



Broadcasting and Telecom Notice of Consultation CRTC 2011-344

*Fact-finding exercise on the over-the-top programming services
in the Canadian broadcasting system*

Joint Submission of ACTRA, APFTQ, CMPA, DGC and WGC

July 5, 2011

Introduction

1. This submission is on behalf of the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Association des producteurs de films et de télévision du Québec (the APFTQ), the Canadian Media Production Association (the CMPA), the Directors Guild of Canada (the DGC), and the Writers Guild of Canada (the WGC). Descriptions of our organizations can be found at the end of the document.
2. We are pleased that the Commission has initiated this fact-finding process as we believe much has changed even since the examination of New Media Broadcasting two years ago when the Commission concluded that the New Media Exemption Order remained an appropriate measure. As the Chair has said, "It's moving very fast and I don't want to have to deal with it when it's too late."¹
3. We have commissioned three companion reports for this fact-finding exercise that are included as appendices to this submission. The reports are *Trends in TV and Internet Use: The Impact of Internet TV on Canadian Programming* by Barry Kiefl ("the Kiefl Report")²; *Foreign Over the Top Services and the Creation, Acquisition and Exhibition of Canadian Content* by Paul Gratton ("the Gratton Report")³; and *Trends in Multichannel TV and Online Video in the United States* by Robert Tercek ("the Tercek Report")⁴.
4. Notwithstanding the attached expert reports, the minimal measurement data available creates significant challenges in responding to this fact-finding initiative with solid evidence. As consultant David Keeble recently wrote at Cartt.ca⁵, respondents in this current process "will have to go beyond "facts" ... let's hope the Commission is prepared to take their projections, their strategies, and their imminent challenges into consideration as they consider their next steps in adapting to the multi-platform world." Where possible, we have responded with facts, but in some instances we have had to make assumptions and speculate in order to best assess the possible impact of the OTT world on the Canadian broadcasting system.

General Comments with Respect to Over-the-top Services

5. We agree with the Commission's definition of "over-the-top" (OTT) services in paragraph 3 of the Notice of Consultation and its specific inclusion of both fixed and wireless technologies as delivery mechanisms. For greater clarity, though, we wish to emphasize that our interpretation of OTT services includes ANY form of online broadcasting that is currently subject to the New Media Exemption Order including, for example those services that are linked to a BDU service subscription (the so-called "TV Everywhere" offerings such as Rogers On Demand Online) or broadcaster-affiliated offerings such as video streamed on their websites or through mobile applications.

¹ COMMENTARY: Industry will have to go beyond "facts" to deal with over-the-top video, David Keeble, Cartt.ca, June 28, 2011.

² Appendix 1.

³ Appendix 2.

⁴ Appendix 3.

⁵ *Ibid*, above note 1.

6. What differentiates these operations from those within the traditional broadcasting system is the fact that, as a specific consequence of the New Media Exemption Order, they are not currently regulated by the CRTC. They therefore have no regulatory obligations to contribute toward realizing Canada's broadcasting policy objectives as established in the *Broadcasting Act* ("the Act").
7. We believe that OTT broadcasting is now firmly entrenched in Canada and will, if not today, certainly in the near future, have a significant impact on the existing ecosystem. We also believe that the growth of OTT services is inevitable and their impact will continue to increase over time.
8. We are pleased that the Commission is addressing both the current state and potential future impact OTT services will have on the broadcasting system. However, we have difficulty providing the Commission with specific statistics due to the lack of measurement data available today. Absent measurement capabilities, we risk failure in properly assessing the longer-term impact in time to adapt policy to ensure that the needs of Canadians and the objectives of the *Act* continue to be well addressed across all broadcasting platforms.
9. The need for measurement across all broadcasting platforms is critical but we have made little headway in attaining such capabilities. In the absence of such data, we are forced to rely on observation and a certain degree of speculation not just to see where we might be going but also to determine where we are today.
10. OTT services are offered by both domestic and foreign operators and we will demonstrate that these services have achieved significant penetration and now need to be considered "players" in the Canadian broadcasting system. Foreign services such as Netflix Canada and domestic "TV Everywhere" offerings have attained significant consumer uptake, as we will discuss later in this submission.
11. We encourage the Commission to ensure that all players within the system, regardless of whether they are foreign or domestic, contribute to the well-being of the system and to the realization of the goals of the *Act*. We believe the Commission has an obligation to Canadians to pursue this objective and also the jurisdiction to do so, as supported by Peter Grant in the accompanying paper entitled *Enforcement of CRTC Jurisdiction over Foreign OTT Services*.⁶
12. We also note, as we will discuss later, that Netflix has found a profitable business model for its Canadian operations and that the magnitude of its operation in Canada has made it a significant player not just in the OTT space but in the context of the entire broadcasting system. This represents a significant change from just two years ago when the Commission last examined and updated the New Media Exemption Order.
13. OTT services today are at once a complement to BDU services, a partial replacement for BDU services and a potential substitute for BDU services. When used as a partial or complete replacement for BDU services, though, this impacts BDU revenues. Any potential negative impact on BDU revenues will have a proportionally negative impact on the funding of the Canada Media Fund (CMF) and the independent production funds. Absent any contributions from OTT services, producers will have to make do with less funding causing a trickle-down effect that may negatively impact every aspect of the creative industries.

⁶ Appendix 4.

