canada (Attorney General)*, 2011 FC 1120; *Bell Canada, Petition to the Governor in Council to Vary Telecom Regulatory Policy CRTC 2015-326, Review of wholesale wireline services and associated policies* (20 October 2015), online: <[www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/trp-crtc-2015-326-bell-canada-petition-en.pdf/\\$file/trp-crtc-2015-326-bell-canada-petition-en.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/trp-crtc-2015-326-bell-canada-petition-en.pdf/$file/trp-crtc-2015-326-bell-canada-petition-en.pdf)>.

145. As discussed below, the proposal does not even meet the *Telecommunications Act* objectives, but even if it did, it is at odds with the policy direction, providing an obvious and clear-cut basis for the Commission to reject it.

ii. The Coalition Proposal Fails to Further the Telecommunications Act Objectives

146. The Commission has made it clear that it will only permit blocking in “exceptional circumstances” and only where doing so would further the objectives found in the *Telecommunications Act*.

147. As discussed above, the 2009 CRTC net neutrality decision says the following about website blocking:

*The Commission notes that the majority of parties are in agreement that actions by ISPs that result in outright blocking of access to content would be prohibited under section 36 unless prior approval was obtained from the Commission. The Commission finds that where an ITMP would lead to blocking the delivery of content to an end-user, it cannot be implemented without prior Commission approval. **Approval under section 36 would only be granted if it would further the telecommunications policy objectives set out in section 7 of the Act.** Interpreted in light of these policy objectives, ITMPs that result in blocking Internet traffic would only be approved in **exceptional circumstances**, as they involve denying access to telecommunications services.*¹⁵⁷

148. The Commission view was reiterated in its September 2016 letter arising out of the Quebec law mandating the blocking of access to unlicensed gambling sites:

*the Commission is of the preliminary view that the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet, whether or not this blocking is the result of an ITMP. Consequently, **any such blocking is unlawful***

¹⁵⁷ *Supra* note 145.

*without prior Commission approval, which would only be given where it would further the telecommunications policy objectives. Accordingly, compliance with other legal or juridical requirements – whether municipal, provincial or foreign – does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act.*¹⁵⁸

149. The Coalition Proposal must therefore do more than simply raise concerns with respect to copyright law or cultural policies found in the Broadcasting Act objectives. Rather, it must convince the Commission that website blocking would further the telecommunications policy objectives.¹⁵⁹ The *Telecommunications Act* enumerates nine 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;*
- (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;*
- (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;*
- (d) to promote the ownership and control of Canadian carriers by Canadians;*
- (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;*
- (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;*
- (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;*
- (h) to respond to the economic and social requirements of users of telecommunications*

¹⁵⁸ *Supra* note 107.

¹⁵⁹ See Part G(i), *above*.

services; and

*(i) to contribute to the protection of the privacy of persons.*¹⁶⁰

150. The Coalition Proposal cites three objectives in support: that piracy “threatens the social and economic fabric of Canada” (subsection a), that the telecommunications system should “encourage compliance with Canadian laws” (subsection h), and that website blocking “will significantly contribute toward the protection of the privacy of Canadian Internet users” (subsection i).

151. The Coalition Proposal is exceptionally weak on all counts. As discussed above, there is no compelling evidence that piracy on telecommunications networks is threatening the social and economic fabric of Canada. Indeed, claims that Canada is a piracy haven are not supported by the data. If anything, the data supports the view that Canadians are rapidly shifting away from unauthorized sites toward legal alternatives as better, more convenient choices come into the market. Moreover, the Canadian data on the digital economy and Canadian creative sector show a thriving industry.¹⁶¹

152. The argument on encouraging compliance with the law is even weaker as the Commission has already stated that compliance with other legal or juridical requirements does not justify site blocking. The Coalition couches this argument within the objective of responding “to the economic and social requirements of users of telecommunications services”, but even the application doesn’t seem to buy its own argument, instead referring to compliance with other laws:

Clearly the Canadian telecommunications system should encourage compliance with Canada’s laws, including laws with respect to the intellectual property communicated by telecommunications. Those laws exist to foster social and economic objectives important to Canadian society, including encouraging the creation and dissemination of creative

¹⁶⁰ *Telecommunications Act*, SC 1993, c 38, s 7(a)—(i).

