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Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Les Terrasses de la Chaudière
Central Building
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Hull, Québec
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Dear Mr. Morin:

Re: Broadcasting Notice of Public Hearing CRTC 2008-11 – Notice of consultation and hearing to consider the issues pertaining to Canadian broadcasting in new media (the “Notice”)

1. This is the Writers Guild of Canada’s reply to the Commission in connection with various questions which were raised during the hearing by the Commission itself or by other parties who were part of the proceedings. Thank you for the opportunity to either address your questions or elaborate on our answers at the hearing.

International Standard Audio-Visual Number (“ISAN”)

2. At the hearing the Chair of the Commission, Konrad von Finckenstein, asked a number of parties whether the ISAN system could be used to measure the amount of Canadian Content available on new media platforms. As we advised the Chair, the WGC has been involved in the ISAN system for many years. In 1998, the WGC started advocating for the ISAN system as a means of identifying audio-visual works being distributed. We support the material provided to you by the CFTPA and ISAN Canada however we have one clarification which we would like to make.
3. ISAN is a voluntary tracking system which is just starting to roll out in Canada. It allows creators and producers to track the use of an audio-visual work in order to assist in the administration of royalties based on uses. It was not intended to be used as a measurement system. The CFTPA’s materials point out the difficulties in using ISAN as a measurement system both because of the limited information collected and because it is an internationally administered system. The CFTPA suggests that there are other systems which can more accurately measure audience data, such as BBM Nielsen.

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4. It seems to us though that the CRTC should be more concerned with measuring audio-visual content that is available on new media platforms, and how much of it is Canadian rather than how much is being consumed by the audience. Audience measurement is about success, and is a useful tool, but comes after analysing whether a broadcaster is meeting its *Broadcasting Act* obligations by 'presenting' sufficient Canadian programming on new media platforms. ISAN's tracking system cannot be used to accurately measure audio-visual content that is available, but only potentially what has been used.
5. In the WGC's written submission and our presentation we acknowledged that measuring interactive content has its challenges however we proposed that linear video was not as hard to measure. We continue to believe that linear video (i.e. television programs or webisodes streamed or available for download) can be measured by length of time and Canadian Content identified by either the existing CAVCO certification system for traditional content or identified by a new similar Canadian certification system for made-for-new media audio-visual programs.

Independent Production

6. The Commission asked our colleagues at the Canadian Film and Television Production Association ("CFTPA") why it was necessary to protect independent production. The WGC shares the CFTPA's position on the importance of independent production to the Canadian broadcasting system and in particular new media broadcasting and would like to add a few comments in that regard.
7. Independent production fosters creativity and diversity. Ideas and projects compete for new media broadcast licences and financing and only the best succeed. There is a winnowing with independent production that does not happen with broadcaster in-house production. Broadcasters make minimal investments during development, relying on the writer and producer, those least able to financially, to fund or find funding for the bulk of development costs. Further, in the case of new media production, unlike television, there are no funds that require a broadcaster to pay a licence fee or set minimum thresholds for that licence fee. This encourages the broadcasters to make minimal financial commitments. This minimal investment allows the broadcasters to easily cease to support projects that are not good enough or right for their channel.
8. Independent production is also important to a strong and healthy Canadian broadcasting system. Independent producers seek to maximize the distribution of programs in order to maximize the resulting revenues. This includes foreign distribution and other platform sales of both the television and new media components of a project. On the other hand in house production is focused on the broadcast within the territory. The broadcaster may be able to take advantage of other windows on channels within its station group and it may be set up for DVD sales or streaming. However, broadcasters generally are not set up to distribute television and new media programs around the world or to make ancillary sales such as spinoffs, remakes or merchandising. Unlike the U.S. broadcasters they do not have distribution arms or production arms that can readily take advantage of these opportunities. It is unlikely in these tough economic times that the

Canadian broadcasters would be able to make the financial investment required to establish themselves along the lines of the U.S. studios.

9. Independent producers are uniquely in a position to make the most revenue from the exploitation of a program, revenue which goes back to creative participants such as writers, performers and directors and back to the producer so that they can go on to create other television productions. A successful independently produced television program is able to benefit a much larger pool of participants than one produced in-house by a broadcaster, particularly given the stated objective of owning and keeping all rights. This in turn is an important part of maintaining a vibrant and diverse talent pool in Canada.