14. Traditional Canadian broadcasters, too, are at risk. In the long term, they could be at risk of disappearing from the value chain. If that happens, it could impact broadcaster revenues, in turn decreasing their Canadian Programming Expenditures.
15. OTT services are currently under no obligation to make Canadian programming available and, absent any requirement, this has the potential to negatively limit Canadians in their ability to choose Canadian content.
16. Netflix in particular has made significant inroads in Canada in a very short time. Netflix Canada is expected to add its one-millionth Canadian customer this summer.⁷ At \$7.99/month per subscriber, that translates to annual revenue from the *Canadian market alone* of almost \$100 million – without even factoring in additional subscriber growth.
17. As the Gratton Report notes, after only *one year*, the projected annual revenues of Netflix Canada are already approaching those of Canada’s two leading Pay TV services (TMN at \$136.5 million and Movie Central at \$107.8 million) and it has taken each of these services *30 years* to reach those levels.
18. The Gratton Report also notes that with almost 23 million subscribers in the U.S., Netflix has more subscribers than Showtime (at 18.2 million) and is approaching the combined numbers of HBO and Cinemax at 28.6 million.
19. We need to be mindful that the benefits of a Netflix Canada subscription are often enjoyed by multiple members of a household. Therefore, while Netflix Canada may be approaching one million *subscriptions* in Canada, the number of Canadians *users* of its paid service is likely much higher.
20. The Gratton Report notes that it is very difficult to measure the amount of Canadian content available on the Netflix Canada service due, among other things, to overlapping categories and the lack of a master content list. That said, the Report concludes that only 2.3% of the content that is available is Canadian content; in the specific category of dramatic television content, that number is still a mere 7% of titles. We therefore conclude Netflix Canada is not contributing to the Canadian broadcasting system in an appropriate manner and commensurate with the extent of its business operations in this country.
21. Netflix expects its Canadian operation to be profitable by the third quarter this year about a year after its September 22, 2010 launch.⁸
22. For perspective, we can also look at subscriber numbers. As noted in the Gratton Report, if we assume that Netflix Canada will indeed reach the one million subscriber mark in short order, that will give it a greater number of subscribers than Cogeco Cable (at 881,000) and the Shaw Direct satellite service (at 900,000).
23. Market capitalization (“market cap”) is the value of a company’s stock price multiplied by the number of shares outstanding and is therefore an indicator of the investing public’s assessment of a company’s worth. It is one factor that has a direct impact on a company’s ability to borrow

⁷ Netflix shareholder communication dated April 25, 2011 available at <http://files.shareholder.com/downloads/NFLX/1304488981x0x461760/11046ba9-7ea4-4b77-b1bd-a3035fc913d5/Q1%2011%20Letter%20to%20shareholders.pdf>.

⁸ *Ibid.*

money to finance expansion and growth and the terms on which it can borrow. Netflix's market cap is \$13.33B – about equal to that of Shaw Media, Corus Entertainment, Astral Media and TVA combined.⁹

24. With near-term annual revenues projected in the \$100 million dollar ballpark, close to a million subscribers, and near-term profitability, clearly Netflix has found a business model for online broadcasting in Canada that works.
25. We must be mindful that Netflix is by no means the only player out there. Indeed, even larger players are also active in this space. A quick look at the market capitalization¹⁰ of Apple (*iTunes, Apple TV*) at \$304.9B, Google (*YouTube, Google Video, Google TV*) at \$154.4B and Amazon (*Amazon Instant Video*) at \$89.1B gives an indication of the muscle that these other foreign-owned players can leverage in the OTT service space. All have profitable revenue streams and significant available cash stockpiles that could be used to fund their content ventures or subsidize their operations until they attain profitability. The cash stockpiles for these three players are \$29.23B, \$36.67B and \$6.88B respectively.¹¹
26. Hulu, a joint-venture created by Disney-ABC Television Group, Fox Entertainment and NBC-Universal, offers on-demand streaming of popular first-run television content. The Tercek Report notes that, in May 2011, "Hulu accounted for 28% of all online video advertising" in the U.S.
27. As Netflix has clearly demonstrated, the lack of barriers to entry to the Canadian market today make Canada a viable and, arguably, attractive expansion territory (especially given that comScore data shows that Canadians continue to lead the world in online video consumption).¹²
28. OTT services aren't just foreign-owned, either. In fact, domestic BDU-based "TV Everywhere" OTT services are showing impressive usage rates. As detailed in the June 2011, Lemay-Yates Associates Inc. *Over-The-Top (OTT) Service Trends in Canada* report, 46.5% of all respondents indicated that they use at least one OTT service. This includes Rogers on Demand Online, Videotron's *illico* Web service, TELUS TV online service, and Shaw Direct Online VOD. When expressed on a national basis, each of these services is used by the respondents in proportions close to or within the same range as Netflix Canada (although the survey did not differentiate between those who are paying Netflix Canada subscribers and those who are partaking of its one-month trial offer for new users).
29. BDU-based OTT services are of little value to non-subscribers as there is little free content of note available to the general public. Interpretation of the real uptake of these services is complicated by the fact that Bell, Shaw and TELUS (as a reseller of Bell's service) all offer satellite services that lack the geographic limitation that applies to cable operators *in addition to* operating services that operate over cable or telephone lines and do have geographic constraints associated with them. Therefore, in the analyses that follow, we have used Rogers On Demand Online as an example since Rogers does not offer DTH services and is purely a geographically constrained cable operator.

⁹ As observed June 27, 2011 at Yahoo! Finance: Netflix: \$13.33B; Shaw: \$9.05B; Corus: \$1.63B; Astral: \$2.07B; TVA: \$0.3B. All figures are in \$US.

¹⁰ *Ibid.*

¹¹ As observed June 28, 2011 at www.ycharts.com.

¹² As identified in [Online video surging in Canada](#), Globe and Mail, Michael Oliveira, April 28, 2011.