¹⁶¹ See Part C(i), *above*.

*works through the creation of a rights system (under the Copyright Act and related statutes) that fairly compensates content creators.*¹⁶²

153. Yet the Coalition surely knows that this is not an argument about furthering the objectives of the *Telecommunications Act*, but rather the *Copyright Act*. The Commission has already concluded that that does not help justify website blocking.

154. As discussed above, the attempt to justify website blocking on the grounds that it wants to protect privacy is not credible and the claim that this will further the *Telecommunications Act* objective of user privacy is unsustainable. The Coalition Proposal may target privacy enhancing technologies such as virtual private networks, hints at snooping into Internet users' online activities, and may deploy site blocking technologies that raise serious privacy concerns. If anything, the Coalition Proposal places privacy at risk.

iii. The Coalition Proposal Undermines the Telecommunications Act Objectives

155. Not only does the Coalition Proposal fail to make the case that it furthers the *Telecommunications Act* objectives, but there is a far better argument that it undermines them.

156. **Subsection (a)** references the “orderly development throughout Canada” of the telecommunications system, but the creation of a blocking system applied to hundreds of ISPs and wireless carriers of all sizes across the country would undermine that goal as it would likely lead to the implementation of differing blocking technologies, inconsistent over-blocking of legitimate content, and a non-neutral Internet in Canada.¹⁶³ Access to content could differ from ISP to ISP.

¹⁶² *Supra* note 1 at para 95(ii).

¹⁶³ See Part E(i) and F(iii), *above*.

157. **Subsection (b)** identifies reliability and affordability as objectives, but both would be undermined by website blocking. The reliability of the telecommunications services would be harmed by over-blocking of legitimate content and by the violation of net neutrality norms. The goal of better affordability would be undermined by the increased costs that would be passed along to subscribers to fund site blocking technologies and services.¹⁶⁴

158. **Subsection (c)** focuses on competitiveness of telecommunications services, yet the Coalition Proposal would have an uneven impact: larger ISPs will face new costs but may find it easier to integrate into existing systems, whereas hundreds of smaller ISPs would face significant new costs that would affect their marketplace competitiveness.¹⁶⁵ In fact, while some Coalition members would stand to gain from blocking with higher fees passed along to subscribers and reduced competition, smaller ISPs would face a difficult economic challenge, leaving all Canadians facing higher monthly Internet bills and reduced competition.

159. **Subsection (f)** emphasizes the need for efficiency and reliance on market forces. As discussed above, website blocking could not be more inconsistent with that objective. Indeed, with courts around the world concluding that site blocking is a disproportionate remedy, evidence that it is likely to lead to over-blocking and is ineffective, and that it risks violating net neutrality and privacy rights, the Coalition Proposal fails to meet the *Telecommunications Act* objective of “efficient and effective” regulation.

160. **Subsection (h)** speaks to the economic and social requirements of users of telecommunications services, but users of those services are largely absent from the proposal. Instead, broadcasters, broadcast distributors, movie theaters, and some creator groups seek to impose new restrictions on users in the form of a regulatory framework without court orders. If anything, the social requirements of users should

¹⁶⁴ See Part F(i), *above*.

¹⁶⁵ *Ibid.*

include compliance with net neutrality, human rights, and privacy norms, a standard the Coalition proposal fails to meet.¹⁶⁶

161. **Subsection (i)** focuses on contributing to privacy protection, but rather than enhancing privacy protection, the Coalition proposal puts it at greater risk, with the possibility of VPN blocking, incentives to monitor customer traffic, and the potential adoption of invasive site blocking technologies.¹⁶⁷

iv. The Coalition Proposal Turns the Commission into an Internet Content Regulator

162. The CRTC site at the very beginning of a page devoted to TV shows, movies, music and other content online states: “*In Canada, services that broadcast over the Internet don’t need a licence from the CRTC, as we exempted them from this obligation. We do not intervene on content on the Internet.*”¹⁶⁸

163. The Commission has rightly rejected efforts to convince it regulate online content, emphasizing that it does not licence or judge Internet content nor is it empowered by legislation to do so.

