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FILED ELECTRONICALLY

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Les Terrasses de la Chaudière
Central Building
1 Promenade du Portage
Hull, Québec J8X 4B1

Dear Mr. Morin:

Re: Public Notice CRTC 2008-44 - Call for comments on the scope of a future proceeding on Canadian broadcasting in new media

Introduction

1. These comments are filed by the Writers Guild of Canada (WGC) in connection with the above-noted Public Notice calling for comments on the scope of a future proceeding on Canadian broadcasting in new media. The WGC is the national association representing more than 1,800 screenwriters working in English-language film, television, radio and digital production in Canada.
2. WGC members are the creators of Canadian stories including feature films like *Passchendaele*, indigenous dramatic series such as *Flashpoint* and *Robson Arms*, and children's programming such as the *Degrassi* series. The WGC is committed to building a vibrant broadcasting and film industry showcasing Canadian talent.
3. The *Broadcasting Act* exists in part to ensure the continued health of the Canadian audio-visual industry. New media is a key element of this environment. The WGC is committed to building an industry that showcases the talents of the Canadian English-language creative community on all platforms. Over the last

several years, the WGC has been working actively in support of a broadcast regulatory framework that encourages the production and exhibition of Canadian programming.

4. Therefore, the WGC is keenly interested in the Commission's call for comments on the scope of a future proceeding on Canadian broadcasting in new media and its potential impact on the Canadian broadcasting landscape. As we will explain in our comments below, this proceeding provides a key opportunity for the Commission to take steps to ensure that the development, creation and distribution of Canadian new media content will not get lost in the shuffle.

The importance of new media

5. Screenwriters create content over a myriad of broadcast platforms and in a variety of formats, including podcasts and audio-streaming, online video content, mobile content, and interactive programming and gaming. New media business models are evolving on a continual basis and creators, aggregators and content providers are increasingly distributing old and new content directly to Canadians on a myriad of new platforms. An example is the CBC dramatic series *The Border*. Episodes of the series can be downloaded from iTunes. In addition, users can also participate in an interactive experience involving the series where the audience, acting as a new recruit, plays along with the show characters through interaction with video. As new media continues to develop, screenwriters will be at the forefront, being the creators of the content showcased by these new and innovative distribution platforms. Screenwriters no longer think only of the television program but develop a broad spectrum of entertainment experiences for an audience.
6. WGC's focus in these comments is to provide input in response to the Commission's request on the questions and issues to be explored in the future new media broadcasting proceeding. The importance of asking the right questions cannot be overstated if the Commission is to effectively address its overarching question as stated in the Public Notice:

Fundamentally, it is necessary to determine if the new media broadcasting environment is contributing sufficiently to the achievement of the broadcasting policy objectives of the Act and if it will continue to do so. If new measures are required, the Commission is seeking ways to support Canadian digital content with tools that embrace the innovation and creativity of the new landscape.

7. WGC commends the Commission on the foregoing approach. Under its statutory duty under the *Broadcasting Act*, the Commission has imposed various measures on licensed programming and distributing undertakings, ranging from Canadian exhibition and expenditure requirements on traditional broadcasters, as well as requirements for distribution undertakings to contribute financially to the production of Canadian programming. The Commission explained that this was done in recognition of “the fundamental importance of broadcasting to Canadian sovereignty and cultural identity and the realization that market forces alone would not provide a significant amount of Canadian broadcasting content”.¹ As the Commission noted, Canada's small domestic market makes it difficult to finance the creation of competitive Canadian programs. Whereas U.S. producers can recover the majority of their production costs through domestic licence fees, the licence fees earned in Canada by most Canadian program producers represent only a fraction of their total production costs. The economies of scale that exist in the United States make American programming less expensive for Canadian broadcasters to acquire than Canadian programming. In examining the market structure for “new media” content nearly a decade ago, the Commission found that at that time, the circumstances that led to the need for regulation of Canadian content in traditional broadcasting did not exist in the Internet environment. WGC notes, however, that the Commission’s approach in the 1999 proceeding and in the current proceeding to continue to look at new media with a “holistic” approach, is appropriate. All Canadian “broadcasting” content, including content created initially for traditional broadcasting services as well as new, original content produced for new platforms such as mobile and the Internet should be examined with a view to assessing the fulfillment of the broadcasting policy objectives set out in the *Broadcasting Act*.
8. The foregoing approach would accord with the Commission’s approach to date in addressing technological developments, which has been one of “technological neutrality”. The history of broadcasting regulation in Canada is replete with examples of how the Commission has approached new developments in a manner that ensures the goals of the *Broadcasting Act* were met. These examples include the advent of cable television in the 1970s, the arrival of DTH services in the 1990s, and, more recently, Internet “retransmitters” and satellite subscription radio services. As the Commission noted in its 1999 New Media ruling, the definition of “broadcasting” “is, and was intended to be, technologically neutral”. Accordingly, the Commission found that, for example, the mere fact that a program is delivered by means of the Internet, rather than by means of the

¹ See New Media, Public Notice CRTC 1999-84, May 17, 1999, paragraph 60.

airwaves or by a cable company, does not exclude it from the definition of "broadcasting".

