Comments

by

Vaxination Informatique

to the

Standing Committee on Canadian Heritage

regarding

Bill C-11
An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts

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1. Jean-François Mezei, dba Vaxination Informatique has participated in CRTC telecom processes since 2008 and was the author of the 2011 Petition to Governor in Council seeking the overturn of the CRTC's UBB decisions. I present as a citizen and have no affiliation with media or incumbent enterprises.

2. The following document has been modified from its original version. It has been formatted and truncated to fit the Standing Committee on Canadian Heritage page limit despite Bill C-11 requiring far greater of analysis. No executive summary or table of contents provided due to these limits. For purposes of filling pages, certain topics are out of order.

9(1)(h) funding

3. The original 9(1)(h) mechanism included obligation by BDUs to provide per-subscriber funding to certain channels such as APTN, AMI-tv, CBC News Network,CPAC, Canal M, Ici RDI, MétéoMédia, Omni, The Weather Network, TV5. Some of this funding is regional. For instance, Ici RDI gets $0.10 per subscriber in anglophone markets.

4. Bill C-11 seems to replace 9(1)(h) with 9.1 (h) for legacy BDU and 9.1 (i) for online undertakings but without terms and conditions.

5. Bill C-11 does not deal with the need to restructure how "essential" channels continue to get funding as viewership shifts from legacy BDU to the Internet. A proper policy would be to shift funding to a neutral source for those channels deemed essential for Canadian culture and help them shift to digital distribution to ween themselves from legacy BDUs.

6. In particular, Pelmorex which operates MétéoMédia and the Weather Channel also operates the Canadian emergency alerting system for Television/Radio and Cellular services and that operation is dependant on 9(1)(h) funding.

7. The simplest solution would be for a government fund with CRTC making decisions on its distribution to broadcasters that warrant such funding (as it does already). This would make such funding independent of a shift from legacy to digital and allow these channels to make the jump to digital. It also makes BDUs on same equal footing as digital platforms.

8. An administrative tribunal should not and must not have the power to define the scope of its own jurisdiction. The jurisdiction must be spelled out clearly in the law with definitions which will last decades.

9. Whether within a CRTC process, or an appeal at Federal Court of Appeal, it is the text of the law is which matters, not what a politician promised during TV interview 10 years earlier when the law was passed. Vague, anachronistic or missing definitions in the proposed Broadcasting Act will lead to constant challenges of how the CRTC interprets the Act. Even chairman Scott admitted it will take at least 2 years to begin implementing the act. If there is such an urgency in helping artists, why pass a flawed bill that can't be implemented?

10. It is also not clear whether a Policy Direction is treated by the Federal Court of Appeal at the same level as the law for questions of jurisdiction. In the case of the appeal for CRTC decision 2019-288, the Court was satisfied that the CRTC, as instructed by the law, ***considered*** the Policy Direction, which implies that interpretation of the Policy Direction is a question of fact.

Federal Court of Appeal

11. Challenging a CRTC decision at the FCA is possible only for questions of law or jurisdiction. As the CRTC is being granted jurisdiction over the Internet (any web site or service with a sound or image), whenever the Commission rules on whether to exempt a class or individual service from the Broadcasting act, it will be within the Commission's jurisdiction to do so, therefore the decision will be seen as a question of fact with which the FCA has no competence.

Petition to Governor in Council

12. Sections 28 and 29 allow for impacted parties to petition Cabinet to order the Commission to change, review a decision. However, 28(1) limits the scope to questions of license (Section 9).

13. With C-11, the CRTC's role will consist not only of granting, rejecting licences, granting exemptions for the need of a licence, but will now also have to rule on whether an entity is to be regulated or not, and what reporting requirements would be required for unregulated entities.

14. Therefore, the scope of issues for which Petition to Governor in Council is allowed must be expanded beyond licensing issues.

15. Should the Commission reject a bank's request for an exemption from regulation (since its web site contains images distributed to large number of people, it is broadcasting by default), the Commission can support its decision by stating that the contribution by the bank (based on total revenues) represent a significant contribution to implementing broadcasting policy. The bank can neither appeal to the FCA (question of fact) nor to Cabinet (not a license issue).