Program Definition

10. At the hearing, the Chair of the Commission asked for clarification on the issue of 'unique or customized audio-visual entertainment'. We would like to expand on our response. As part of the 1999 New Media Exemption Order decision 'program' under the *Broadcasting Act* was defined to exclude unique or customized audio-visual content. Most discussions regarding original online content assume that the foregoing definition is limited to linear video such as webisodes. The WGC is advocating for a more expansive definition of program that would include limited interactivity such as found in the immersive scripted experience at www.zostv.com among others. Our position would allow innovative storytellers to gain access to funding should there be an ISP levy and not be limited by 'old media' definitions and methods of storytelling. Our definition of program is consistent with the Commissions as it does not include unique or customized content.
11. To be clear, what is meant by 'unique' in this context is not 'special' or never seen before. Every day new media producers create content that is special and never seen before. In this context unique refers to the user's experience. Will there experience be completely unique from another user's experience. In television, individual audience members in their separate homes all experience the same television program. The other extreme can be found online when, for example, the audience participates in massive multiplayer online gaming such as "Second Life" or "World of Warcraft". In those cases the audience creates an individual avatar and plays against other individuals and their avatars. Each experience (what games, what path through the world, what objects obtained, what level obtained) is unique and cannot be replicated by another. Somewhere in the middle is innovative online storytelling with limited amounts of interactivity and choices. There are a set number of paths or options for the audience. One person's experience may not be the same as another's but it will be shared by many other individuals who made the same choices. It is very much a controlled experience with the controls in the hands of the creators rather than the audience. For this reason, the WGC feels that interactive storytelling fits within the definition of program.

One Fund or Two

12. During the Hearing Commissioner Leonard Katz asked if we agreed that if there was a levy there should be one fund for all production, on the assumption that the majority of

online video viewing is of traditional broadcasting programming. We would like to clarify our response.

13. The WGC has two concerns with any fund created with the levy or in fact with any funding aimed at content production. The first is that funding for original new media production should not come at the expense of funding for television production. There is not enough money available both in the marketplace and from government or regulated sources to produce the volume of television programming that broadcasters and producers want to produce. Canadian television drama budgets need to stay at least at current levels¹ in order to successfully compete with the much higher budgeted U.S. dramas attracting Canadian audiences. Should a combined fund be created, for example as has been recently announced by the Minister of Heritage, which combines support for traditional and new media production, we would expect that it would be given additional funds to be able to support new media production rather than expect a larger mandate from the same pool of funds. Adding an ISP levy to the new Canada Media Fund (“CMF”) could address our concerns with the fact that the CMF is now mandated to support both new media and television production.
14. The second concern is the definition of what kind of ‘new media production’ might be supported by the ISP levy. Commissioner Katz suggested that new funding should go to traditional broadcast production as new media production was merely ‘advertising’ for traditional production. The WGC respectfully disagrees with this characterization of new media content. When broadcasters first started to exploit the online world they thought of it as merely a way to drive traffic to their television broadcasts. However, as understanding of the medium has grown and as more advertisers are willing to advertise on the new platform, broadcasters have evolved in their thinking. New media is now considered as a way to extend the audience’s experience and engagement both with a television program and the broadcaster’s brand. This entails both original content that supports a television program, such as webisodes or games and original ‘standalone’ content that is unrelated to any television program but supports the broadcaster (e.g. original web series). The WGC proposes that any ISP levy would go to fund both types of original new media content. This is different from funding traditional television content which will then be distributed on new media platforms.
15. It may be easier to keep mandates clear if there is a separate fund for new media and one for television. On the other hand, if funds are combined then cross-platform productions with combined budgets can be easily funded. We believe that this is one of the principles behind the new CMF. However, our concern with the CMF and this approach to distributing any ISP levy continues to be the danger of cannibalizing television funding to be able to fund new media. We would encourage the Commission to require that safeguards be put in place to ensure that if it was decided to commingle new media and television financing that the new media financing was truly incremental to the television financing.

Deep Packet Inspection

16. The WGC holds no position on whether Deep Packet Inspection (“DPI”) is technically possible or not to identify and measure Canadian Content video online. However, we

¹ The average budget for a Canadian one hour drama is \$1.4 million per episode

have read with interest the paper by Robert Hester which was put on the public file. We are troubled by the recommendation to create a 'walled garden' to make CBC programming available online. This was suggested as the solution to the need for intervention to ensure that there is sufficient and visible Canadian Content online. Our concern is that this proposal is limited to Canadian Content on the CBC and in effect creates an online 'ghetto' for Canadian programming. We are intrigued by the Rogers portal proposal (see below) and agree that the BBC iPlayer has much to recommend it. However, this proposal would limit Canadians' choices for viewing Canadian content online to CBC programming, resulting in a severe lack of diversity. Any solution involving an online video player would have to be open to, at a minimum, all Canadian broadcast programming.