9. The WGC welcomes the CRTC's decision to potentially review its approach to the new media environment and the various exemptions within this sector. While the Commission's *raison d'être* for exempting new media broadcasting from regulation was to enable continued growth and development of the new media industry in Canada, the WGC submits that a regulatory framework should be forward looking, not reactive: it must anticipate rapid change, rather than trying to cope with such change after the fact.
10. New media is taking on increasing importance, as the findings set out in the document released by the Commission in conjunction with this proceeding, *Perspectives on Canadian Broadcasting in New Media*, ("*Perspectives*"), underscores. In *Perspectives*, the Commission notes that technological developments have spurred new consumption patterns, described as a "growing trend toward the consumption of broadcasting content on unregulated platforms, which is showing initial signs of having an impact on the traditional broadcasting system." The research indicates a trend among many demographics towards consumption of broadcasting everywhere and anytime and available on various platforms, including the personal computer and mobile devices" (page 5).
11. In WGC's view, the foregoing "demand side" developments, where audiences are increasingly seeking access to content on various platforms, needs to be tempered with a "supply side" analysis, to ensure that the objective of ensuring sufficient availability of high-quality original Canadian new media broadcasting content is met. The Commission undertook this very analysis in 1999 when it examined the appropriate approach under the *Broadcasting Act* to oversee new media. It concluded that no action was needed at that time. However, clearly the environment has changed: as noted by the Commission in Public Notice 2008-44, "the pace at which professionally produced broadcasting content is being made available online is accelerating, but Canadian participation is lagging with the amount of high-value, professionally produced new media broadcasting content and the level of early stage investment in the new media broadcasting environment" (Para. 20).
12. As noted in the introduction, above, it has become evident that while new media continues to grow globally, Canadian content has the potential of getting "lost in the shuffle". In order for a meaningful Canadian presence in the new media landscape to develop, it will be crucial for the Commission to consider, support and adopt measures to maximize the potential for the creation and distribution of distinctive Canadian new media broadcasting content. To the extent that 'new

media' is part of the Canadian broadcasting system, it too must uphold the goals of the Broadcasting Act.

13. The Commission's ultimate determination on the degree of regulatory oversight of new media will have implications for screenwriters, producers and broadcasters, all of whom are key elements of the Canadian broadcasting system. As the WGC stated on the record of earlier proceedings before the Commission, it was concerned with the scope of the New Media and Mobile Broadcasting Exemption Orders. The WGC recognized that new media was not merely an experimental or temporary phenomenon. Rather, the WGC had already seen through the growing engagement of screenwriters how new media was starting to have an impact on the television industry.
14. Within an environment where full-length traditional broadcasting content is available to consumers over new media distribution networks such as the Internet and mobile, traditional broadcasting will inevitably lose viewership to this new technology, a prospect the Commission itself has noted in the Public Notice. As the *Perspectives* document recognizes, there is general consensus that, at the current time, no viable business models exist which would permit new media broadcasting distribution revenues to completely replace traditional broadcast distribution revenues. Therefore, the concern is that any economic impact of the Internet on traditional broadcasting, such as a large-scale shift of audiences to online consumption of programming outside of the regulated broadcasting system, could impact the broadcast revenue stream without providing replacement revenues.
15. WGC submits that the Commission's regulatory framework must take into account that, increasingly, competition for users/viewers on new media platforms is rapidly resembling the traditional broadcast framework. Moreover, business models have been proliferating in which traditional broadcasters have established a new media presence by commissioning and acquiring new original, new media content with a view to bringing traffic to Canadian new media portals and other destinations. These activities raise issues with respect to activities of licensed broadcasters and the application of the broadcasting policy objectives under the Act to these new platforms. These are key developments that need to be understood in formulating a new media strategy.
16. In summary, a holistic approach is needed, one which recognizes that, ultimately, overlapping public policy measures will be applicable for both new media and traditional media. The presence of Canadian content on the Internet and other new media platforms by definition, meet the goals of the *Broadcasting Act*. Without support mechanisms available to encourage a supply of Canadian-

produced content, it is highly likely that only foreign content will be promoted and assured. This is a scenario that would be overtly detrimental to the underlying objectives of Canadian broadcasting legislation, as evidenced by the studies which are part of *Perspectives*, is almost the current reality.

