Intervention

Regarding

Part 1 Application to disable on-line access to piracy sites
8663-A182-201800467
Asian Television Network International Limited, on behalf of a Coalition (FairPlay Canada)

Intervenors:

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Contents of submission

I. Comments

1. **Who we are:** We are submitting this intervention regarding the *Part 1 Application to disable on-line access to piracy sites* submitted by FariPlay Canada as individuals. We are researchers with expertise in the analysis of telecommunications policy, Internet infrastructure development, and the implications of network control technologies that shape Internet access and use. This research has been supported, in part, by the Social Sciences and Humanities Research Council of Canada (SSHRC). We are grateful to Jean-François Mezei for collecting the data used in this analysis. The views expressed herein are ours alone and should not be interpreted to reflect those of any affiliated organizations.

2. **Technological reality:** As researchers that both produce and consume copyrighted scholarly works, we recognize that copyright infringement can have negative revenue implications for rightsholders. However, the history of the development of the Internet over the past two decades is replete with examples in which attempts by Internet service providers to use blacklists have proven to be wholly ineffective in achieving their objectives as people learn to use new technologies and obfuscation techniques to bypass such blocking mechanisms. The FairPlay Application provides little credible evidence that the type of approach it is proposing is likely to have any meaningful impact in further reducing "piracy" by the 7% of Canadian households (i.e. 2-3% of population at 2.5 persons per household, if we were to assume there is only one pirate in each household, which may or may not be a valid assumption) FariPlay contends are engaged in unlawful copyright infringement. We suspect sophisticated network engineering and technical teams in fixed and mobile Internet access providers that are part of the FairPlay coalition would agree with our assessment of the likely ineffectiveness of the proposed solution to achieve its stated objective of reducing online copyright infringement.

3. **Economics of false positives:** Furthermore, we are particularly concerned that adoption of the type of approach to addressing copyright infringement FairPlay has proposed will lead to a war of attrition between Internet Piracy Review Agency (IPRA) blocking regime and the so-called "pirates". Without any substantive reductions in copyright infringement, the emergent war of attrition around IPRA's blocking regime with the pirates will run a significant risk of restricting the ability of others (i.e. innocent bystanders) to access the wide world of legitimate content and sources of information that are available from open Internet (i.e. false positive errors). Even if we were to accept FairPlay's unsubstantiated claim that IPRA's blocking regime may be beneficial in terms of reducing financial losses to rightsholders, these benefits must be viewed in terms of the costs of false positive errors expected to occur if the Commission were to adopt FariPlay's request. From an economic perspective, the risks of false positive errors are likely to growth with

time as IPRA learns that its blacklist is ineffective in reducing copyright infringement and responds by expanding its scope to a broader range of Internet resources to achieve its laudable objective of fighting "piracy".[1]

4. **Core legal flaws**: In addition to technological and economic flaws in the logic of FairPlay's proposal outlined above, it has a number of legal flaws that we submit are important to for the Commission to consider:

5. **(A) Statutory authority:** There is no specific statutory basis under which the Commission has been given the authority to address copyright infringement. FairPlay's various arguments that the Commission has the authority to adopt its proposal are highly contorted and not sufficiently credible to withstand legal scrutiny on appeal. Adopting FairPlay's proposal would be inconsistent with the scope of the Commission's specific statutory objectives as allocated by Parliament under S.7 of the *Telecommunications Act*. We therefore submit there is a strong *prima facie* case for rejecting the Application due to its highly tangential relationship to the specific statutory basis under which the Commission is empowered to operate (i.e. without devoting any further scarce Commission resources to consider the merits of the FairPlay proposal; issuing requests for information or a notice for further consultation).

6. **(B) 2006 Policy Direction and Commission practice:** Even in various previous proceedings where the Commission has specific statutory authority to regulate activities of telecommunications service providers, over the past few decades it has exercised significant forbearance in exercising its authority so as not to "interfere with market forces" too much (e.g. price/service quality regulation, wholesale access to transport facilities, misleading advertising, consumer protection, etc.). In the hierarchy of public interest needs and Commission's statutory responsibilities, we submit that it may be more relevant to focus scarce agency resources to achieve its specific statutory objectives in terms of affordability of access to reliable and high-quality communication services than venturing into the realm of copyright protection. The FairPlay Application does not provide any evidence to support its contention that the Canadian judicial system lacks adequate copyright protections necessitating the Commission to substantially interfere with legitimate "market forces" in the development of Canadians access to the open Internet (i.e. per 2006 Policy Direction), with limited expected benefits in terms of reduced "piracy".