Rogers Broadband Video Portal

17. Rogers presented a very interesting proposal for a broadband video portal which they feel should solve the problem of insufficient broadcast Canadian Content being found online and the difficulty of finding it once it is there. We are optimistic that this venture could solve the problems but the WGC is of the opinion that there are a number of unanswered questions and a few issues with the Rogers proposal.
18. Commissioner Arpin summed up the proposal succinctly when he described it as "offering VOD on the internet"². In many ways what has been suggested is an extension of each broadcaster's broadcast offering. To that extent it is most analogous to subscription VOD. For that reason M. Arpin asked Rogers if their 'portal' would need to be licensed. Rogers responded that since the traditional broadcast was regulated then its extension to the online portal did not have to be.
19. The WGC finds this argument of Rogers to be missing the point, perhaps intentionally. Platforms are regulated, not content. Regulation on one platform does not negate regulation on another platform. The Commission needs to determine whether regulation is necessary and appropriate in the circumstances. The WGC is of the opinion that the Rogers portal acts as an extension of the broadcaster and therefore the broadcasting system. As such, lack of regulation would allow broadcasters freedom to promote and distribute non-Canadian programming at the expense of Canadian programming. Currently lack of regulation has allowed broadcasters to feature the non-Canadian programming, at times exclusively, on other platforms such as YouTube or iTunes. We note as an example, the Treehouse channel on iTunes which the WGC attempted to demonstrate for you at the hearing. The Commission has learned over the years that it cannot rely on 'expectations' of behaviour. Only regulation, preferably supported by enforcement mechanisms, will ensure that Canadian broadcasters fulfill their obligations under the *Broadcasting Act*.
20. Rogers expressed a concern that regulating its portal would put it at a competitive disadvantage when compared to non-Canadian services such as Hulu. It must be noted that Hulu is only available to residents of the United States, primarily because Hulu only obtained programs cleared for streaming in the United States. Advertisers are only interested in paying for distinct territorial markets in which they sell their products and this is pushing the territorial licensing of rights. Very few advertisers can take advantage

² Paragraph 9825 March 10, 2009 Transcript of Proceedings

of a global audience. As well, producers expect to be able to generate greater revenues from sales on a territory by territory basis. Should business models evolve such that it makes sense to license streaming on a global basis this might change but currently that is not the case. Accordingly, the Rogers portal will not be competing with Hulu when launched. However, should that one day happen, regulatory obligations ensuring carriage of and promotion of Canadian programming will serve to distinguish the Rogers portal from Hulu just as those same obligations distinguish CTV from NBC.

21. Broadcasters will not be in a position to port their entire schedule to the Rogers portal when it first launches. It is likely that they will not have obtained streaming rights in Canada to all of their licensed programs. It is actually possible that producers may choose not to assign streaming rights to a broadcaster so that they can exploit the streaming rights themselves. It therefore cannot be assumed that the existing television schedules would be replicated wholesale on the Rogers portal. Care would need to be taken and safeguards implemented to ensure that broadcasters did not take advantage of the portal to make programming decisions that they are prevented from making on the traditional broadcast platform. In other words, only regulation can ensure that Canadian Content levels are maintained on the Rogers portal at the same levels as they are maintained on traditional broadcast. Broadcasters have repeatedly demonstrated that 'expectations' are insufficient. They only support Canadian Content and fulfill their *Broadcasting Act* obligations when they are required to do so.
22. Should the Rogers video portal be successful in capturing audiences who are migrating online then it is inevitable that the portal will generate revenues. While the business model is not yet proven it can be imagined. The Commission may wish to consider implementing the BDU contribution to Canadian programming but providing that it does not kick in until a minimum level of revenues are met. It would be inconsistent regulation to require a contribution from all other BDUs and revenues generated by BDUs but not from the Rogers video portal just because it is distributing programming services online. If there is more than one revenue stream, and the potential for online advertising suggests that the video portal could earn revenues from advertising as well as from subscribers, then that additional revenue should be included in any calculation of BDU contribution.
23. All that being said, however, the Rogers video portal continues to be an exciting development with potential to promote and widely distribute Canadian Content. It would even be possible to require the portal to promote Canadian Content in a similar way that preview channels are required to promote Canadian services, perhaps through a similar preview area on the portal. The WGC looks forward to the development of the portal and encourages the Commission to take an active role in ensuring that this or any similar online video portal is regulated under the *Broadcasting Act* as part of the Canadian broadcasting system.