17. What follows are WGC's comments and proposals with respect to the Commission's issues and questions raised in the Public Notice, in light of our comments above.

I. **The scope of new media broadcasting**

(i) **Background**

18. WGC notes that the common thread in the questions raised in this section of the Public Notice relate to the need to demarcate audio-visual activities that should be within the Commission's oversight and those activities that are best left outside of its regulatory ambit. WGC submits that, ultimately, all questions raised in the new media proceeding under "scope" will need to be tied in some way to the goals of the Act. Establishing the scope of new media broadcasting is not merely a question of statutory interpretation. Rather, this issue depends on whether the creation of and access to certain Canadian new media content has an impact on achieving the goals of the *Broadcasting Act*.
19. Section 2 of the *Broadcasting Act* defines "broadcasting" as any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication *for reception by the public* by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public space. "Program" is also defined in Section of the *Broadcasting Act* as sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.
20. In its 1999 New Media ruling, the Commission employed a broad, "technologically neutral" approach to its jurisdiction. It carefully applied the definitions in the Act to establish the potential scope of activities that should fall under broadcasting regulation.² Only customized content is excluded from the definition of "broadcasting" because it reflects an individualized experience and, therefore, such content would not be transmitted "for reception by the public". If,

² Alphanumeric text-based media is explicitly excluded from the definition of "program" and thus, outside the scope of the Commission's jurisdiction.

however, the extent to which the content can be individualized is limited so that the experience of end-users is similar, such as the case with digital audio services, audio/visual signals, or “on demand” media, new media interactive content may be found to fall within the Commission’s jurisdiction.

21. As noted in *Perspectives*, the above technologically neutral approach has been supported by various stakeholders. In their view, all audio-visual and audio content that reaches end users via the Internet and mobile platforms should be contemplated as being within the scope of new media broadcasting. The Commission noted as follows:

These parties suggest that the technological neutrality of the Act and its definitions require an expansive view of what constitutes new media broadcasting. These parties contend that all distribution methods, including downloading and streaming and all variants of those, whether from a single source or many sources (as in a P2P model), must be included in a definition of new media broadcasting.

22. Other parties, as evidenced in TELUS’ recent discussion paper³, have raised concerns that a broad definition of new media broadcasting may have the effect of capturing activities not intended by policy-makers to fall within the broadcasting realm. In that regard, TELUS suggests that the question of whether a paid download of TV program content on the Internet is a *broadcasting activity* or a *retail sales activity* (i.e., the distribution of retail goods in digital form) remains unresolved. TELUS argues that under current technology it is too difficult to distinguish between these types of activity, given the fact that even streamed content may be technically characterized as downloaded (in a cache). TELUS concludes that the only solution is to completely leave all of these activities outside of regulation.
23. The WGC submits that the Commission should not be overly concerned about the distinction that some parties are making between “streaming” and “downloaded” content as an analogy for “traditional broadcasting” and transactional (retail activity), such that the latter would fall outside of the definition of “broadcasting” in the Act. As noted above, the Commission has previously interpreted its statutory jurisdiction broadly. In that regard, the phrase “intended for reception by the public” in the Act may ultimately depend on the characteristics of the specific content being delivered, *rather than the manner in which it is being received*.

³ TELUS, Two Solitudes.

24. The Commission should not lose sight of the fact that full-length traditional broadcasting content is increasingly available to consumers on new media platforms. This could conceivably warrant some oversight by the Commission in order to ensure that broadcasting policy objectives are realized, irrespective of whether it is streamed or downloaded.
25. Focussing solely on the mode of delivery (i.e., “broadcasting” vs. “retail”) cannot be the sole factor in the determination of whether to adopt regulatory measures. The underlying considerations in the next new media proceeding will be the development, creation and distribution of broadcasting content on *all* platforms. The mode of delivery of such content should not be a reason to exclude it from the Commission’s overall consideration, including its role in meeting broadcasting policy objectives. The system should be viewed as a seamless whole: for example, there is no rationale for a differential treatment of the regulation of licensed VOD services distributed in a traditional broadcast medium, while not also considering policies and measures to oversee such content when it is distributed on a global distribution network.
26. WGC does agree that analyzing and understanding the emerging new media broadcasting environment will require new measurement systems and methodologies and that there is a requirement for additional and more precise data to describe this dynamic landscape. The Commission needs to understand the impact of increasing online advertising revenues on traditional broadcasting entities, changes in broadcasting consumption, and the greater degree of detail with respect to the availability and distribution of new media broadcasting content. As noted in *Perspectives*, “data related to these trends is needed for stakeholders, including the Commission, to obtain an accurate picture of the challenges, opportunities and metrics for success for Canadian content in the new media broadcasting environment.”