7. **(C) Limited liability of common carriers/common law:** In addition to its basic technical and legal flaws noted above, adoption of an extrajudicial Internet blocking scheme like IPRA is clearly inconsistent with the conceptualization of basic telecommunications service providers as common carriers.[2] This is not surprising since the FairPlay proposal only focuses on the costs of

[1] Please note that this economic incentive problem on the part of IPRA will arise as it tries to achieve its objective of reducing piracy; independently of how the proposed entity is funded. Funding the agency with fees from rightsholders will only accentuate this problem, but public funding will not eliminate it. For a general discussion of the interplay between different types of errors in the operation of legal/regulatory mechanisms see Rajabiun, R. (2009). Private enforcement of law. Chapter 2 in *Encyclopedia of Law and Economics, Criminal Law and Economics*, Garoupa, N. ed. Edward Elgar. https://www.e-elgar.com/shop/criminal-law-and-economics

[2] McKelvey, F. (2017) The Internet Was Always a Common Carrier. http://www.amo-oma.ca/en/2017/09/07/the-internet-was-always-a-common-carrier/

copyright infringement to rightsholders, without considering potential economic harm to third party interests that will arise when legitimate material is caught up in IPRA's blacklist. The logic of FairPlay's proposal is fundamentally flawed as it looks only at one type of economic costs (i.e. from "piracy" imposed on rightsholders) and omits those associated with inevitable false positive errors that using a blacklist will entail. In other words, the proposal does not account for the real possibility of "who pays" when something goes seriously wrong with the implementation of the blacklist. It certainly won't be IPRA, CRTC, or rightsholders who will compensate businesses and individuals adversely impacted by material errors in the composition of IPRA's blacklist. Potential damages from such errors will therefore be effectively allocated to providers and consumers of lawful content whose legitimate economic interests becomes collateral damage to the ensuing war of attrition between the blacklist administrator IPRA and innovative pirates. When damages from false positive errors are particularly large, business and consumers may start to seek compensatory remedies through the courts from the Internet service providers who had little option but to implement IPRA's blacklist that contained the relevant error. The potential for uncompensated third-party damages under the IPRA regime can ultimately erode justifications for limitation on civil liability Internet service providers generally enjoy as common carriers acting as neutral conduits for lawful communications.[3]

8. **Summary:** Based on technological, economic, and legal reasons outlined above, we therefore oppose the Application for three key reasons: (a) copyright infringement is not within the scope of the Commission's statutory authority, (b) the proposed blocking regime will do little to reduce "piracy", and, (c) it does not account for economic damages caused by false positive errors to third party entities, which can create substantive liability risk for various stakeholders in the broadband ecosystem (e.g. users, technology companies, providers of legitimate content and information, Internet service providers). We submit that it would be a costly error for all stakeholders, including FairPlay members who apparently believe their proposal may actually reduce piracy, if the Commission were to consider this Application any further. If FairPlay members have a serious issue with the competence of Canadian courts and copyright laws, they have the option to engage with elected representative to improve the judicial remedies that are available to them and strengthen Canada's copyright laws as they consider appropriate.

[3] This would be rather ironic for telecommunications service providers who are participants in the FairPlay coalition. We suspect short term incentives to increase revenues that some vertically integrated members of FariPlay hope IPRA will enable might be clouding their long term thinking as it relates to the economic and legal costs that going down this road might have for them.

II. Analysis of the record: *Why Canadians oppose blacklisting "pirate" websites*

9. In addition to noted concerns about the effectiveness of the proposed blocking regime and risks of economic harm it can cause for innocent bystanders trying to sell and consumer legitimate material, we have been particularly intrigued by the strong negative response the proposal has generated on the record of this proceeding. In the three days following the publication of the Application, the Commission received around 4,000 submissions from individuals and organizations, mostly in opposition to adopting FairPlay's proposal. At the time of this writing, there were more than 10,000 submissions, ranging from short comments by individuals to considered opinions from organizations concerned about the potential harmful impacts if the Commission were to adopt FairPlay's proposal. In addition to their large volume, these submissions include a wide range of arguments against adopting this proposal, which can make it challenging to develop a balanced understanding of key reasons "why" most individuals and business on the record strongly oppose this Application.

10. To help the general public and policymakers better understand these concerns, we have used natural language processing (NLP)/quantitative content analysis techniques to evaluate key ideas emphasized in the texts of the first 4000 public comments submitted to the Commission in response to this Application. We have published preliminary results of our analysis as an article in Policy Options, which we submit into the record below to assist with the Commission's deliberations. Time permitting, we plan to explore how the views of stakeholders evolved over the course of this proceeding based on the text of all submissions in the future. Nevertheless, we believe the preliminary analysis should be sufficient in helping the Commission better understand key elements of concerns by individuals and businesses that have responded to the call for comments regarding this Application.

