



December 5, 2008

Mr. Robert A. Morin  
Secretary General  
CRTC  
Ottawa, ON  
K1A 0N2

Online: <http://support.crtc.gc.ca>

Dear Mr. Morin,

**Broadcasting Notice of Public Hearing CRTC 2008-11  
Canadian broadcasting in new media  
Notice of consultation and hearing**

**INTRODUCTION**

1. This is the submission of the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) in the matter of Notice of Public Hearing CRTC 2008-11 on Canadian broadcasting in new media.
2. ACTRA welcomes the opportunity to participate in this process on behalf of our 21,000 members and will bring to it the particular perspective of professional performers working in the English-language recorded media in Canada. In addition, ACTRA represents the interests of thousands of singers and musicians through the work of the ACTRA Performers' Rights Society which collects and distributes royalties from the public performance of musical recordings. In order to ensure that these perspectives are fully considered in this important Commission proceeding, ACTRA wishes to appear at the public hearings in February.
3. ACTRA believes it is essential and appropriate to ensure:
  - i) that Canadian creative resources are predominantly used on the public airwaves and in other public spaces; and
  - ii) that Canadians can have access to a reasonable supply of high-quality English-language programming choices, particularly scripted drama and comedy programs and series, in every medium.
4. ACTRA members are a vital part of Canada's \$85 billion cultural industries and have a stake in a robust domestic television, film and new media production, distribution and exhibition system. ACTRA members also believe in the creativity of Canadians; in our

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capability to tell and perform Canadian stories and in the inherent need for Canadians to be able to see and hear ourselves in all media.

5. Canada has developed a sophisticated system of regulatory measures, public institutions and funding programs designed to ensure that Canadian choices are available to both Canadian and global audiences. These widely-supported measures attempt to level the playing field for Canadians facing the dual challenge of living next door to the world's largest producer of recorded entertainment and information programming, and the high costs of producing quality programs. Appropriate measures for broadcasting in new media must now be implemented.

## EXECUTIVE SUMMARY

6. When the CRTC considered new media in 1999, the technology was in its infancy. When it decided to proceed by way of an exemption order, the CRTC allowed broadcasting in new media to develop outside regulatory controls. As ACTRA predicted at the time, this created a situation in which broadcasters and cable companies are now competing with unregulated programmers and distributors which they own. Canadian programs and music have been marginalized in the rapidly commercializing medium relative to material from elsewhere. While Canadians are major users of the Internet both as a communications tool and a source of programs, we believe that, given the proliferation of non-Canadian choices, the viewing, downloading and listening to Canadian content on the Internet has decreased in relative terms since 1999.
7. In the near future, the Internet and mobile receiving devices will become the primary vehicles through which films, television, music and other entertainment and information programs are delivered to Canadians and global audiences. Broadcasters will no longer transmit "over-the-air" and major movies will move to the Internet shortly after theatrical release. If Canada is to carve out an appropriate place for Canadian content, it is essential for the CRTC to implement appropriate regulatory and funding measures for those who are involved in broadcasting in new media, whether as programmers (broadcasters), service providers (distributors) or producers.
8. ACTRA believes that the exemption orders should be rescinded and replaced with licensing requirements and rules that we will outline in this submission. ACTRA asserts that the *Broadcasting Act* covers the delivery of programming content through the Internet and to mobile receiving devices. The Commission should take an expansive view of the definition of "program" and confirm that all broadcasting over the Internet falls under the *Act* and its regulatory authority regardless of who created the program, or the extent to which the viewer may interact with it. The CRTC also has the legal authority and the responsibility under the *Act* to introduce the following regulations, as well as others we propose in this submission:
  - Require that those who are streaming programs from Canada, through the Internet or to mobile receiving devices, be licensed and subject to rules equivalent to other programming undertakings which broadcast on a fixed schedule.
  - Require that those who are making programs available from Canada, through the Internet or to mobile receiving devices, for viewing at a time and place chosen by the viewer, be licensed, required to provide a program selection that is predominantly Canadian, required to provide appropriate promotion for their Canadian content, and be subject to other regulations equivalent to other on-demand programming undertakings.

- Require that Internet Service Providers pay a levy of 3% of their gross revenues to an arms-length new media production fund, reflecting the fact that more than 50% of the material on the Internet is programming as defined in the *Act*.
- Require that Wireless Service Providers pay a levy of 0.6% of their gross revenues to an arms-length new media production fund, reflecting the fact that a portion of the material transmitted to mobile receiving devices is programming as defined in the *Act*.
- Recommend that the government amend the *Income Tax Act* to provide that a Canadian advertiser may deduct from their expenses the cost of advertising on a non-Canadian Internet website or service only if that undertaking meets conditions the CRTC would develop in consultation with the industry, such as:
  - If it makes programs available either on a streaming (linear) or on-demand (non-linear) basis, that at least 10% of its content and/or catalogue is Canadian.
  - If it enables users to search for programs, that it provides an option to search only Canadian websites, or ensures that Canadian choices are among the first alternatives offered to Canadians.
- Confirm that the Canadian Broadcasting Corporation and other public broadcasters have a legitimate and essential role to play in broadcasting in new media.

## **ACTRA RESPONSES TO QUESTIONS POSED IN THE PUBLIC NOTICE**

Q.1. Does the Commission’s interpretation of broadcasting in new media continue to be correct and are the proposed clarifications, in the paragraphs above, of this interpretation appropriate, complete and comprehensive? If not, how should the Commission’s interpretation change?