30. The foregoing statistics for BDU-based OTT services, and the comparison to Netflix Canada, require further examination as the effectiveness of these BDU offerings is in fact understated when only the raw percentages are considered. For example, 12.9% of all OTTS-using respondents nationwide report using Rogers On Demand Online service; however, when we consider that the service is really only of value to existing Rogers subscribers,¹³ and therefore its use is limited to subscribers within Rogers' service areas, we can infer that the uptake amongst the subset of OTT-using respondents who are Rogers subscribers would be much higher than 12.9%.
31. Therefore, while Rogers On Demand Online appears to slightly trail Netflix Canada in its adoption rate, we can infer that, within the areas it serves, Rogers' On Demand Online service has a substantially higher adoption rate. This is because Netflix Canada services the entire country while Rogers only operates in certain service areas; furthermore, the Netflix Canada number probably includes the temporary bump of trial subscribers who will not all convert to paying customers.
32. The same logic, applied to the other BDU "TV Everywhere" offerings, likely follows suit and indicates that these services are experiencing significant consumer adoption and are proving to be viable OTT alternatives and/or complements to Netflix Canada and other foreign or domestic unaffiliated OTT services.
33. RBC Capital Markets ("RBC") identifies 2017-2019 as a potential inflection period "[f]or OTT services to become a substitute for the current television system in Canada"¹⁴ and notes that "[a]s the OTT inflection period approaches, we believe higher programming costs due to increased OTT buying power will impact the margins of incumbent distributors and broadcasters."¹⁵
34. Based on the RBC analysis, it seems reasonable to conclude that, beginning as soon as early 2017, we could see OTT services beginning to achieve a substantial uptake not as a *complement* to existing BDU services but as a complete *replacement* for them, and also see a financial impact on BDUs and broadcasters even before then.
35. As consumers opt for non-contributory OTT services, we can conclude that a significant negative impact will occur on the Canadian content creation industries because of reduced funding for the CMF and independent production funds.
36. Further, we can surmise that the availability of Canadian content to Canadians could be detrimentally impacted as those who opt for OTT services may have less such content available to them.
37. As noted earlier, the Gratton Report found that Netflix Canada is currently offering only a minimal amount of Canadian content. Since all OTT services currently operate under the New Media Exemption Order, there's no reason to assume that the percentages would be any better on any other OTT services.

¹³ Rogers On Demand Online offers only very limited content to non-subscribers and we consider the impact of this to be negligible in affecting usage statistics.

¹⁴ RBC Media Spotlight – Pricing in a Potential OTT Inflection Period, April 25, 2011, RBC Capital Markets.

¹⁵ *Ibid.*

38. The Kiefl Report projects that:

If internet TV take-up and usage grows substantially in the next decade, virtually all Canadian program genres would lose audience, including sports...

Canadian news and information would suffer relatively little because Canadians would continue to want local and national Canadian TV news but Canadian drama series would lose about 35% of its audience, as would Canadian movies/MOWs.

39. The Gratton Report notes that even when Canadian content does make its way to Netflix Canada, the primary beneficiaries do not include members of the independent production community. The Report found, for example, that two producers of content that was part of a large CBC-Netflix Canada deal announced in December saw no money from the deal.
40. In its June 2009 review of broadcasting in new media (BRP CRTC 2009-329), the Commission noted “the growing importance to Canadians of broadcasting in new media and the challenges and opportunities in defining the appropriate business model to capitalize on this new platform.” Notably, the Commission emphasized that, “[t]o a significant degree, the Commission’s position is based on its conclusion that a successful commercial business model for broadcasting in new media has yet to emerge.”
41. As Netflix has clearly demonstrated, an “appropriate business model to capitalize on this new platform” now exists – and it is being best utilized by a foreign-owned entity. Therefore, a “significant” basis in the Commission’s determination to leave the New Media Exemption Order in place no longer exists.
42. A mere two years ago, no OTT service offered a viable alternative to BDU services. Since then, however, Netflix has launched in Canada. While no current data suggests that Netflix Canada has yet had a significant impact on BDU subscriptions, adoption by nearly one million households suggests that it is being used as, at the very least, a significant adjunct to consumers’ content diet and, in some cases, as a substitute for discretionary BDU services.
43. If we posit that consumer discretionary TV service spending is constant (or declining), and that the money that flows to OTT services is being diverted from BDU revenues, Netflix Canada’s projected Canadian revenues at close to \$100 million would mean that the same amount is not coming into the regulated system. Based on BDU contributions of 5%,¹⁶ that’s \$5 million that is no longer available for the funding of Canadian content.
44. Moreover, the foregoing assumes that a \$7.99 Netflix Canada subscription only displaces \$7.99 of BDU revenue. In fact, it is quite possible that, due to Netflix Canada’s low price, the reduction in BDU revenue that would result from a decrease in premium service subscriptions would actually be much higher, causing an even greater impact on the CMF and the independent production funds.
45. The reality is likely that in some cases, money spent on Netflix Canada represents incremental consumer spending and in other cases it does indeed divert revenue from BDUs. It is reasonable

¹⁶ Because local programming is not available via OTT services like Netflix we have not included the LPIF in this calculation.

to assume, though, that over time, the amount of money going to unaffiliated OTT services will continually increase while BDU revenues will decrease, causing a decline in funding for Canadian content.

46. In its 2009 New Media review, the Commission stated that it “is of the view that parties advocating repeal of the exemption orders did not establish that licensing undertakings in the new media environment would contribute in a material manner to the implementation of the broadcasting policy set out in the *Act*.”
47. **Based on the above, we believe that it is time for the Commission to hold a follow-up procedure to conduct an in-depth examination of the policy issues arising from the growth and impact of OTT services to ensure that OTT services, like other broadcasting undertakings operating in Canada, make a meaningful contribution to the well-being of the Canadian broadcasting system support the objectives outlined in the *Broadcasting Act*.**

Comments on the specific areas of interest raised by the Commission

The capabilities of measurement and analytical tools to enable a better understanding of OTT programming trends over time