11. For consistency, we provide the text of our preliminary analysis as published in Policy Option, March 12, 2018 below by continuing with the same paragraph numbering as above.[4]

[4] Available at: http://policyoptions.irpp.org/magazines/march-2018/why-canadians-oppose-blacklisting-pirate-websites/

Why Canadians oppose blacklisting "pirate" websites

Public submissions to the CRTC suggest Canadians are worried that blocking certain websites for piracy could restrict access to legitimate information.

By Reza Rajabiun & Fenwick McKelvey
Published in Policy Options
March 12, 2018

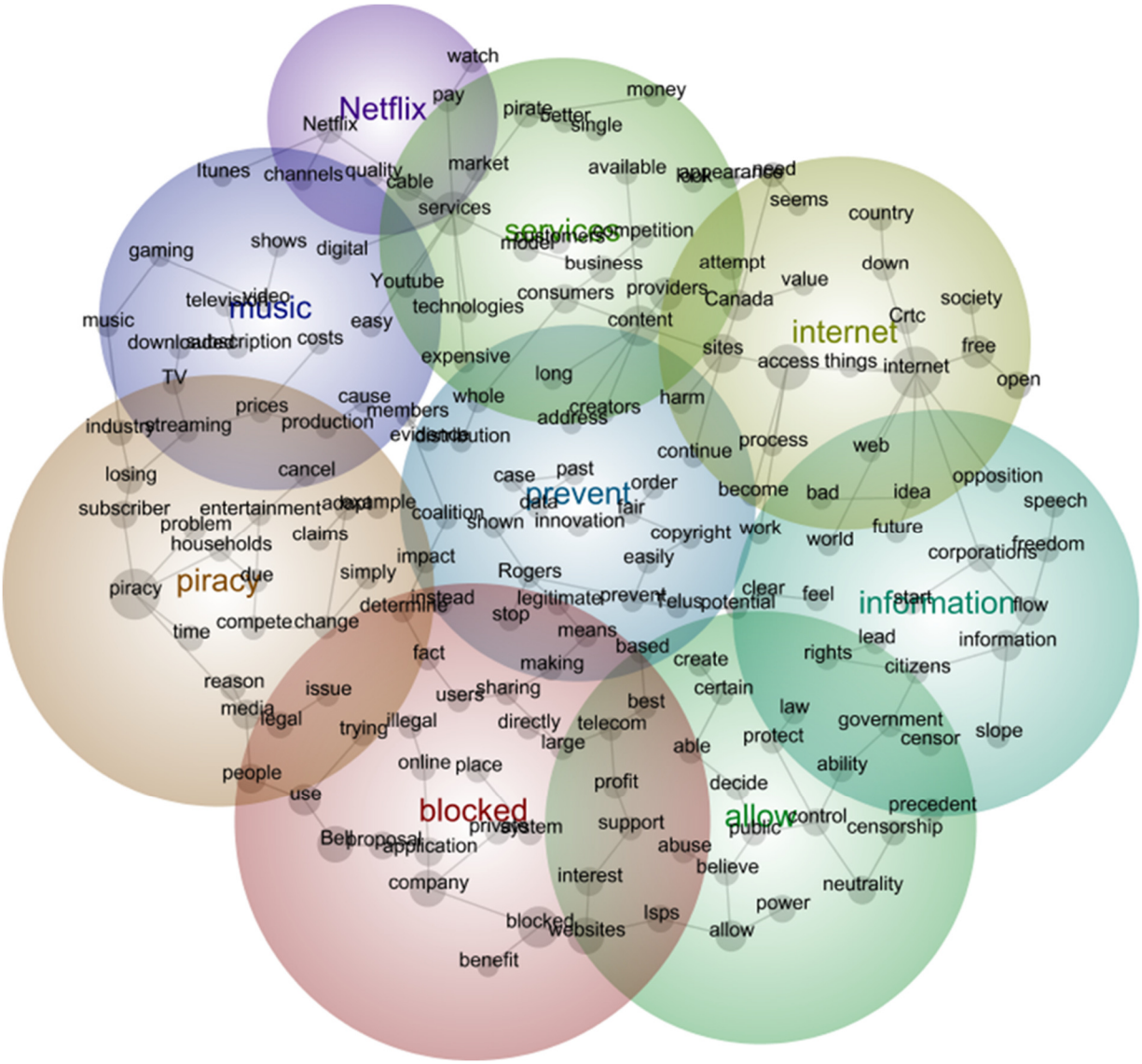
12. Canadians value their access to an open Internet – that view is on full display at a proceeding currently underway at the federal telecom and broadcasting regulator, the Canadian Radio-television and Telecommunications Commission (CRTC). At the end of January, the CRTC published a formal request by a coalition of telecom and media industry players calling itself FairPlay Canada to set up a private nonprofit corporation to be called the Internet Piracy Review Agency (IPRA). The stated objective and mandate of the IPRA, if adopted, will be to identify and block websites and other Internet resources "that are blatantly, overwhelmingly, or structurally engaged in piracy."