9. What Robert Fowler said in 1965 about Canadian broadcasting remains as true today as it was then: “What matters is program content; all the rest is housekeeping.”<sup>1</sup> The discussion of new media broadcasting must start with the definitions of “program” and “broadcasting” in the *Broadcasting Act*. As determined explicitly by those who drafted and approved the *Act*, these definitions are technology-neutral and thus apply regardless of the technologies used in producing or disseminating the material.
10. Under the *Act*, a program is any combination of “sounds and visual images, that are intended to inform, enlighten or entertain.” When a program is transmitted “for reception by the public by means of broadcast receiving apparatus,” there is a broadcast. The screen of the computer and the mobile device are analogous to a television screen when they are showing a program. We also note that one of the definitions of “public” in the *Canadian Oxford Dictionary* is “open to or shared by all the people” (emphasis added).
11. Some argue that on-demand applications fall outside the *Act* since it involves a one-to-one communication. However, as Peter S. Grant has pointed out in a recent paper<sup>2</sup>,

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<sup>1</sup> Robert MacLaren Fowler was best known for chairing two commissions which looked at the Canadian broadcasting system. The most significant conclusions of the 1955 Fowler Commission report were to reject the argument of the private broadcasters that cultural goals should be met primarily by the CBC, and to propose the establishment of minimum cultural standards for private broadcasting and the creation of an independent regulatory agency to supervise broadcasting.

<sup>2</sup> Grant, Peter S., *Reinventing the Cultural Tool Kit: Canadian Content on New Media*, Ottawa February 22, 2008.

“... Parliament considered the exclusion of ‘programs transmitted on demand,’ from the definition of ‘broadcasting’ in the run-up to the 1999 *Broadcasting Act*, but in the end declined to put this exclusion in the statute. Since then the CRTC has exercised jurisdiction over video-on-demand, and has licensed a number of video-on-demand services.”

12. We also note that in Broadcasting Public Notice CRTC 1999-84, respecting new media, the Commission reached the following conclusion: “The fact that an end-user activates the delivery of a program is not, in the Commission’s view, determinative. As discussed below, on-demand delivery of signals over the Internet is included in the definition of ‘broadcasting’”.
13. Thus, ACTRA asserts that the CRTC has the responsibility and broad scope to regulate those who are supplying or making programs available through the Internet or to mobile devices, whether they are determining the time when it may be viewed, or permitting members of the public individually to choose the time and place where they will view it. We also believe that the Commission should take an expansive view and confirm that all broadcasting over the Internet falls under the *Act* and its regulatory authority regardless of who created the program, or the extent to which the viewer may interact with it.
14. Clearly, the CRTC will exercise this authority in a manner that is appropriate for the technology and the use, and may choose to regulate different elements according to different rules, or to permit certain players to be unregulated. Thus, while it can decide in paragraph 23 that it “... is not concerned with user-generated content,” this cannot be construed as being a finding that such content is outside the scope of the *Act* and the jurisdiction of the CRTC. The world changes and the Commission may wish in future to apply regulations to such content.
15. When the matter of new media was first considered in 1999, the technology was in its infancy and thus the Commission was able to conclude at that time that “the majority of services that were available on the Internet consisted predominantly of alphanumeric text and, therefore, did not fall within the scope of the *Act*.” Today, this conclusion is no longer valid. According to figures in a study done by Nordicity Group Ltd.<sup>3</sup>, which is appended to the submissions made by the Canadian Film and Television Production Association, the Writers Guild of Canada and the Directors Guild of Canada, 70% of the current traffic on the Internet is audiovisual content, including video games. ACTRA asserts that all of this is content that would fall under the definitions of “program” and “broadcasting” in the *Broadcasting Act*. The percentage of Internet traffic devoted to audiovisual content, including video games, is expected to continue to grow in the next five years.
16. The Commission also concluded in 1999 that services where the “potential for user customization is significant... do not involve the transmission of programs for reception by the public and are, therefore, not broadcasting.” ACTRA disagrees with this conclusion and calls on the Commission to reconsider it in the current process.
17. ACTRA asserts that user-generated content does fall under the definitions of the *Act* and thus we believe the Commission erred in its earlier determination. Further, the Commission must be careful to avoid creating a situation in which regulations do not cover the leading-edge, interactive content. ACTRA notes that it is already the case that

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<sup>3</sup> Nordicity Group Ltd. *ISP/WSP New Media Broadcasting Content Contribution – Estimation of Market Tolerance and Valuation*, December 2008.

producers and broadcasters are adding value to television programs and movies when they make them available as DVDs or through the Internet. Users may have access to scenes not in the original version, they can view special interviews with the director or actors, or they may choose an alternative ending.

18. Content providers will continue to offer more and more choices for the consumer. The next generation of programs may move beyond the linear storytelling technique to a far more sophisticated approach, creating the potential for each audience member to have a unique experience with the work. We are reminded of the play *Tamara*, which is set in a multi-room mansion. Action occurs simultaneously in these rooms, and the characters move from room to room. While each audience member has a different experience depending on how they choose to view the performance, this does not mean that *Tamara* is not a theatrical stage play. Similarly, just because a viewer may have the ability to navigate through an interactive movie in a manner unique to that viewer, or may have the ability to add their own elements to the narrative, does not turn the production into something other than a movie.
19. ACTRA also believes that video games fall under the scope of the *Act*, and where these are transmitted to the public they should be subject to appropriate rules and regulations established by the Commission. Video games are combinations of “sounds and visual images” which “are intended to inform, enlighten or entertain” and are thus programs within the meaning of the *Act*. We also observe that the dividing line between video games and traditional movies and television programs is blurring rapidly, particularly as live-action segments become integrated into the gaming experience and leading games spawn Hollywood movies. Since 2003 when ACTRA first began organizing video game production, ACTRA-covered performers have been contracted to appear in more than 30 games. Video games also transmit cultural values and social mores. Thus, ACTRA believes that when games are made available through the Internet or to mobile receiving devices, this constitutes “transmission of programs for reception by the public.”