48. Over a year ago, the Commission issued BNC CRTC 2010-97 *Call for comments on the reporting requirements for new media broadcasting undertakings*. However, since that time, no new measurement data have become available, making it difficult to fully assess the impact that OTT services are having on the industry.
49. Further, not only can we not properly assess the current state and impact of OTT services, we are poorly positioned to track trends in this space in any manner. Absent such an ability, we fear the Commission will be unable to develop proactive policy to ensure Canadians continue to have Canadian programming choices available to them.
50. The Commission must take renewed action toward ensuring that accurate and meaningful data is captured across the *entire* broadcasting system for all platforms – traditional and emerging.
51. With measurement of OTT services, it will be possible to observe overall trends and total consumption patterns for all forms of broadcasting in Canada; without it, however, we will be unable to quantify the impact and extent of new media broadcasting and identify whether it is additive to, or cannibalistic of, traditional broadcasting. Further, we believe it is important to be able to identify which types of new media broadcasting are having the greatest impact.
52. Of course measurement of activity by OTT services is important in order to understand the impact that these activities are having on traditional broadcasting content and distribution methods. However, it is also important to measure the degree to which new opportunities afforded by the new media environment are being realized. Only with meaningful data can sound industrial, economic and regulatory policy be developed and the effects of such policies monitored.
53. While the nature of OTT service technologies allows for extremely detailed measurement and analysis of consumer content consumption, and doubtless online broadcasters make extensive use of this information, the data collected would be closely guarded and is likely to remain so in the absence of any mandatory and enforceable regulatory disclosure requirement.

54. For those OTT services that are ad supported, there is a better chance that some disclosure would be made in order to appeal to advertisers and command higher advertising rates. However, for subscription services such as Netflix, there's no incentive (other than bragging rights and to influence investors) to disclose any information.
55. Indeed, as quoted in the *Globe and Mail*,¹⁷ comScore spokesman Andres Palmiter said, "Netflix does a lot to obfuscate what they do online for audience measurement companies like comScore, they don't want to be reported publicly in terms of audience sizes and number of streams."
56. As an example of the ineffectiveness of available data, we note the comScore statistic identified in the Kiefl Report that says that the Netflix Canada website had over 5 million unique visitors from Canada in May 2011. On the surface, that's a pretty impressive number. But what does it really tell us when we attempt to deconstruct it to derive real meaning? We can't actually tell how many of these 5 million visitors *actually consumed content* versus those that were just seeking information. We know from Netflix's own statements that it has almost one million paying subscribers so this could be an indication of a large number of people taking advantage of the free trial offer. It could also mean that a lot of individual users share a household subscription. Further, comScore *only* measures site visits from PCs and laptops, and a lot of streaming occurs from devices *other* than PCs and laptops.¹⁸ In the final analysis, we can only conclude that Canadians *clearly have a lot of interest in Netflix* but we can't draw any other meaningful conclusions, underscoring the need for better data.
57. Concerning Netflix consumption, the Tercek Report notes: "According to Internet research firm Sandvine, Netflix streaming video now accounts for more than 20% of total network capacity during peak hours. Sandvine also reports that by March 2011, Netflix had attained 28% penetration into the U.S. market and 11% in Canada." Tercek also concludes, based on the Sandvine report, that, "[f]or the first time, paid content consumption is outpacing free content online."
58. While it is of use to know how much bandwidth is being consumed by Netflix, it only reveals the tiniest piece of the puzzle to understand what's happening. Consumption data alone is obviously not enough to fully assess the impact of OTT services. We also need easy access to data that quantifies the amount of Canadian content that is available on each service and what percentage that represents of the service's total content.
59. The Kiefl Report quotes leading content measurement firm comScore as stating: "It is important that the TV industry, along with the Commission and the ratings companies work together to find a solution to what will eventually become a major measurement problem. In the U.S. Arbitron and comScore are working on an integrated system that captures regular TV viewing, mobile and internet TV. This has been organized by the Coalition for Innovative Measurement. Nielsen in the U.S. is also working on the multi-screen measurement issue."
60. Clearly, we need to initiate similar holistic cross-platform measurement techniques in Canada, and we call on the Commission to spearhead this.

¹⁷ *Ibid*, above note 12.

¹⁸ The Tercek Report, for example, notes that, in the United States, the "[Microsoft] Xbox is the second-most popular viewing platform for Netflix, after the Sony Playstation 3".

Technological trends in consumer devices and network capabilities that will influence the development of OTT programming

61. The growth in the number of ways in which consumers can access OTT services in recent years has been significant as is the growth in the number of OTT-capable devices owned by Canadians. A wide range of in-home devices can now be used by consumers to access OTT services. These include independent devices that are self-contained such as computers, smartphones and tablets. These also include “gateway” (or “sidecar”) set-top boxes that attach to existing TVs specifically to receive and display audio-visual content (for example, Boxee and Apple TV). Beyond these, there are devices that have a specific primary purpose unrelated to receiving TV content but that are capable of doing so (examples included current-generation gaming consoles and newer Blu-ray players). Finally, newer TV sets often have built-in OTT service connectivity.
62. Beyond the in-home devices, smartphones, tablets and laptop computers provide access to OTT content for consumers on the go.
63. All of these various types of devices allow for easy access to OTT service such as YouTube, Google TV, iTunes, Amazon Instant Video and Netflix.
64. According to Lemay-Yates Associates Inc.’s *Over-The-Top (OTT) Service Trends in Canada* report, “43.5% of all respondents over 18 years old – which would represent 55% of households with Internet access – across Canada identified using at least one OTT-capable device in their household” – excluding mobile devices but including “Apple TV, iPads with WiFi [only], Blackberry Playbooks, game consoles, and connected devices such as Blu-Ray players and televisions.” Note that if desktop and laptop computers were included the number would be much higher, encompassing all residential high-speed Internet users.
65. Lemay-Yates found that, on average, their survey respondents who have OTT-capable devices reported owning 1.7 such devices (excluding computers).
66. Specific applications (apps) have been developed for mobile platforms and we are beginning to see app development that targets specific in-home entertainment platforms as well.
67. These mobile broadcasting apps exist for foreign services including YouTube, iTunes and Netflix but we also see an increasing number of mobile broadcasting apps from domestic players (for example, CBC, City TV and others have iPad apps for streaming content). Mobile carriers also offer broadcasting services.
68. Lemay-Yates examined buyer intentions and concluded that more than 3 million additional OTT-capable devices (mostly smartphones and tablets) will be sold in Canada before the end of 2011, (including more than 1 million tablet computers). While smartphones, with their smaller screens, don’t deliver the most compelling viewing experience, tablets, with their larger screens, offer a quite satisfactory viewing experience.
69. Clearly, devices capable of accessing OTT services are becoming increasingly ubiquitous today and this will doubtless contribute to the increasing adoption of OTT services and the increasing use of such services across many touch-points in the home and beyond.