13. In the three days after the CRTC asked for public comment, nearly 4,000 individuals submitted their views about the proposal. As of writing, 7,762 Canadians have submitted their views. Why did a proposal aimed at curbing online piracy generate such a strong response? What are Canadians concerned about? We analyzed the first 4,000 public response to this industry proposal to better understand why the general public is so against it.

Canadians for an open Internet

14. While we don't want to speculate on the economic and strategic motivations of FairPlay, we think it is critical for policy-makers to appreciate the concerns of Canadians about the proposed extrajudicial blocking regime. Otherwise, we fear that the voice of a narrow coalition of industry interests, in the name of preventing piracy, will suppress legitimate concerns about the unintended consequences of adopting FairPlay's proposal. To this end, we have analyzed the content of those nearly 4,000 formal submissions to the CRTC. We used quantitative content analysis techniques that allowed us to map statistically significant concepts emphasized by respondents in

the text of their submissions, and to examine the relationship among these concepts. We present the results of the analysis with a visual depiction.



15. Moving from left to right in the diagram, concerns about “piracy” (in the beige bubble) that purportedly motivate FairPlay’s proposal are closely associated with “industry” “losing” “subscribers” due to “streaming.” The key “issue” people have with the proposal appears to be its potential to have a negative impact on access to “legal” “media” “people” want to “use” (at the intersection of the beige and red bubbles).

16. At the top of the visual depiction, Canadians appear to be reminding policy-makers that they are not pirates and that they already “pay” for digital music and video

content from legitimate sources such as “iTunes” and “Netflix.” In the middle of the diagram, a few concepts capture the rational fear of the potential for the proposed regime aimed at protecting “copyright” to actually “prevent” “innovation” by restricting access to “legitimate” material. In the concept clusters on the upper right side, respondents emphasize the “value” they place on their “access” to the “Internet,” and why they believe the proposal represents a threat to their desire to live in a “free” and “open” “society.”

17. According to their CRTC submissions, Canadians believe that the proposal is a “bad” “idea” because it enables “corporations” and the “government” to restrict “freedom” of “speech” and “flow” of “information” among “citizens.” The fear of setting a bad “precedent” is closely associated with the potential for “censorship” in the future. Overall, it is easy to see that Canadians tend to view the proposed blocking regime not just in terms of its benefits for fighting “piracy”; they also perceive that setting up a national blocking regime may be a threat to their economic interests as “consumers” of “legitimate” “media” and of their political “rights” as “citizens.”

18. While industry interests in the FairPlay coalition care about financial losses from alleged piracy (by less than 7 percent of households according to data submitted by FairPlay to the CRTC), the general public appears to have a more sophisticated long-term view of the problem that takes into account the risk that the proposed national blocking mechanism may have the unintended consequence of restricting access to lawful material.

Internet governance as a matter of access to information

19. Media coverage of FairPlay Canada has been quick to frame the issue as one of network neutrality, but our analysis of Canadians’ contributions shows that many oppose the proposed blocking regime because of its potential to end up limiting their access to lawful information from the global Internet.

20. The future of Internet policy will largely be about limits of control. Various technologies are already being used to restrict unlawful access to copyrighted material, without blocking legal content as can happen with blacklists. Emerging data and algorithmic network control systems promise to stop certain crimes, including piracy, before they happen by identifying pirate-like behaviour. The CRTC decision will impact Canadians’ access to the Internet by influencing choices by the telecommunications industry about which technologies they deploy to limit access to unlawful content.

21. Judging by their CRTC submissions, Canadians clearly understand the potential of FairPlay’s proposal to restrict their access to legitimate information and to prevent innovation. Lawful material may get caught up in IPRA’s blacklist, and it remains to be seen whether the industry and policy-makers recognize the risk of false-positive errors. Furthermore, it is not evident whether FairPlay’s blocking proposal would actually be effective in curbing piracy because tools to evade IPRA’s blocking regime

are easy to access. These include virtual private networks (VPNs) that have legitimate privacy and critical security-enhancing applications, which makes it difficult to restrict their use. As motivated pirates bypass IPRA's blockade, to achieve its objectives the organization will have strong economic incentives to extend the scope of its blacklist, increasing the likelihood of false positive errors without any compensating benefit in terms of reduced piracy rates.

22. If policy-makers want to adopt a policy that is in the "public interest," they should carefully weigh the risks that might result from creating an extrajudicial body that has the authority to control Canadians' access to the open Internet. Canada's CleanFeed program already blocks access to websites known to be trading in child pornography. The lack of public concern over CleanFeed suggests that Canadians are willing to accept some regulatory restrictions on the Internet. Should the same type of mechanisms be used to address copyright infringement? What is the threshold to warrant adoption of blocking mechanisms? Canadians seem to have given the CRTC clear answers to these questions.

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