Q.2. Given that the Commission has clearly articulated that it is not concerned with user-generated broadcasting content, to what type of broadcasting content in new media should the Commission pay particular attention? For example, should the Commission draw a distinction between professional versus non-professional content, or content aimed at commercial versus non-commercial use? If so, how should the terms be defined?

20. For the reasons outlined above, ACTRA submits that, in the new media context, the CRTC should take a literal interpretation of what constitutes a “program” and “broadcasting.” As ACTRA understands the meaning of these *Broadcasting Act* definitions, all combinations of “sounds and visual images”, if they are “intended to inform, enlighten or entertain,” and are made available to the public, are included within the scope of the *Act* and the regulatory authority of the CRTC. This is the case whether the material in question is user-generated, professionally-produced, commercial or non-commercial, or gives the user an ability to interact with it in sophisticated ways.
21. As we have stated above, ACTRA believes the Commission must state clearly that user-generated content is covered by the *Act* when it meets the definition of a program and is made available to the public, either through the Internet or to mobile receiving devices.
22. ACTRA is concerned that Canadian content should be available in news, information, current affairs, sports, variety, music and other genres of programming. We support measures that facilitate production and distribution of these genres. However, the Commission should pay particular attention to the availability of scripted programs and

movies. This is the case because this is the type of programming most needed by the system and because market forces alone cannot ensure an adequate supply of Canadian scripted programs and series, such as drama and comedy.

23. For the past eight years, ACTRA and its members have been leaders in the campaign to reverse the precipitous decline in the availability of domestically produced English-language television drama. We have raised this issue publicly, with politicians and with the Commission. For many more years, we have also worked to increase the number, budget and quality of English-language Canadian feature films.
24. The Commission has on numerous occasions acknowledged the crucial role of dramatic programs. In PN CRTC 2003-54 it was expressed in this way: "it is through television drama that most Canadians participate in their national culture and share in the evolution of social values and stories of human passion. Canadian drama should be a cornerstone of the Canadian broadcasting system." In PN CRTC 2004-32, the Commission added the following observation: "It is the Commission's preliminary view that effective measures to increase the availability of, and viewing to, Canadian drama programs are needed at this time and that such measures would further the objectives of the *Broadcasting Act*." The Dunbar Leblanc study commissioned by the CRTC and released in August 2007 confirmed that such measures remain necessary since market forces alone are insufficient to ensure an adequate supply.
25. While there has been an increase in the volume of production of English-language fiction programming for television in the last three years, no doubt in part related to the impending licence renewal process for Canada's commercial OTA broadcasters, the total volume of fiction programming in 2006/07 was still 16.6% lower than the peak year. In 1999/2000 the volume of production of English-language fiction programs (drama and scripted comedy) reached \$1.12 billion; after falling to a 10-year low in 2004/05, it slowly rebounded to \$0.94 billion in 2006/07.<sup>4</sup>
26. As reported by the CRTC, in 2006, Canadian private conventional broadcasters spent more than \$478 million on foreign (primarily U.S.) drama, an increase of 19.2% from the previous year. In 2007, they spent \$505 million on foreign drama, a further 5.6% increase. Spending on home grown drama was just a fraction of these totals. In 2006, it was just under \$71 million, a decrease of 13.7% from the previous year. In 2007, spending on Canadian drama edged up by 4.2% to reach just over \$74 million. In 2007, Canada's private conventional broadcasters spent almost seven times more on U.S. drama than on Canadian drama.
27. The current hearing provides another opportunity for the CRTC to take measures to correct this unconscionable failure in the broadcasting system.

Q.3. How has broadcasting in new media and the corresponding business models evolved since the issuance of the exemption orders for new media broadcasting undertakings and mobile television broadcasting undertakings? What role can broadcasting in new media be expected to play in the future, as part of the Canadian broadcasting system?

28. When the Commission examined new media and the Internet in 1999 it correctly noted there was little audiovisual content. While music had already found a place in the new distribution system, the compression and distribution technologies were not sufficiently advanced to permit the widespread downloading and streaming of audiovisual works.

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<sup>4</sup> *Profile 2008*, Canadian Film and Television Production Association, January 2008, available at: <http://www.cftpa.ca/news/pdf/profile/profile2008-english.pdf>

However, this has now changed and the majority of traffic on the Internet would appear to fall within the Act's definition of "programs" according to Peter Grant.

29. The business model in the music industry is slowly coming to grips with the new reality that music is widely available for listening and downloading, and often for sharing illegally. In the past decade, we have witnessed the ascendancy of the legal downloading sites from which consumers can obtain their favourite songs, delivered digitally to their computer, iPod and mobile phones. Most Canadian radio broadcasters now simultaneously make their programs available on the Internet either streamed or as podcasts.
30. We have also seen some artists making their material directly available on-line, new artists in the hope people will pay directly for their music, and established artists for promotional purposes and to boost sales of existing CDs and tickets for upcoming tours. However, we have not yet seen any artist become a star based on Internet exposure alone. It should also be noted that perhaps only 15% of the world's recorded music is presently available online<sup>5</sup>.
31. As expected, as the Internet has grown in popularity and become commercialized, we have witnessed the development of an advertising component. Display and search advertising are the two most common forms of online ads. Commercials can be attached to streamed programs and some movie/commercials have been produced for online use. According to the Interactive Advertising Bureau of Canada, total online revenues are estimated to be \$1.5 billion in 2008, a growth of 25% over the previous year and a fourfold increase from 2004. Even with the economic meltdown, studies still predict a 15% growth in 2009.<sup>6</sup> This growth in advertising will only continue as more people use the Internet for new purposes and as advertisers begin to advertise through mobile phones and find more sophisticated ways to target consumers through the Internet.<sup>7</sup>
32. According to *Perspectives on Canadian Broadcasting in New Media* released by the Commission in May 2008, new revenue streams are also emerging. These include advertising-supported streaming content; subscription-driven streaming and downloading; purchased content that is downloaded and retained permanently by the customer; and rented content with DRM technology providing limits on the period of use. There are also some examples of product placement in online content.
33. Many television programs and series are now available online, although this is generally done only after the scheduled broadcast. Unlike radio, only a few are currently streamed simultaneously with the broadcast schedule. Broadcasters' websites are promoting the broadcast schedule, as well as providing a place for fans to obtain additional information and clips, or to watch an episode they have missed or would like to see again. Some Canadian broadcasters are producing material directly for their websites, although this is limited at the moment to material related to a program or series.
34. Since the latest new media provisions came into force under the ACTRA bargaining agreement, more than half of the dramatic productions made specifically for new media use (as opposed to converted to new media use) have been ancillary content related to conventional broadcast productions. Examples include content for shows such as *Degrassi: The Next Generation*, *Da Kink in My Hair*, *Instant Star* and *Corner Gas*.