70. The costs associated with acquiring a single-purpose set-top box from a BDU for digital cable, telco-TV or satellite service, combined with charges for extra cable outlets or possible satellite dish upgrades to support an additional set-top box, can present a significant barrier to an increased BDU service touch-points in the home. In contrast, given the plethora of OTT-capable devices entering the home, the incremental cost associated with an extended presence of OTT services in an OTT subscribing home is usually minimal (although an upgrade to the consumer's high-speed Internet speed and/or bandwidth cap might be required).
71. The future of ISP consumption caps is unknown, but there are cap-less alternatives that can eliminate that potential barrier / cost element, leading to even higher adoption rates.
72. OTT services can also offer a richer consumer experience by allowing a seamless viewing transition from one device to another. Integrated communications companies that offer BDU and mobile services could evolve to offer a similar seamless experience. The existing BDU models are built on a closed network that uses proprietary conditional access devices. The model that has served them so well in the past may now become a liability that hinders their ability to adapt as the vast installed base of existing set-top boxes likely can't be upgraded to do this. So even were these companies to adopt such an approach, it would take a long time for many to do so as the refresh cycle for BDU set-top boxes can be very long, and further market penetration by more agile offerings would likely occur during that time.
73. OTT-capable devices can provide highly co-ordinated second screen experiences and enhanced social experiences even in time-shifting situations (which is most applicable to dramatic content but also applies to any other type of content).
74. While concurrent viewing of OTT services within the home today does face practical limitations due to bandwidth constraints, faster networks will become available that will eliminate this barrier.

The impact that OTT services might have on the acquisition and exhibition of programming available to Canadians

75. Continuing regulation of Canadian programming within the regulated system will ensure that Canadian content will remain available to Canadians. However, as long as OTT services remain subject to the New Media Exemption Order, we have no confidence that an appropriate level of Canadian content will be available to Canadians on OTT platforms.
76. As previously mentioned, The Gratton Report calculates that only 2.3% of all content that is available is on Netflix Canada is Canadian content; in the specific category of dramatic television content, that number is still a mere 7% of titles. Netflix is not doing enough to acquire and make available Canadian content to Canadians.
77. The Kiefl Report notes:

If Netflix, Apple TV and other OTT services were to operate in Canada with little or no Canadian content or regulations to ensure Cancon expenditure and scheduling, CMRI estimates that over the next ten years the audience share of Canadian programming would decline from its current level of about 33% to just under 27%, a decline of some 6 share points. To put that in context, it would mean that Canadians would be spending about 2 billion fewer hours annually

watching Canadian content and instead would be spending that time with foreign, mostly U.S. programs (and U.S. content providers).

Canadian movies/MOWs would be severely affected by foreign OTT services. Canadian movies/MOWs currently account for about 1.2% of the total English TV audience but, given their premium status, a disproportionate share of this audience is currently delivered by The Movie Network/Movie Central (e.g., 18.2% in 2010). These premium movie services are the first Canadian channels that would likely be negatively affected by OTT services, which rely heavily on movie offerings, mostly from Hollywood.

Canadian drama series would also be severely affected by foreign OTT services. Canadian drama series currently account for about a 2% share of the English TV audience but this genre too would lose about a third of its audience in an unfettered OTT environment. Currently Canadian specialty channels, which schedule multiple airings of old and current Canadian drama and account for over 50% of the audience to Canadian drama series, would also be the first to be 'shaved' by cable/DTH subscribers. In an unregulated environment foreign OTT services would be unlikely to give Canadian drama the same prominence and audiences would fall substantially.

78. An OTT player could outbid regulated Canadian players for Canadian exhibition rights to popular foreign programming. These rights might be limited to OTT distribution, or only as a primary window, *but it's not unimaginable that in time this could extend to all exhibition rights within the Canadian market, precluding distribution of some content through traditional broadcasting methods.*
79. Netflix is already successfully flexing its muscle. In March, Netflix signed a five-year deal with Paramount for the exclusive subscription television rights for all first-run films.¹⁹ Netflix has also obtained exclusive rights to the new David Fincher series *House of Cards*, reportedly outbidding American broadcast heavyweights HBO and AMC.²⁰ We are, therefore, now seeing content deals that mean that Canadians wishing to see some Hollywood content can *only* do so through foreign-owned OTT services.
80. As noted previously, the market cap for Netflix, at \$13.3B, is now in the range that is considered "large cap" (\$10B - \$200B) and its valuation has grown 200% in the past year.
81. Netflix will require significant financial resources to negotiate the critical licensing agreements that need to be in place before it launches in any additional markets. Based on its quarterly financial statements for the period ending March 31, 2011, Netflix is essentially debt-free as cash and cash equivalents plus short-term investments far exceed long-term debt. This, and Netflix's \$13.3 B market cap, therefore put it in a position to borrow significantly to finance growth both in existing markets (Canada and the U.S.) and abroad if it chooses to do so.

¹⁹ *Netflix adds hundreds of Paramount titles to Canadian inventory*, Cartt.ca, March 30, 2011.

²⁰ Source: <http://www.deadline.com/2011/03/netflix-to-enter-original-programming-with-mega-deal-for-david-fincher-kevin-spacey-drama-series-house-of-cards/>.