16. The Telecom Act does not restrict the scope of Petitions to Governor in Council, so the precedent exists to implement the same policy for Broadcasting Act, especially as the CRTC will be required to issue an incessant number of exemptions from regulation in order to try to keep up with the ever changing Internet.

Definition of Program

17. By far the greatest flaw in C-11 is its failure/refusal to update the definition of "program" which dates back from the days when only a television could receive and display transmitted images (at 29.97 images per second) , and only radios and televisions could receive transmissions of sounds in either AM or FM modulation.

> **Current (and unchanged in C-11):**
>
> **program** *means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text; (émission)*

18. As NTSC could only transmit images and audio, an exemption was needed because the transmission of text could only be done when it was formatted as an image (for instance channel displaying a programming guide). This reference needs to be removed as it is yet another anachronistic inclusion in an allegedly modernized act. Channel guides are obtained not by tuning to a channel, but pressing a button and having the STB (Set Top Box) generate the display from data).

19. Because the products of the broadcasting industry are now also transmitted over the Internet, there is an understandable desire to expand the scope of the Broadcasting Act, however the anachronistic definition of "program" ends up capturing any web site/service that contains an image or sound. (such as a bank's or newspaper's web site, as well as personal web site, podcast, audio books, art gallery web sites etc. As the Internet is constantly evolving with new services emerging at rapid pace, they become "broadcasting" by default until/unless the CRTC issues an exemption from regulation for them. Such exemptions cannot exist ahead of the invention of a new service. Uncertainty on whether a new service will gain exemption (and how many years it will take the CRTC to process) will turn away investment.

20. In the end, any new service will need to get the CRTC's permission to be exempt from the Broadcasting Act, and this breaks the very essence of permission-less environment that has made the innovation and new business models of the whole digital economy possible. Trying to manage the rapidly changing Internet is akin to trying to herd 150 cats in a field full of catnip. To expect the CRTC to manage this is unrealistic.

21. Therefore I propose this new definition of Program:

> **Proposed:**
>
> **program** *means video and/or audio content for which rights need to be held for transmission to the public by a broadcasting undertaking and whose production requires crews or artists be members of recognized artist or trade unions*[1].

22. Combined with a new definition of Broadcasting and Online Undertaking, will properly circumscribe the jurisdiction of the Broadcasting Act to only content that is "broadcasting" instead of encompassing the whole of the Internet and expecting the CRTC to issue a constant stream of exemption orders.

23. The new definition is re-enforced by the fact that in Québec, the " Loi sur le statut professionnel et les conditions d'engagement des artistes de la scène, du disque et du cinéma"[2] requires membership to a recognized union for the production of content that is part of the broadcasting ecosystem.

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1 The CRTC can maintain an official list of recognized Artist/trade unions. It can expand on the list of reciprocal arrangements maintained by ACTRA and UDA.

2 Loi sur engagement des artistes: http://legisquebec.gouv.qc.ca/fr/showdoc/cs/s-32.1

Definition of Program (cont)

24. However, my proposed definition would unfortunately capture Steve Smith who purchased the rights to "The Red Green Show" and posted them to Youtube on a personal basis. It would capture his content as a "program" since the content is of a type that requires unionized tradesmen/actors to create it. However, Youtube does not own the rights nor has it selected this content, so would not be considered an online undertaking while delivering this content. (per my proposed definition of online undertaking).

> *(3) Subsection 2(3) of the Act is replaced by the following:*
> *Exclusion — carrying on broadcasting undertaking*
> *(2.1) A person who uses a social media service to upload programs for transmission over the Internet and reception by other users of the service — and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them — does not, by the fact of that use, carry on a broadcasting undertaking for the purposes of this Act.*

25. While this much discussed exemption appears in the proposed act, it declares that the person isn't considered a broadcasting undertaking, it does not declare that the person's content isn't a program. So while madame Tremblay won't be a broadcaster, her cat video will be considered a program transmitted by an online undertaking which will be regulated and is expected to make its contributions to legacy media funds. This means that madame Tremblay, while not herself regulated, will see Youtube reduce her ad revenues by the percentage that the CRTC requires Youtube to contribute to legacy broadcasting funds.

26. Furthermore, while the text of C-11 provides vague exemptions for undefined "social media", it does not cover citizens who have their own web sites, their own apps, use web hosting services etc and they become broadcasters as soon as their content has an image or audio. Consider a photographer who maintains an on-line portfolio of his/her work.