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<sup>5</sup> Bach, Dagfinn, Managing Director of Artspages International, Presentation to International Music Forum, Beijing, 12 November 2007. [www.artspages.org](http://www.artspages.org).

<sup>6</sup> <http://www.iabcanada.com/newsletters/110608.shtml>.

<sup>7</sup> See also *The Economist*, November 29-December 5, pages 65-66

35. Producers are also using new media content alongside conventional content in traditional formats. For example, the *Corner Gas* DVD set includes both complete episodes and new media webisodes.
36. In recent months, important deals between Internet companies and Hollywood studios have been announced. This represents the next step in the development of the Internet. Thus far, the deals have been for movies which have moved well along the traditional distribution chain. However, it is expected over the next few months that Internet distribution of Hollywood movies will occur at a much earlier stage in the chain, eventually moving perhaps to a place immediately after the theatrical release. Current release movies will likely be available for rent and streamed viewing; older movies will likely be available for purchase and download.
37. In 1999, ACTRA first predicted in the CRTC process that the future delivery model to homes would be on demand, via a computer network (probably the Internet), through a broadband pipe (let's now add "or wirelessly"), to the integrated home theatre/entertainment centre/computer. The technology is now in place. Consumers in the U.S. with a Sony PlayStation 3 can download movies and TV shows directly over the internet to their PS3 for viewing on their televisions. Canadians will also be able to download content once rights issues are resolved. What will this mean for Canada's conventional broadcasters?
38. ACTRA believes that conventional broadcasters will continue to have a role to play as packagers of content, particularly in relation to events and specials which can attract a mass audience and be valuable to advertisers. Broadcasters will be out of the transmission business and will distribute through the Internet to homes and mobile devices. Pay and on-demand services may have a more difficult time unless they package niche materials, since consumers will most probably chose to pay for the specialized streamed webcast or the specific movie directly from the supplier.
39. In either case, a key element of the future system will be the mediator between the content providers and the consumers. It's one thing to have access to a virtually limitless array of material; it's another thing to find the particular movie or program that you want to watch right now. ACTRA continues to urge that the Commission signal to those who are providing Internet navigation services that Canadian content should always be among the first options provided to the consumer until s/he has made a decision. In this connection, ACTRA commends the UK site, [www.myfilms.com](http://www.myfilms.com), run by the UK Film Council, the government-backed lead agency for film in that country. The site provides information about, and access to, all films, domestic and foreign, mainstream and independent. Because of its genesis, UK films are highlighted.

Q.4. Who are the relevant players in the creation and distribution of Canadian broadcasting content in the new media environment? How are they performing financially and how are they contributing to the creation and distribution of Canadian broadcasting content in new media today? What can be expected in the future?

40. While there is some audiovisual content created and uploaded to the Internet by individuals and new players, the material that is currently most widely available and consumed is created by existing film, television and interactive media producers. Broadcasters are playing their role as aggregators of content, which they package and make available through the Internet. When the HD format becomes standard and Hollywood movies become widely available online, ACTRA believes the process will be increasingly dominated by the huge multinational entertainment firms and the big Internet



companies (YouTube, Google, MySpace, Apple, Microsoft, etc.). The home movie on the Internet will largely lose its appeal. Hopefully, Canadian companies will carve out an appropriate space and will use it as a way to distribute their Canadian content programs.

41. The Internet is also a communications tool which links individuals and businesses. As it becomes increasingly commercialized and used as a vehicle to distribute programming content, governments and regulators will need to collaborate to preserve public spaces on the Internet.
42. The other significant players are the Internet Service Providers. Over the past 10 years, we have seen Canada's telecommunications and cable companies come to dominate this sector, taking over or displacing the hundreds of small companies that led the way. The role of the ISP is two-fold. For some of the traffic they facilitate, they are analogous to the telecommunications common carrier. For the rest, they are analogous to the cable and satellite companies, providing access to content. At the moment, ISPs are under no regulatory obligations to give priority to Canadian services and they make no financial contribution to Canadian production. According to the study by the Nordicity Group Ltd., total ISP revenues which are related to residential retail high-speed Internet capability (required for viewing audiovisual content) in 2007 were \$3.3 billion.
43. Wireless Service Providers are also becoming players in broadcasting in new media, although their share of the market is currently small. At the moment, WSPs are under no regulatory obligations to give priority to Canadian services and they make no financial contribution to Canadian production. According to Nordicity, revenues of WSPs related to all data, roaming charges, interconnection fees and others was only 15.4% of total wireless revenues in 2006. Using this as a base, Nordicity has estimated that 1% of revenues of mobile receiving devices in Canada are presently related to the reception of programming content, although this is expected to grow exponentially in the next five years. Total retail wireless revenues in Canada in 2007 were estimated to be \$12.9 billion.