82. Interestingly, though, as noted in the Tercek Report, while a deal in 2008 between Starz and Netflix for access to Starz' approximately 2500-title catalogue for an estimated \$25-30 million dollar annual fee was likely instrumental in getting Netflix's streaming service off the ground, that deal is about to expire and "industry watchers expect the renewal price to be as much as ten times higher."
83. As the Tercek Report notes: "The entry of Amazon into the online broadcasting market has cheered some movie studios because it creates a competitive bidding environment that will help them negotiate higher licensing fees from Netflix." This OTT versus OTT competition for rights, combined with the competition between OTT services and traditional media, can only serve to drive content acquisition prices higher.
84. The Gratton report notes: "The arrival of unregulated foreign OTT services in Canada becomes a direct threat to the system that we have so successfully built up here when they start using deep financial resources to purchase exhibition rights to product that would otherwise be sold to broadcasters within our territory, and to use these purchases to compete with Canadian broadcasters directly: in other words, when OTT services become 'players' in the Canadian broadcasting system, as Netflix Canada has clearly become in a very short period."
85. It seems reasonable that penetration in the Canadian and U.S. markets will continue at a reasonable pace even without significant investment as more and more consumers acquire Netflix-capable devices. Netflix could, however, accelerate this growth significantly by investing more aggressively in first-run content, exclusive rights, and the commissioning of original content. There's little doubt that, currently, it would be able to leverage both its dominant market position and its position of strong market capitalization to finance such ventures.
86. Whether simply through buying power, or through the breakdown of controlled markets, it seems inevitable therefore that Netflix and other OTT services will only have greater access to the most sought-after content in the future.
87. Further, OTT services represent one of the few ways to reach consumers that have cut the cord with premium content in an effective (and monetized) manner.
88. While Netflix has built its existing streaming business on a flat-rate all-you-can-eat model, it is reasonable to predict that it might, in the future, consider offering premium tiers that provide access to additional (possibly exclusive) content or a la carte content offerings. Today Netflix is arguably a sleeping giant that could awaken and wreak havoc.
89. Low barriers to entry and no need to negotiate for carriage, coupled with low up-front capital expenditure requirements, mean that it is likely that we will see more entrants in this space competing for content and likely greater market fragmentation. For example, Zip.ca, a Canadian service that is analogous to Netflix's DVD-by-mail subscription service, has said on more than one occasion that it will enter the streaming video market, most recently with an announcement that it will stream to select Samsung devices.

Trends in consumer behaviour, including the current and projected consumption of programming in the next five years, including Canadian and non-Canadian programming

90. We believe that as user-friendly OTT-capable devices become ubiquitous and content selection much broader, an increased and substantial uptake of OTT services is inevitable. For the most

part, the shift will likely be a gradual one as consumers mix OTT services with existing services in the short term. As previously mentioned, RBC has identified 2017-2019 as the period during which OTT services will become viable competitors to BDUs as a complete substitution option. However, we can expect to see rapid growth in OTT services leading up to the inflection period.

91. Consumer adoption of OTT services will be driven in large part by the ease of adoption and the perceived value proposition. As access to OTT services is becoming ubiquitous and going beyond the early-adopter realm, more and more consumers will at least dabble with such services.
92. In the past, a significant barrier to adoption of OTT services has been the technical complexity of accessing OTT services from the TV set. That's changing quickly. As previously discussed, a plethora of easy-to-install and user-friendly add-on "gateway devices" is now available that ease the process of introducing the "connected TV" into the home. The cost of such devices is falling and they are now well within the means of most Canadians. Beyond that, though, we are now seeing TV sets reach the market with built-in OTT reception capabilities. While these will be slow to gain significant penetration (there's a refresh cycle for TVs), we must not overlook the huge number of OTT-capable game consoles that exist in Canadian homes. According to an Entertainment Software Association of Canada report entitled *2010 Essential Facts About the Canadian Computer and Video Game Industry*²¹, "47% of Canadian households have at least one video game console such as an Xbox 360, Wii or PlayStation" and, according to the Lemay-Yates report, 51% of respondents aged 18+ who have a least one OTT-capable device (excluding computers and smartphones) has a game console.
93. As the Kiefl Report notes, TV viewership by those 18 and over in Canada has remained relatively stable over the past 9 years but time spent online has doubled between 2004 and 2010, eclipsing the time spent listening to the radio for the first time in 2010. While the average of 18.9 hours spent watching TV still exceeds the 11.3 hours spent online, the gap narrows every year.
94. The Kiefl Report also found that 15.7% of English-speaking viewers were heavy viewers of TV on the Internet (five or more hours per month) while a further 15.1% spent between one and five hours a month watching TV on the Internet, for a total of 30.8% of respondents. French-speaking viewers were even more apt to watch TV online, with 31.1% falling into the heavy use category and a further 13.3% watching at least an hour per month, for a total of 44.4%.
95. Significantly, while the average time spent on the Internet, as noted previously, is only 11.3 hours per week, among heavy viewers of TV on the Internet, that number jumps to 23.0 hours and, for them, watching TV takes a backseat at only 16.6 hours. Interestingly, for light online viewers, while there is a smaller increase in the amount of time spent online (12.5 hours), a similar reduction (to 16.9 hours) is noted in time spent watching TV.
96. Not surprisingly, the Kiefl Report shows that there is a demonstrable correlation between age and online TV consumption with 47.7% of heavy users are 18-34 years olds²² and a further 56.9% in the same age group are light users. For the 35-54 age range, the figures were 43.1% for heavy usage and 26.8% for light usage. Males are somewhat more likely to be heavy users (54% versus

²¹ The report is available at http://www.theesa.ca/documents/essential_facts_2010.pdf.

²² The Kiefl Report only covers English-speaking online TV viewers aged 18+ in the remaining analyses.

46% for females) although the divide for light users is almost equal (with a slightly greater number of females being light users).