27. This is why it is important to limit the scope and jurisdiction with the definitions, instead of granting the CRTC powers over anything that has an image/audio and then have some convoluted exemptions that are incomplete.

28. A BDU can simply raise its retail rates by 3% to make its contributions. Youtube can only decrease the creator's revenues by 3% because the advertising engine is auction-driven and there is the complex mixture of memberships, premium memberships and free use. This is why it is crucial to have a proper definition of "program".

29. Things get complicated when a citizen posts a home video that contains commercial music which Youtube's "ContendID" captures and advertising is added to the video to pay the SOCAN royalties for the song that is heard in video. Does this video become "broadcasting" because of this? Consider that in some cases, the music is incidental to the video while in other cases, the individual create his own version of a music video for that song (so primary purpose is to publish that music). Some artists who own their rights will post directly on Youtube, while other go through a record company. Independent artists will see reduced revenues from Youtube due to Youtube being forced to contribute to legacy media funds.

30. The Broadcasting Act was based on the unique business models of linear television and radio which had exclusivity on "broadcasting". Its passage set in concrete their business model. Expanding the Act to the Internet will not only force new media to adopt an incompatible legacy business model, but will also prevent innovation. Funding for culture needs a complete rethink that is not tied to legacy media and business models.

Definition of Broadcasting

C-11:

broadcasting *means any transmission of programs – regardless of whether the transmission is scheduled or on demand or whether the programs are encrypted or not – by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place; (radiodiffusion)*

Proposed:

broadcasting *means any transmission to the public of programs by radio waves, distribution undertaking or online undertaking but does not include any such transmission of programs that is made solely for performance or display in a public place; (radiodiffusion)*

31. Proper definitions of "program", "distribution undertaking" and "online undertaking" allow for far simpler more precise definition of what is considered "broadcasting" which does not need the mention of scheduled or on-demand as the are contained in the undertaking definitions.

32. As well, anachronistic terms such as "broadcast receiving apparatus" used at a time when only televisions could display images/sounds, and televisions' sole capability was to display broadcasted content. Today, a watch, telephone or a refrigerator can become a "broadcast receiving apparatus".

33. The notion of "encrypted" dates back from the era where "pay TV" was distributed on coax frequencies that were scrambled and when you subscribed to them, an installer would come to remove the scrambler for those channels. Another anachronistic mention.

34. It should be noted that most streaming rights include requirement by rights owner that the streamer use specific technologies to implement DRM to prevent piracy. With the Sony data breach of a few years ago, certain contracts between Bell Media and US studios were made public and they even specified which version of Flash and Silverlight were acceptable to ensure adequate DRM. Retaining the notion of encryption in updated bill would mean interpretation in a 2022 context and this should carefully studied to ensure no unwanted side effects. Overall, its mention is redundant in defining "broadcasting" and it should be removed.

Definition of Online Undertaking

C-11:

online undertaking *means an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus; (entreprise en ligne)*

Proposed:

online undertaking *means an undertaking which selects programs to be available to its customers and obtains streaming rights for their transmission via the Internet for reception by the public.*

Internet *means, for the purposes of this act, a transmission whose destination is allowed to be outside the undertaking's own IP network.*

Streaming *means the transmission of a program for the purposes of viewing during its transmission with no right to retain a copy after transmission has completed.*

35. The definition of on-line undertaking restricts "broadcasting" only to activities where the undertaking chooses and gets rights to programs. This properly circumscribes this to digital activities that mimic legacy broadcasting.

36. In a hybrid case such as Amazon which not only acts as a streamer with its own portfolio of programs, but also resells additional "channels" from other streamers, these other streamers should be considered separate they would have to make their contributions and abide with Broadcasting Act based on wholesale revenues obtained from Amazon and possibly others.

37. The definition of **Streaming** is needed to exclude the purchase/rental of music and videos which are the equivalents of record and video stores which sold or rented content and were not regulated under the Broadcasting Act. In cases where the purchased rented program reside "in the cloud", there is usually the right to download to the device, whereas for pure streaming, there is no such right. The distinction is also needed because Streaming requires different type of rights from broadcast television, sale or rental of programs.