Q.5. How are traditional Canadian broadcasting undertakings adapting to new media and what is the impact on their business models?

44. ACTRA is pleased to see conventional Canadian television broadcasters have a presence on the Internet. We note that many cable and telecommunications companies are Internet Service Providers. As we predicted in 1999, by permitting broadcasting in new media to develop outside of the regulatory regimes, the CRTC created an environment in which the regulated broadcasting undertakings are now competing with unregulated services that they own and control.
45. Despite the cries of poverty that have come from Canadian broadcasters for the past 25 years, traditional broadcasting undertakings have enjoyed strong and growing revenues. Advertising revenues for all conventional television operators in Canada reached \$2.17 billion in 2007, a 5.9% increase over revenues in 2003. Advertising revenues for specialty, pay, pay-per-view and video-on-demand services reached \$0.973 billion in 2007, a 56.9% increase over 2003. While it does appear that the current economic meltdown will bring lower advertising revenues for Canada's OTA broadcasters in 2008 and 2009, they should be able to weather the storm and will recapture these revenues when the economy recovers.
46. Furthermore, ACTRA notes that, despite the fragmentation of audiences and the growth of the Internet, prime time television audiences continue to be strong for high quality programming content in every genre. In 2006/07 the average weekly television viewing

hours for all Canadians was still 26.8 hours, only slightly lower than the peak reached the year earlier. It is true that younger Canadians now spend roughly the same amount of time online as they do watching television, but some of this online activity involves watching television programs and movies. Younger Canadians are more likely than older people to use the Internet for entertainment purposes.

47. ACTRA believes that conventional broadcasters will continue to have a viable business as aggregators of television programs and films, even when the distribution model is exclusively based on the Internet.

Q.6. What is the current availability of Canadian broadcasting content in new media? Are there challenges related to business models with respect to the creation and distribution of Canadian broadcasting content in new media?

48. It is currently difficult to quantify the availability of Canadian programming on the Internet, let alone to analyze the availability and viewing of Canadian fiction programming. However, a few general comments can be made.
49. Most Canadian broadcasters have a presence on the Internet. The majority of radio broadcasters are now simulcasting online. In television, Canadian and American broadcasters use the medium in different ways. According to *Perspectives on Canadian Broadcasting in New Media*, 64% of the U.S. content offered on American websites consisted of complete programs; only 42% of the Canadian content offered by our broadcasters was available as complete programs. While Canadian broadcasters made additional content (webisodes and interviews) for 44% of their Canadian offerings, American broadcasters had such ancillary material available for 94% of the U.S. shows. A 2007 study undertaken by Nordicity showed that only 28% of Canadian shows had online-only video content, as compared to 78% of U.S. programs.<sup>8</sup>
50. On November 11, 2008, Global's website had episodes of nine television series available for viewing. Only two, *Da Kink in My Hair* and *The Guard* were Canadian, all the others were U.S. series. That same day, CTV provided access to 24 programs, of which 12 were Canadian.
51. With respect to Canadian content delivered to mobile phones, there is solid data and a serious problem. According to the *Perspectives* report, in April 2008, the following offerings were available:

Content that is Canadian			
	Mobile TV	VOD	Radio
Bell Canada	42%	52%	22%
Rogers	57%	35%	15%
Telus	45%	n/a	14%

52. ACTRA is not aware of any authoritative study of the overall availability of Canadian content in new media. However, it is the perception of most members of ACTRA that there is a problem and that it has gotten worse since 1999. While there are clearly many more Canadian programs available now than there were in 1999, there has been an explosion in the overall volume of audiovisual material on the Internet since that time. This results in the Canadian material being marginalized and challenged to find audiences. We support the conclusion reached in *Perspectives* that:

<sup>8</sup> Quoted in Grant, page 8

“Globally, the pace at which professionally produced broadcasting content is being made available online is accelerating, but Canadian participation is lagging with respect to the amount of high-quality professionally produced new media content available ....”<sup>9</sup>

53. One of the reasons for this development is that there is simply insufficient funding to support the production of Canadian content. Internet revenues are not yet finding their way back to producers and, outside of the Bell Broadcast and New Media Fund, there is little public money available to support new media productions. ACTRA notes that producers have been advised that the Canada New Media Fund, through which Telefilm Canada has distributed \$14.5 million annually, will not be renewed by the federal government in the next fiscal year.

Q.7. What is the extent of consumer demands in Canada for broadcasting content in new media?  
How is the broadcasting sector responding

54. Canada remains a world leader in the availability and adoption of new media technologies. High-speed residential Internet access is now available to 93% of households across the country and 64% of households subscribe to a service. Eighty-three percent of Canadians have a computer in the home.
55. Canadians are also heavy users of the Internet. Earlier this year, comScore reported that Canadians spent the greatest amount of time online when compared to several other countries. The worldwide average was 26.0 hours, while Canadians spent on average 45.5 hours in January 2008.<sup>10</sup>
56. Canadians regularly visit Canadian websites. Among broadcaster-related domains, Canadian sites occupied all of the leading positions, with CBC as the most visited. Among multimedia domains, the only Canadian site in the top 10 was Tetaslaques.TV, although several of the others maintain a specific Canadian site providing at least some material of particular relevance to Canadians.<sup>11</sup> We conclude from this that there is a strong consumer demand for broadcasting content in new media and for Canadian choices.
57. ACTRA also believes that the Pollara public opinion survey it co-sponsored and released in May 2008 in the context of PN CRTC 2007-10 shows that Canadian audiences want more Canadian content. While they were questioned specifically about television, the fact that a solid majority of Canadians felt it is important to have Canadian-created content, including drama and comedy, sports, documentary, public affairs and local news can be extrapolated to broadcasting in new media.
58. Finally, ACTRA was pleased to receive the annual report of the Canadian Television Fund released in October. This report showed that English-language Canadians watched 34% Canadian programming in prime time in 2006/07, which was up from 29% in 2004/05. This demonstrates that, when Canadian drama and other high-value scripted programs are made available to Canadians at a time when they are most likely to be sitting in front of their screens, they will watch it. This is an important lesson for this process.