97. Data from comScore show that Canada continues to lead the world in online video consumption: “In fact, Canada’s already world-leading viewership numbers surged by another 37% in the last six months, from Sept. 2010 to March 2011, according to the latest numbers from comScore.”²³

98. From the Tercek Report:

As AllThingsD’s Peter Kafka reports: “New research from Nielsen shows that the more Web video you watch, the less time you spend on traditional television. And that effect gets more pronounced if you look at 18 to 34 year olds, the generation that’s grown up with YouTube, iTunes, Netflix, etc.”

99. OTT creates a paradigm shift in which control is transferred from those who program content to those who consume content, or as described in the Tercek Report, a shift in “the value control point from distribution to consumption.”

100. Moreover, this new-found control lies not just with the individual. Collective curation and recommendations, especially across social media, have the power to influence consumption. The Tercek Report supports this: “In June 2011, startup company Redux announced the development of a new user interface for Google TV that utilizes human curation and social networking to aid browsing and discovery of content on Google TV.”

The possibility that, in the near term, OTT services may cause replacement or reductions in BDU subscriptions

101. Again, we believe that ubiquitous user-friendly OTT-capable devices and greater content selection will continue to support the uptake of OTT services in the short term, with a gradual shift as consumers supplement existing services with OTT services. Some consumers are no doubt already using OTT services as a complete substitution for BDU services, although that number remains small at the moment.

102. The Lemay-Yates Associates report found that, overall, 6.6% of their survey respondents aged 18 and over “were “seriously considering” disconnecting cable television services in order to watch TV and movies either on-line or on a wireless connected device.” The figures were higher in the major centres of Toronto, Montreal, Quebec City and Vancouver. The same report also found that 12.3% of Canadians aged 18 and over were considering using Netflix or Apple TV (specifically these two services) to reduce their cable bill. Notably, as many French-speaking respondents indicated the specific intent to use Netflix to reduce their cable bill as English-speaking respondents.

103. For most consumers, today, OTT services alone are not likely a part-and-parcel substitution for BDU subscriptions due to limited content catalogues in the genres they tend to address (TV shows and movies) and the limited content genres themselves (for example, services like Netflix offer no news or sports programming). Based on the Lemay-Yates statistics showing a higher

²³ *Ibid*, above note 12.

rate for those who intend to reduce their BDU subscription costs versus those who plan to cancel their subscriptions, the impact on BDUs in the near term will likely be manifested more often as a reduction of discretionary pay and specialty services (the so-called “cord shaving” effect) and less frequently as the more drastic complete BDU subscription cancellation (“cord cutting”).

104. As the Tercek Report notes: “At this stage, the nascent online video services seem to be *additive*, not a substitute or replacement for BDU services. However, that could change swiftly, especially if subscription prices continue to rise, and if the quality and reliability of online alternatives continue to improve.”
105. Further, says Tercek: “It seems inevitable to all but a few die-hard TV veterans that eventually a significant percentage of BDU subscribers will ‘cut the cord’ or at least ‘shave’ their subscription package as they substitute online video for traditional BDU services.”
106. Tercek says: “Netflix will likely continue to build a content mix that has some variation of deep long-tail content, newer popular hits and exclusive access to original programming. That last piece is vital, and will be the key to Netflix being able to control its own destiny, rather than relying on others for scripted programming. It will also help set it apart from other me-too streaming services that might appear.”
107. As previously noted, RBC projects that OTT services will become a direct competitor to BDU services this decade. Implicit in such a conclusion is the likelihood that the content catalogues of OTT services, and the range of services themselves, will become much more extensive and that content not widely offered today (e.g. ethnic programming, specialty content, news and sports) will be available.
108. In the interim, though, the combination of digital over-the-air (OTA) services and OTT services could be a compelling and inexpensive alternative for those consumers in well-served digital OTA areas and these two in tandem (OTA and OTT services) could provide a satisfactory content selection.
109. In the past, one of the barriers to adoption of OTT services as a substitute for BDU offerings has been the technological complexity of accessing Netflix on the TV set since, for many, it required connecting a computer to the TV set. As discussed earlier, though, a vast range of OTT-capable devices are entering consumers’ homes that significantly reduce the complexity involved in accessing OTT services on a TV set. In the near term, with a reported 3 million additional OTT-capable devices being sold in Canada before the end of this year, it is not unreasonable to assume that OTT services will achieve greater penetration in short order and that this may have a negative effect on BDUs.
110. Exclusive licensing is a consideration, too. As noted in the Gratton Report, Netflix Canada has acquired full Canadian linear rights to Paramount Pictures content, thus, “essentially taking them out of the market for Canadian broadcasters.” The attractiveness of a BDU’s content offerings may be diminished when they cannot deliver appealing content. This isn’t a short-term *possibility* – it’s *happening now*.

The impact of the growth of OTT services on consumers

111. The growth of OTT services have undeniably made more content available to consumers in more ways and on more devices. Consumers have greater choice than ever but in some cases the choices available are disproportionately foreign and Canadians are being denied the option to choose Canadian content.
112. From the Gratton Report: “Another analysis we attempted was to track approximately 50 Canadian-produced MOWs (movies of the week) produced between 2009 and 2011 and all presently available on Netflix USA. None were available on Netflix Canada. The most recent Canadian MOWs on Netflix Canada go back to the year 2008. Yet newly released non-Canadian MOWs were frequently available on both Netflix Canada and Netflix USA.”
113. Should OTT services outbid regulated Canadian broadcasters for exclusive rights to popular programming, this could cause content fragmentation wherein consumers must subscribe to both BDU services and one or more OTT services in order to obtain all of the content they desire.
114. Netflix’s pricing could put direct price pressure on BDUs in their efforts to counter the cord shaving / cord cutting potential. This would have obvious beneficial consumer impact – but would also negatively impact funding for Canadian content.