Levels of Canadian Content Online

24. During this hearing, the Commission has been very focused on the question of measuring Canadian Content online. There have been many allegations by ISPs that not only is there plenty of Canadian Content online but that no one has presented any evidence to the contrary. The ISPs have been unable to present any evidence to support their position however to the extent that it is possible the creative groups and in

particular the WGC has presented evidence regarding the lack of online Canadian Content. It must be noted that arguments stating that there is sufficient Canadian Content are based in the notion that amateur or user-generated video content should be counted by the CRTC as Canadian content. This flies in the face of the *Broadcasting Act* as well as being contrary to the Commission's stated intentions. The *Broadcasting Act* requires programming to be of high standard³, which excludes the majority of user-generated videos created with home video cameras or webcams and without professional writers, performers or crews. Broadcasting undertakings are to make maximum use of 'Canadian creative and other resources'⁴ and the Canadian broadcasting system should provide 'a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity'⁵. All of these concepts go towards providing Canadians with a wide variety of professionally produced high quality programming. It is insulting of ISPs and Google Canada to say that Canadians should be satisfied by the amount of user-generated content being regularly uploaded to YouTube.

25. Leaving aside YouTube and user-generated videos the Commission is then left with the question of how to measure how much video is being carried by new media platforms within CRTC jurisdiction and how much of that video is Canadian Content. We urge the Commission not to wait for the perfect measurement system before implementing any regulation or incentives to promote and protect Canadian Content on new media platforms. As we described in our written submission a quick scan of Canadian broadcaster websites demonstrates that most broadcasters are featuring their U.S. programming at the expense of their Canadian programming and are behind their U.S. counterparts in providing audiences with ancillary new media content. A per minute analysis of linear video on Canadian broadcaster websites would quickly identify which broadcasters are presenting a predominance of Canadian linear video content online. Regulation can be refined when more specific tools are available.

Prioritizing .ca Domain Names Proposal

26. It was suggested during the Hearing that one proposal for promoting Canadian Content was for the ISPs to prioritize .ca domain names. We heard the Chair ask several of the ISPs if this was a viable option with differing responses. The WGC is of the opinion that prioritizing .ca domain names is not an effective solution to the problem identified by us, namely that online Canadian Content is buried within the available content online and even in particular is lost on the broadcaster websites.
27. The test for 'Canadian presence' required to be able to register a .ca name is merely citizenship or permanent residence if an individual or registration as a Canadian corporation. It has no bearing on content. As such, a .ca site could be a Canadian version of a U.S. site carrying nothing but U.S. video.
28. The WGC is also concerned that any attempts to create 'fast lanes' for Canadian Content gives the ISPs too much scope for inappropriate traffic management and is contrary to the principles of network neutrality. Further, it opens the CRTC to

³ S. 3(1)(g)

⁴ S. 3(1)(f)

⁵ S. 3(1)(d)(ii)

allegations, though unfounded, of censorship or 'forcing' Canadians to view Canadian Content. This kind of hyperbole has been thrown around in response to this specific 'fast lane' proposal. We encourage the Commission to create regulations and/or incentives that are less likely to be inflammatory with the general public.

29. Instead, incentives or regulations need to focus on the actual content rather than the site carrying the content. In the WGC submission we suggested that broadcasters earn access to the ISP levy for in-house new media production by visible and effective promotion of Canadian Content. We think that this would be an effective incentive for broadcasters.

Legal Opinions

30. The Chair of the Commission stated in his questions to Rogers that this hearing was not the appropriate place to discuss the competing legal opinions. We do not propose to do so in our reply however together with the DGC, ACTRA and the CFTPA, the original commissioners of the McCarthy Tétrault LLP legal opinion, we have engaged McCarthy's to provide the Commission with additional information regarding the original opinion which the Commission may find useful. You will find this additional information from McCarthy's contained within the DGC's reply in this proceeding.

31. However, we would like to clarify one point that arose during the WGC presentation. At line 4344 of the Transcript⁶, Vice-Chair Katz referred to paragraph 90 of our written submission. In order to clarify the exchange between the Vice-Chair and representatives of WGC, WGC supports completely the legal submissions of McCarthy Tétrault LLP (both the original opinion that was supplied as an attachment to our written submission and the Reply submission which is being filed by the DGC). As the Vice-Chair alluded to at line 4352⁷, "our position is the legal position" [of McCarthy Tétrault LLP]. Any inferences that WGC has a position in any way contrary to those contained in the opinions should be disregarded.

32. We thank you for this opportunity to provide you with our reply comments.

Yours very truly,



Maureen Parker
Executive Director

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⁶ Paragraph 4344, February 24, 2009 Transcript of Proceedings

⁷ Paragraph 4352, *ibid.*