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<sup>9</sup> *Perspectives on Broadcasting in New Media*, CRTC, May 2008, page 3

<sup>10</sup> *Perspectives*, page 31

<sup>11</sup> *Perspectives*, pages 36-37

Q.8. How should "Canadian content" be defined with respect to broadcasting content in new media? Are any of the definitions that the Commission uses for other platforms, such as radio and television, relevant? If so, how would they be applied?

59. A Canadian program is one conceived, written, performed, directed and produced by Canadians. It is one in which people who live and work in this country, or Canadians living and working abroad, are employed in all of the creative aspects of making television shows and movies.
60. 'Canadian-ness' is not defined by the content of a project. Certainly, we want Canadian storylines and locations. But, Canadian creators must be free to tell whatever stories they want. What determines 'Canadian-ness' is whether or not the production is created by Canadians. If it is produced, directed and performed by Canadians; if the cinematographer, editor, costume designer, technicians and narrator are Canadian; if the post production work is done by Canadian artists; the project will look and feel Canadian, regardless of what the story is about, or where it is set.
61. The use of Canadians in our own productions should be the norm, and the use of artists from elsewhere should occur only in the most exceptional circumstances, particularly where the Canadian public is footing most of the bill. As consumers now have access to a virtually limitless supply of programs and movies from elsewhere, ACTRA believes it is time to define a Canadian program as one that is fully made by Canadians. We urge the Commission to signal in this hearing an intention to move in this direction in the next few years.

Q.9. Given the level of Canadian broadcasting content in new media, are measures needed to support the creation, promotion and visibility of Canadian broadcasting content in new media? If so, what measures, and how can these be accomplished within the mandate of the Commission?

62. Yes. ACTRA asserts that the *Broadcasting Act* covers the delivery of programming content through the Internet and to mobile receiving devices. The CRTC has the legal authority and the responsibility under the *Act* to introduce appropriate measures to support the creation, promotion and visibility of Canadian broadcasting content in new media.
63. Where programs are being streamed from Canada, through the Internet or to mobile receiving devices, on a scheduled basis (linear), the current Cancon rules should apply. In order to give effect to this policy, the CRTC will need to amend the licences of conventional television broadcasters and/or establish a new class of licence to cover programming undertakings involved in broadcasting in new media. In addition to Cancon rules, new media broadcasting undertakings should have the same conditions and regulations, and be held to the same standards, as all other broadcasters.
64. At this point, ACTRA must also note that it completely rejects the unsubstantiated arguments of those, including Professor Eli M. Noam in *TV or Not TV: Three Screens, One Regulation?*, who conclude that the existing Canadian content rules in traditional broadcasting "are likely to be replaced by direct content production support and incentives." Total advertising dollars available in the traditional broadcasting sector are more than double those in the online world. Furthermore, even when the Internet becomes the distribution vehicle, traditional content rules are appropriate and should be implemented when program schedules are streamed to consumers.
65. The Commission should also require that those who are making programs available from Canada, through the Internet or to mobile receiving devices, for viewing at a time and

place chosen by the viewer (non-linear), be licensed. The conditions of such licences should require the programmer to provide a program selection that is predominantly Canadian and be subject to the same conditions and regulations, and be held to the same standards, as all other on-demand programming undertakings. The program providers should also be required to adequately promote the Canadian choices, through highlighting them on the main screen, and offering Canadian alternatives in any listing of offerings.

66. ACTRA notes that its proposals for content requirements for both linear and non-linear suppliers of program content are in-line with the Audiovisual Media Services Directive adopted by the Council of the European Union and the European Parliament. The obligations in the Directive are now being implemented by member states. ACTRA also notes that in its October 30, 2008 notice, *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, the CRTC requires BDUs to ensure that “a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services....” This section is headed Preponderance of Programming Services.
67. The CRTC should require that Internet Service Providers pay a levy of 3% of their gross revenues to an arms-length new media production fund. This would reflect the fact that more than 50% of the material on the Internet is programming as defined in the *Act* and for these purposes the ISPs are acting in a manner analogous to BDUs, which are now paying 6% of their gross revenues into program production funds. A levy of 3% of the 2007 ISP residential broadband revenues of \$3.3 billion would generate \$99 million annually. We believe this amount is fair, equitable, sustainable and essential to ensure there is an adequate supply of Canadian programming content.
68. The CRTC should require that Wireless Service Providers pay a levy of 0.6% of their gross revenues to an arms-length new media production fund. This would reflect the fact that currently a small portion of the material they distribute to their subscribers is programming as defined in the *Act* and for these purposes the WSPs are acting in a manner analogous to BDUs. A levy of 0.6% of the 2007 WSP retail revenues of \$12.9 billion would generate \$8 million annually. We believe this amount is fair, equitable, sustainable and essential to ensure there is an adequate supply of Canadian programming content.
69. Since ISPs and WSPs provide services that are analogous both to that of telecommunications common carriers and broadcasting distribution undertakings, the Commission may wish to establish a new category of licence.
70. When Peter Grant first put forward his proposal for an ISP levy, ACTRA with its partners CFTPA, DGC and WGC, commissioned a public opinion survey from Harris-Decima. Key findings included:
  - 69% of Canadians believe that ISPs should be required to help fund the production of Canadian digital media content;
  - 73% of Canadians agree that WSPs should be required to help fund the production of Canadian digital media content; and
  - 84% of Canadians feel that the federal government should work to ensure that Canadians have Canadian content choices available to them on all media platforms.<sup>12</sup>

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<sup>12</sup> Harris-Decima, *Canadian Attitudes Towards Canadian Programming and CTF Issues*. Prepared for the CFTPA, WGC, DGC, and ACTRA, January 2008.