164. The Commission’s past pronouncements on website blocking are a case in point. As noted above, the first request for mandated website blocking involved a request in 2006 from Richard Warman to block two hate sites. Warman provided the Commission with expert evidence that the sites violated the Criminal Code. The Commission refused to issue the order, noting that it did not think it had the legislative power under Section 36 to issue blocking orders.¹⁶⁹ The Commission’s unwillingness to order the blocking of sites that violate the Criminal Code highlights why ordering the blocking of non-criminal content as contemplated by the Coalition Proposal should be rejected.

¹⁶⁶ See Part F(iii), *above*.

¹⁶⁷ See Part F(ii), *above*.

¹⁶⁸ CRTC, “TV Shows, Movies, Music and Other Content Online”, online: CRTC <crtc.gc.ca/eng/internet/musi.htm>.

¹⁶⁹ *Supra* note 1.

165. Further, the Commission's September 2016 letter arising out of the Quebec law mandating the blocking of access to unlicensed gambling sites noted that "compliance with other legal or juridical requirements – whether municipal, provincial or foreign – does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act."¹⁷⁰ This statement is often cited with reference to the Commission's ability to approve blocking in exceptional circumstances. However, the more important takeaway is that the Commission is not the right venue to opine on the legality of activities that fall outside of its legislative framework.

166. The Commission's net neutrality rulings provide another illustration of its reluctance to regulate online content within the *Telecommunications Act*. For example, in the 2017 differential pricing decision, some groups argued for preferential treatment for Canadian content. The Commission rejected the proposals:

*Given all the drawbacks and limitations of using differential pricing practices as a way to support and promote Canadian programming, the Commission considers that any benefits to the Canadian broadcasting system would generally not be sufficient to justify the preference, discrimination, and/or disadvantage created by such practices.*¹⁷¹

167. In other words, even some potential benefits for *Broadcasting Act* policies are not enough to overcome the harms that arise from tinkering with the free flow of telecommunications. The Coalition's legal opinion notably spends more time justifying the site blocking in the Coalition Proposal under the *Broadcasting Act* than it does under the *Telecommunications Act*. The reason for doing so is obvious: site blocking cannot be easily justified under the *Telecommunications Act*. Indeed, the attempt to incorporate the *Broadcasting Act* into the argument runs counter to the Supreme Court of Canada's 2012

¹⁷⁰ *Supra* note 125.

¹⁷¹ *Framework for assessing the differential pricing practices of Internet service providers* (20 April 2017), 2017-104 at para 113, online: CRTC <www.crtc.gc.ca>.

ISP Reference, which leaves no doubt that ISPs simply do not fall under that Act when transmitting content:

*An ISP does not engage with these policy objectives when it is merely providing the mode of transmission. ISPs provide Internet access to end-users. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. We agree with Noël J.A. that the term “broadcasting undertaking” does not contemplate an entity with no role to play in contributing to the Broadcasting Act’s policy objectives.*¹⁷²

168. The regulatory framework for telecommunications – whether in the Act’s objectives, the government’s policy direction, or in the Supreme Court’s clear separation of broadcasting and telecom – all point to policy priorities premised on efficiency, affordability, and competitiveness. To engage in content regulation on the Internet is incompatible with those priorities and would turn the Commission into an Internet content regulatory authority, opening the door to licensing or regulating Internet streaming services, traffic that runs through ISP networks, and web-based content wherever it may be located.

169. Supporters of the Coalition Proposal downplay these concerns, arguing that it is a narrowly tailored approach to address piracy. This submission identifies why the blocking system is likely to lead to over-blocking and expanded scope of coverage for both IP and non-IP issues.¹⁷³ But even more fundamentally, implementing blocking under Coalition Proposal without a court order under the auspices of the CRTC turns the Commission (and by extension the government) into a regulator of Internet content in direct contradiction to the telecommunications legislative framework and the Commission’s stated approach to online content.

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¹⁷² *Reference re Broadcasting Act*, 2012 SCC 4 at para 5, [2012] 1 SCR 142.

¹⁷³ See Part E, *above*.