The opportunities and challenges for the Canadian creative industries associated with OTT services

115. OTT services create both new opportunities and new challenges for the creative industries.
116. OTT services should represent new potential buyers for Canadian content and provide much easier access to foreign markets as an alternative to negotiating to find a broadcaster to carry the content on a country-by-country basis. However, the Gratton Report points out that Canadian producers have had little success with this.
117. OTT can also be used by content owners as a direct-to-consumer delivery channel – something previously impossible to achieve.
118. For broadcasters, OTT provides an additional way to reach consumers who aren’t BDU customers.
119. Broadcasters can also reach consumers by way of OTT technologies even if the consumers’ BDUs do not carry the broadcaster’s service.
120. From the Gratton Report: “According to *Profile 2010* (an annual snapshot of the production industry jointly financed by the CMPA, the APFTQ and the Department of Canadian Heritage), the volume of Canadian production was just under \$2.3 billion in 2009-10. Canadian production generated GDP of \$3.1 billion and employed 54,700 FTEs in 2009-10. The export value of Canadian productions in 2009-10 was \$214 million.” The Report goes on to note that the arrival of foreign OTT services is a direct threat to the system.
121. The plethora of OTT services and the increasingly overwhelming amount of content available to consumers makes it harder for Canadian content to find an audience. OTT services currently have no obligation to promote Canadian content or provide “shelf space”. Consumption of

content is more closely correlated to its discoverability (prominence and promotion) than to its availability.

122. In many cases, content owners have surrendered exclusive digital rights to the broadcasters. In cases where they haven't, and retain those rights, realizing significant opportunities with large OTT services will still be a challenge for small, independent producers. They will still often need to team up with a broadcaster or some other form of content aggregator in order to get the attention of the OTT services.
123. According to the Gratton Report, Bell Media, Rogers, Corus and Shaw Media have not licensed any content to Netflix so producers are unlikely at this time to benefit from any broadcaster assistance in landing a deal.
124. Even when Canadian content is being licensed by an OTT service, as in the case of the CBC's deal with Netflix, the Gratton Report indicates that money is not flowing back into the hands of the producers. Thus, at this point, such deals are beneficial to the broadcasters' bottom lines but don't do anything to help producers.
125. As previously discussed, it can be anticipated that OTT services will have an inevitable negative impact on BDU revenues through cord shaving, cord cutting and downward price pressure and this, of course, will adversely affect the monies provided to the CMF and the independent production funds, directly impacting the ability to finance domestic TV and innovative interactive content.

Any additional issues or evidence relevant to the contribution of OTT programming services to the achievement of the policy objectives of the *Broadcasting Act*.

126. Our broadcasting policies have been developed to ensure that the Canadian broadcasting industry remains viable in the face of competition from foreign content and foreign-owned entities – and that Canadians have the ability to choose to watch Canadian content.
127. We have long had a list of “eligible satellite services”. One of the criteria for addition to the list is that the proposed service must pass a competitiveness test to ensure that the undertaking won't cause undue harm to a similar existing Canadian service. Eligible satellite services also require “an undertaking from the service provider that it does not hold, will not obtain, nor will it exercise, preferential or exclusive programming rights in relation to the distribution of its programming in Canada.”
128. OTT services by-pass these requirements and undermine their effectiveness, with a potential detrimental impact on licensed players and, also, consequentially, a resultant material impact on content funding.
129. For domestic broadcasters, policy has always been geared to ensuring that Canadians have access to Canadian content and a reasonable opportunity to choose Canadian programming options. Since Canadian broadcasters offer their own OTT services, we believe that it is important that this policy be extended to include these OTT services too.
130. Further, we believe that unaffiliated domestic and foreign OTT services should be guided by similar policies to ensure that Canadians have the opportunity to choose to watch Canadian content regardless of the source or the viewing platform.

131. In conclusion, a successful business model for OTT broadcasting, something that was elusive just two years ago, has now been demonstrated by Netflix. Netflix and other OTT services are now clearly players in the Canadian broadcasting system, and it is a critical time for re-examination of the Commission's policies with respect to over-the-top broadcasting.
132. The growth of OTT services in no way justifies any reductions to the contributions which licensed Canadian broadcasters currently make to support Canadian programming; instead, it is now time for the Commission to ensure that these new OTT players in the system also contribute in an appropriate manner to the creation and presentation of Canadian programming, as required by the Act. We look forward to participating in a follow-up proceeding to this fact-finding exercise in order to pursue that Canadian broadcasting policy objective.

The Respondents

ACTRA (Alliance of Canadian Cinema, Television and Radio Artists) represents 22,000 professional performers working in the English-language recorded media. For more than 67 years ACTRA has represented the performers living and working in every corner of Canada who are pivotal to bringing Canadian stories to life in film, television, sound recordings, radio and digital media. The ACTRA Performers' Rights Society (PRS) secures and disburses use fees, royalties, residuals and other forms of performers' compensation. In 1997, ACTRA created the ACTRA Recording Artists' Collecting Society (RACS) to administer the royalty and private copying levy due to performers in sound recordings. ACTRA also speaks on behalf of the Canadian Federation of Musicians, the foremost organization of professional Canadian musicians.

The **Association des producteurs de films et de télévision du Québec** (APFTQ) represents the vast majority of independent film and television production companies in Quebec, acting on behalf of its members with government and industry organizations and encouraging close cooperation among all stakeholders.

The **Canadian Media Production Association** (the CMPA) represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. The CMPA's 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

The **Directors Guild of Canada** (the DGC) is a national labour organization that represents key creative and logistical personnel in the film, television and digital media industries. Its membership includes over 3,800 individuals drawn from 47 different occupational categories covering all areas of direction; production; editing; and design of film, television and digital media production in Canada.

The **Writers Guild of Canada** (the WGC) is the national association representing over 2000 professional screenwriters working in English-language film, television, radio and digital media production in Canada. The WGC advocates for policies that benefit its member screenwriters and foster the Canadian cultural industries as a whole. In particular, the WGC is actively involved in advocating for a strong and vibrant Canadian broadcasting system containing high quality Canadian programming.

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