71. Some commentators will question the legality of such a levy. We assert that the Commission does have the authority to introduce such a levy since ISPs and WSPs are enabling the transmission of programs to the public and are not acting “solely” as telecommunications common carriers. Attached to this submission is an analysis of this issue prepared for ACTRA and its partners by the law firm McCarthy Tétrault. We believe this analysis is clear and definitive.
72. All funds generated by the levy should be provided to an independent new media production fund. The beneficiaries of the fund should include independent producers and new media developers.
73. Finally, ACTRA proposes that the Commission recommend that the government amend the *Income Tax Act* to provide that a Canadian advertiser may deduct from their expenses the cost of advertising on a non-Canadian Internet website or service only if that undertaking meets conditions the CRTC would develop, such as:
1. If it makes programs available either on a streaming (linear) or on-demand (non-linear) basis, that at least 10% of its content/catalogue is Canadian.
  2. If it enables users to search for programs, that it provides an option to search only Canadian websites, or ensures that Canadian choices are among the primary alternatives offered to Canadians.
74. The proposal to amend the *Income Tax Act* is based on the existing provisions of Section 19.1 which provide rules related to advertising on U.S. border broadcasting stations and Canadian editions of foreign magazines. The Commission should work with the industry to consider other criteria that may be appropriate in addition to the two conditions outlined above, such as respecting Canadian copyright laws and program rights’ contracts.

Q.10. What benchmarks and measures are appropriate to assess the level of Canadian broadcasting content in new media? How should these standards be applied?

75. In moving to a regulated system for broadcasting in new media, the Commission should ensure that appropriate reporting mechanisms are introduced both for existing and new players. For example, it will need to ensure that logs for programs which are streamed on the Internet are kept. Similarly, those providing programs on demand will need to report on what material is in their catalogue to ensure there is a preponderance of Canadian content.
76. More importantly perhaps, Canada’s *Broadcasting Act* in section 3.2 provides the following: “It is further declared that the Canadian broadcasting system constitutes a single system ....” Given that it will be difficult, in an online, on-demand, interactive world, to establish goals around the overall level of availability of Canadian content and its viewership by the public, ACTRA recommends that the Commission now establish benchmarks related to the overall volume of Canadian content production.
77. Appropriate benchmarks could be established for production by language and by genre. The Commission could tie the performance of licensees to these benchmarks as appropriate depending on their role in the system and their financial strength.

Q.11. Is there a specific role for local broadcasting content in new media in achieving the broadcasting policy objectives of the *Act*? If so, are measures required to further local participation in this environment?

78. Particularly as young people are increasingly using the Internet as their primary source of information and entertainment, there is a need for local Canadian broadcasting content in new media. We support measures to ensure such content is available in all genres and would specifically recommend that local producers of scripted programs, such as drama and comedy, have access to the new media production fund created by the levy on ISPs and WSPs.

Q.12. Does broadcasting content in new media reflect Canada's linguistic duality, multicultural nature, and special place of Aboriginal peoples within society, as well as the broadcasting policy objectives of the *Act*? If not, are measures feasible or necessary, and how would they be applied?

79. There is much debate about diversity of languages and cultures on the Internet. There is not yet even agreement on what measures can be used to judge the issues, particularly since access to the Internet is far from universal. Providing websites in minority languages is irrelevant if members of those communities lack access to the technology. Even in Canada, only 60% of Canadians currently subscribe. ACTRA does note that Aboriginal Peoples Television Network (APTN), OMNI Television and other Canadian minority language broadcasters do have a presence on the Internet.

80. According to a recent survey by Global Reach, roughly 68% of websites are in English and only 3% are in French. However, the past few years has seen an explosion of Internet use in developing countries. Chinese-speaking people are now the second largest users of the Internet, and there are hundreds of new Chinese-language websites available each month. While Global Reach reports that only 3.9% of websites are in Mandarin, this is growing rapidly.

81. ACTRA would support measures to encourage more diversity of content on the Internet.

Q.13. Is the Canadian independent production sector contributing in a significant manner in the environment for broadcasting in new media? If not, are measures feasible or necessary, and how would they be applied?

82. As we noted earlier, Canadian producers are creating material for new media, although outside of games, the material being produced is generally ancillary to the primary television program or movie. ACTRA believes that when additional funds are available through the proposed levies, Canadian producers and new media developers will take advantage and produce new and creative programs, movies and other content to be broadcast on the Internet.

83. ACTRA continues to support efforts of Canada's independent producers to negotiate a terms of trade agreement with Canadian broadcasters. This is particularly important in the context of these hearing since the issue of rights in new media is one of the key questions at stake.

Q.14. Are there practices that restrict or enhance the distribution of and access to Canadian broadcasting content delivered and accessed over the Internet and through mobile devices? If so, describe the practices and the nature and extent of their effect. Are measures necessary, and how would they be applied?

84. ACTRA is concerned about Net Neutrality and urges the Commission to take actions to ensure that all content on the Internet is treated equally. We assert that ISPs should be precluded from giving preferential treatment to certain types of Internet traffic. In an

environment in which ever larger vertically-integrated companies are involved in the production and distribution of content, as well as being ISPs, without rules there is a potential for a serious conflict of interest.