(ii) **Key Issues relating to “scope”**

27. In its 2006 Future Environment Report, the Commission directed its focus to three broad new media broadcasting content categories: user-generated content; relatively inexpensive commercial content; and high-quality, relatively expensive programming. WGC agrees that, user-generated “programs” made available over new media platforms may not on their own raise licensing or regulation issues under the *Broadcasting Act*. An individual writer/producer who creates a channel of content may technically fall within the definition of “broadcasting”,

- given the low barriers to entry associated with providing such content. However, the need to license or regulate such content under the *Broadcasting Act* may not be warranted.
28. Many stakeholders argue that the Commission's focus should be on the third category, high-quality, relatively expensive programming, where Canadian content production needs the most help and where the economics are the most problematic. Programming in the first two categories faces relatively fewer economic hurdles. In fact, it has been argued that Canadian content in these categories appears to be flourishing on the Internet. This in turn has led to the conclusion that the objective of effective support for national content on new media distribution networks require, as a pre-condition, effective support for national content on *the traditional media*, given that most of this content ultimately is made available on the Internet.⁴
 29. In that regard, there are several current examples of models for distributing high-quality relatively expensive programming on services such as "Joost" or CTV.ca. The Commission may ultimately determine that these types of activities may warrant a conventional regulatory approach, both in terms of regulatory burdens and benefits. For example, the current "regulatory toolkit" of exhibition and expenditure commitments may be applicable to new media ancillary activities of traditional broadcasting.
 30. Over and above the foregoing, the WGC wishes to draw the Commission's attention to all categories of Canadian content. A holistic approach is needed, one which recognizes the inter-relationship between all categories of content, on all modes of consumption and distribution, whether they originated first on traditional platforms or the newer platforms.

(iii) **Issues for Consideration**

31. Ultimately, WGC submits that it would be prudent for the Commission at this stage to establish a broadly-accepted set of definitions before the overall proceeding commences, in order to ensure that all parties are addressing a common set of terminology. Rather than narrowly defining the scope of interpretation, to avoid pre-judging the issue, the Commission should continue its "technologically neutral" approach and only subsequently make the determination

⁴ A Presentation to the CRTC Invitational Session on New Media Government Conference Centre Ottawa by Peter S. Grant (Senior Counsel, McCarthy Tétrault LLP), October 1, 2007.

that certain type of new media broadcasting may not warrant licensing or regulation.

32. The questions set out in the Public Notice approach the scope issue comprehensively. However, in view of the foregoing discussion, WGC submits that the following additional issues should be included under the questions that the Commission explores under this area:
- *The Commission should avoid unduly restrictive approaches to delineating concepts such as “traditional broadcasting services” and “new media broadcasting services” for the purpose of formulating an overall policy for new media vis a vis the goals articulated in the Broadcasting Act.*
 - *Issues such as channel scarcity in and of themselves should not be determinative of whether the Commission should oversee new media broadcasting.*
 - *The Commission should consider the issue of market imbalances that exist in traditional broadcasting platforms in assessing the challenges with respect to the creation and distribution of Canadian content in the context of new media platforms. The WGC submits that the same rationale for regulatory oversight could well exist in the new media environment.*

II. **Are incentives or regulatory measures required for the creation and promotion of Canadian new media broadcasting content?**

(i) **Background**

33. As noted in *Perspectives*, high-speed residential Internet access is now available to 93% of households across the country and has been adopted by more than 60% of Canadian households. It is clear that Canada is a global leader in broadband connectivity. Still, Canadian participation is lagging with the amount of high-value, professionally produced new media broadcasting content. Therefore, WGC supports the funding, promotion, and placement of Canadian-based new media broadcast content. The consequences of not providing incentives or regulatory measures for the creation and promotion of new media content will be predictable: Canadian traffic will be directed to foreign sites and foreign new media content.
34. As noted above, while Canadians enjoy a high rate of penetration of broadband internet access, Canada is at a comparative disadvantage with respect to the creation and distribution of high-quality new media content. WGC agrees with the discussion in *Perspectives* that promotion is a critical element in raising awareness of the availability of Canadian new media broadcasting content. Canadian content *funding* is a necessary but not sufficient measure: *promotion*

will be critical to raise awareness of the availability of Canadian new media broadcasting content. The importance of promotion is amplified in the borderless global environment of new media.