38. The definition of **Internet** is needed to differentiate a streaming service such as Netflix from legacy BDUs who delivers the BDU signals using with IPTV on the same connection as the Internet service. In the later case, the service remains a legacy "BDU" as long as the linear TV channels and other content are delivered only within the ISP/BDU's own network footprint (aka: IP address space). This emulates the footprint restrictions on cable companies' coaxial distribution plant.

39. SVOD/Streaming services are differentiated by having rights to distribute to any IP address within a country for which they have rights. The definition of Internet in the context of this Act is necessary to differentiate between "Broadcast Distribution Undertaking" and "Online Undertaking".

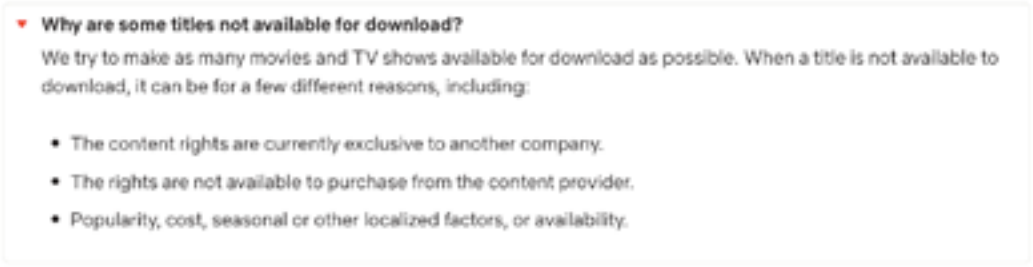
40. Sections 9.1 (i) and 9.1(h) of C.11 are very problematic because the Commission cannot require an online undertaking to carry any broadcasting undertaking. And online undertaking can distribute programs with "streaming" rights, and has no rights to distribute programs that have "linear television" rights. Forcing Netflix to carry APTN would require APTN acquire streaming rights for all its programming, which may not be possible if some other media company holds exclusive streaming rights. There is also the question of who would pay APTN to purchase those extra rights.

41. Section 9.1(f) which requires a broadcaster obtain permission from the Commission to enter into a contract with a telecommunications carrier is highly irregular. Even where the Commission regulates telecom rates, it is not in the business of approving contracts between a customer and a telecom service provider. If the intent of this clause was to require permission for a legacy broadcaster to become an online undertaking, then it should be stated as such and if permission is granted, the negotiation between broadcaster and any telecom service provider is none of the Commission's business.

42. Section 9.1(g) requires a distribution undertaking to give priority to the carriage of broadcasting. This anachronistic clause worked well when BDUs were COAX based and those networks could only carry TV channels. As much of legacy broadcasting is now distributed over telecommunications links (such as IPTV) this clause conflicts with network neutrality and Telecommunications Act 27(2) (undue preference). and should no longer be considered. The Mobile TV proceeding confirmed this at the CRTC and at the Federal Court of Appeal. When Broadcasting content is delivered to end used over a telecommunications link, it is the Telecommunication Act which applies to delivery and undue preference is not allowed.

Download vs Stream

43. The Netflix service downloads for off-line viewing. Not all titles have this feature enabled and the FAQ explains why[3]:



Why are some titles not available for download?

We try to make as many movies and TV shows available for download as possible. When a title is not available to download, it can be for a few different reasons, including:

- The content rights are currently exclusive to another company.
- The rights are not available to purchase from the content provider.
- Popularity, cost, seasonal or other localized factors, or availability.

44. The behaviour of the Netflix download service is in fact that of a program rental, and Netflix confirms that different rights are needed for this (rights which are not always available because exclusive rental rights may have been purchased by another media outlet). Therefore, this function should not be regulated as a streaming service because it is not.

45. The Commission did not regulate movie rental services like Blockbuster and has no business regulating the equivalent in the digital world.

46. Consider there are services such as iTunes while also sell movies digitally, and when purchasing DVD/ BlueRay, one usually gets a coupon to download a digital copy from a service. C-11 has no business granting the CRTC jurisdiction over these activities.