85. As ACTRA has argued above, the CRTC may wish to establish a new class of licence to reflect the fact that ISPs and WSPs are acting both as telecommunications common carriers and as broadcasting distribution undertakings. While acting in a manner analogous to BDUs, ISPs and WSPs should be precluded from providing preferential treatment to programmers which they own or control and this should include providing a preferential delivery speed.
86. ACTRA looks forward to participating in the public hearing which the Commission has announced will take place in 2009 on the issue of traffic management practices under the *Telecommunications Act*.

Q.15. The Commission has no policy with respect to the cross-ownership of licensed broadcasting undertakings and new media broadcasting undertakings. Is such a policy necessary or appropriate? Why or why not?

87. ACTRA is not concerned about broadcasters also distributing their material in either a linear or non-linear manner through the Internet. In fact, for many years, ACTRA has encouraged broadcasters to embrace these new distribution technologies. Similarly, ACTRA has no concerns about cable and satellite companies which act as Internet Service Providers, since they are providing an analogous service in all media.
88. However, ACTRA remains concerned about vertical integration, as between content creators and programmers, and programmers and distributors. These concerns extend to broadcasting in new media since vertical integration can create situations in which there can be preferential access and treatment, which diminishes diversity. If the Commission accepts our recommendations for regulating those involved in broadcasting in new media, these concerns will be mitigated.

Q.16. How, and to what degree, does the environment for broadcasting in new media affect diversity of voices in the Canadian broadcasting system?

89. The great promise of the Internet is that it will be a force for diversity, by providing a means for creators to distribute their works directly to global audiences; access to varied sources of information and news; and by promoting communication and dialogue. However, as we have seen, the Internet is becoming increasingly dominated by large multinational companies, most of which are U.S.-based.
90. If the CRTC takes actions in this hearing which promote the production and distribution of Canadian new media content, it will add to the diversity available both to Canadians and global audiences.

Q.17. Is there a special role for Canada's public broadcasters in the environment for broadcasting in new media? If so, are measures required? Describe any such measures and how these can be accomplished within the mandate of the Commission.

91. The *Broadcasting Act* applies to programs that are distributed through the Internet and to mobile devices. When the Internet is used in this way, it is part of the broadcasting system, which the *Act* specifies is a "single system." The CBC and other public broadcasters thus have an essential role to play in broadcasting in new media.



92. The *Act* goes further in relation to the CBC. It provides that its programming should “be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose.” Increasingly this is the Internet. ACTRA notes that the CBC has had a presence on the Internet since 1991 and was one of the first broadcasters to recognize the potential of this medium. According to a study reported in *Perspectives*, the CBC website had the highest number of unique visitors of all broadcaster-related domains available in Canada, almost 19% higher than the next highest site, Astral Media.
93. Finally, the *Act* specifically states that if there is any conflict between the private elements in the system and the objectives of the CBC, this conflict shall be resolved in favour of the public interest. This is important because ACTRA is aware that some commercial broadcasters in Europe argue that public service broadcasters should not be permitted to broadcast through, or otherwise have a presence on, the Internet. ACTRA urges the Commission to state clearly that the CBC and other public broadcasters have a legitimate and important role to play in broadcasting in new media.
94. For the CBC, the principal challenge is the adequacy of its funding. ACTRA continues to call on the Canadian government to provide increased and stable long term funding to the CBC.

Q.18. Is there a special role for community broadcasters in the environment for broadcasting in new media? If so, are measures required? Describe any such measures and how these can be accomplished within the mandate of the Commission.

95. The *Act* also recognizes a role for “community elements” in the broadcasting system. ACTRA would support measures to reinforce this role in relation to broadcasting in new media.

Q.19. Do the exemption orders for new media broadcasting undertakings and mobile television broadcasting undertakings continue to be appropriate? Why or why not? Are measures and/or regulatory amendments required to ensure that the environment for broadcasting in new media is contributing in an appropriate manner to the achievement of the broadcasting policy objectives of the *Act*? If so, describe any such measures or amendments.

96. ACTRA believes that the exemption orders should be rescinded and replaced with the licensing requirements and rules that we have outlined in this submission.
97. In moving to a new regulatory system for broadcasting in new media, the Commission will need to provide an appropriate timeframe to allow certain complex business issues to be resolved satisfactorily. For example, the Canadian Motion Picture Distributors Association has pointed out that, if the new media exemption order is rescinded, Internet re-transmitters would acquire the benefits of the compulsory licence provided in the *Copyright Act* to cable and satellite companies. However, the existing compulsory licence arrangement does not need to address the geographical nature of rights sales since distribution by cable and satellite is generally restricted to residents of Canada. Clearly, distribution through the Internet means that anyone in the world with a suitable computer and Internet connection can view the programs. Those who provide programs through the Internet must respect and pay for program rights, and the practical arrangements will take some time to negotiate between rights-holders, programmers and ISPs.

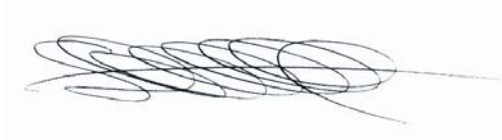
98. Similarly, the CRTC should ensure that negotiations for a Terms of Trade Agreement are successfully concluded by the Canadian Film and Television Production Association prior to the new rules coming into force.

Q.20. Under what conditions should the Commission revisit the appropriateness of the new media exemption orders in the future?

99. ACTRA asserts that the CRTC must act now. Tomorrow will be too late.

100. We thank the Commission for this opportunity to provide our comments and we would be pleased to have an opportunity to appear at the public hearing to expand on our concerns.

Thank you.

A handwritten signature in black ink, appearing to read "Stephen A. Waddell", written over a light blue horizontal line.

Stephen A. Waddell,  
National Executive Director

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