35. To date, there are several examples of success with respect to Canadian use of broadcaster/media portals (including CBC.ca, CTV.ca, Canoe.ca and others). Support for these portals will help to solidify the brand of existing licensed broadcasters and therefore help to achieve the objectives of the *Broadcasting Act*.
36. At the same time, the Commission should be careful not to pre-judge the rationale for regulatory oversight over new media platforms. A coherent, consistent approach to oversight of content is needed, with the appropriate limitations. Arguments that focus on scarcity alone as the rationale for regulation under the *Broadcasting Act* ignore a key paradox: while the new media landscape is characterized by an abundance of capacity, it is this multitude of disparate content that renders Canadian-based content on new media platforms more difficult to find. Thus, it is vital for the CRTC to ensure proper funding, promotion and placement of Canadian new media content. Otherwise, users will simply flock to the greater publicized and more developed content of various foreign entities.

(ii) **The existing landscape**

37. The WGC supports the view that the Commission should explore various options available for funding the supply of new media content. We anticipate that this issue will be extensively addressed and considered in the new media proceeding in 2009. Among the potential measures with respect to new funding that could be considered by the Commission including the following:
 - amendments to the *Income Tax Act* and increased direct government programming subsidy also need to be considered (although this will require action by other areas of government, as such measures fall outside of the Commission's jurisdiction);
 - broadcaster-based measures permitting the diversion of a portion of pay and specialty service Canadian programming expenditure requirements ("CPE") commitments to new media broadcasting content;
 - measures to ensure that all elements of the broadcasting system, including ISPs, make the required contribution toward Canadian content.

(iii) **Issues for Consideration**

38. In view of the foregoing, WGC submits that the following questions should be included under the questions that the Commission explores under this issue:
- *What is the role of each element along the new media distribution chain, including ISPs, and what measures, if any, should be adopted to require contribution from these elements?*

III Barriers to Access Canadian new media broadcasting content

(i) **Background**

39. WGC notes that this section of the Public Notice primarily addresses technology issues, including bandwidth and capacity constraints all of which relate to physical access. WGC submits that there are additional issues to be addressed with respect to access. These include issues with respect to rights and even net neutrality, all of which will have a direct impact on access by Canadians to new media broadcasting content.

(ii) **Rights issues**

40. The issue of access to both original new media broadcasting content and new media broadcast of traditional broadcast content is dependent, to a significant degree, on the availability of the necessary rights. As can be gleaned from the recent Writers Guild of America strike, new media is an absolutely vital platform to showcase content. Current tensions in the traditional broadcasting environment have resulted, in many cases, in broadcasters insisting that producers give up the new media rights as part of the TV sale – with little or no compensation offered – and then do nothing with the new media rights. This precludes independent producers from distributing their content on new media platforms and denies consumers the opportunity to enjoy the content on their own terms.
41. WGC agrees with the position of some stakeholders that reasonable terms of trade must be established to ensure a healthy Canadian independent production sector. Only when terms of trade are established will revenues from exploitation on all platforms equitably flow to producers and then to screenwriters. Terms of trade will ensure that Canadian creators can maximize their exposure and economic potential in new media markets. This is a necessary precondition of ensuring that Canadian content is produced and made available online, to ensure its proper place within the vast supply of foreign content on new media platforms.

42. Finally, the Commission should take into account that, while new media broadcasting has proliferated, rights holders have also taken steps to sort out the territorial and related rights challenges associated with such new media broadcasting content. Measures such as geo-gating and similar tools have been used to bring more order to the new media broadcasting sector which has begun to replicate more traditional broadcasting markets.

(iii) **Issues for Consideration**

43. In view of the foregoing, WGC is proposing that the Commission include the following additional issues that are relevant to the question of whether there are any barriers to accessing Canadian new media broadcasting content:

- *Consideration should be given to practices that affect distribution and access to Canadian new media broadcasting content. In particular, the Commission should address whether new media programming rights are being effectively exploited.*
- *Are there any impediments to regulating the new media platforms to ensure access to Canadian new media broadcasting content given that distribution of programs on new media platforms can be limited on a geographical or territorial basis?*

44. The WGC welcomes the opportunity to be involved in such a timely consultation and looks forward to participating in the Commission's future new media broadcasting proceeding.

Yours very truly,



Maureen Parker
Executive Director

c.c. WGC Council
Kelly Lynne Ashton, Director of Policy, WGC

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