3 Download FAQ: EN: https://help.netflix.com/en/node/54870
FR: https://help.netflix.com/fr-ca/node/54870

Social Media

47. Bill C-11 makes numerous mentions and exemptions based on the undefined term "social media". This is unacceptable, especially as the term's definition in the population is likely to evolve in meaning over the years. My proposed definitions of program and online undertaking eliminate much of the need to refer to social media. When Twitter obtains rights to broadcast a football game live, this becomes a program and is distributed by Twitter as on-line undertaking for that activity only. When a user posts a cat video, he/she should not have to hire a lawyer to read the Broadcasting Act to figure out if the cat video is to be regulated, if it needs to be registered/rested as Canadian content or whether Youtube's algorithm , known to creators, will be disabled due to CRTC involvement and the cat video will see distribution around the world greatly reduced.

News

48. In the good old days, newspapers were published in the morning, radio provided news during the day, and television provided the evening news at 18:00 and 23:00. The 3 had their own distinct markets and did not compete. Today, they all compete in one over crowded market, all have web sites with video, audio, images, text.

49. Under the current definitions of C-11, all 3 become broadcasters due to the nature of their web site which means they will be saddled with the heavy CRTC regulatory hand and obligations to fund legacy media.

50. It should be noted that the assertions that Google "steals" most of the advertising revenues. Google acts primarily as an advertising broker where it keeps only a small percentage of the revenues for ads placed on web sites such as a newspaper or TV station web sites that choose to use Google Ad Manager.

Exclusion – certain transmissions over the Internet

> *(2.3) A person does not carry on an online undertaking for the purposes of this Act in respect of a transmission of programs over the Internet*
>
> *(a) that is ancillary to a business not primarily engaged in the transmission of programs to the public and that is intended to provide clients with information or services directly related to that business;*
>
> *(b) that is part of the operations of a primary or secondary school, a college, university or other institution of higher learning, a public library or a museum; or*
>
> *(c) that is part of the operations of a theatre, concert hall or other venue for the presentation of live per- forming arts.*

51. So a school that provides on-line courses on Youtube or udemy, Masterclass or other institutions will be considered regulated broadcasting. This means only legacy educational institutions will get an exemption.

52. With regards to (a), who judges that the "program" on a web site is ancillary? Does the company need to file a Part 1 to the CRTC with all the financial reports and other information to prove its web site is ancillary and get an exemption? What is the definition of "ancillary" in terms of threshold?

Other Items (cont)

53. Consider that Amazon or Ebay's web sites are NOT ancillary as they are their primary storefronts and thus at the core of their business. Since they contain images, they are "programs". Given the text of the law, how would the CRTC or FCA interpret "ancillary" in a context where despite warnings, the government refused to update the definition of "program" knowing that it captures any web site with an image on it?

54. An outfit selling on-line books with images, or an audiobooks business would therefore be a broadcaster and the CRTC would now regulate books.

55. A proper definition of "program" and the distribution/on-line undertakings would remove the need for these vague exemptions that create much uncertainty on how the CRTC will interpret them and may cause the CRTC to be overwhelmed with requests for exemptions.

56. Will every web site need to file a Part 1 with the CRTC along with financial reports and hope that the Commission decides that its "program" (aka web site with images) is ancillary to its core business? This is why the Broadcasting Act needs to define precisely what is broadcasting instead of granting the CRTC huge swath of jurisdiction and attempt an epic adventure in creating any/all exemptions needed.

57. More importantly, in the case of Vevo, it is Vevo which chooses which music videos to upload, not Youtube. Similarly, many independent artists upload their own content to Youtube. However, music.youtube.com is a proper music streaming service where it has curated music and similar to Spotify. It can get very complicated to try to regulate such a diversified service.

Discoverability

58. Instead on imposing and regulating what content is being displayed to users (the stick), it is much better to use a carrot to leverage the platform's logic to one's own advantage. Successful Youtube channels have learned how to use the algorithm to their advantage. Instead of expecting the CRTC to do their work via regulation, producers of formal broadcasting content need to learn to promote their content such that the promotion is automatically amplified by the streamer's algorithm. Orange is the New Black didn't become popular because it as pushed onto people, it did so because of promotion and word of mouth.

Conclusion

59. Due to the 10 page limit imposed by Committee, more in-depth study of the flaws of C-11 cannot be included and will be provided when the bill goes to Senate. In the meantime: modernising the Broadcasting Act should have consisted of removing regulatory burden from legacy broadcasting to give them a chance and using general tax revenue to fund culture. (with expectation that large platforms contribute via GST).

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