Writers Guild of Canada

August 9, 2021 **Filed Electronically**

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet:

Re: Broadcasting Notice of Consultation CRTC 2019-90-1: *Call for comments on a new, annual digital media survey – Additional information to be added to the public record – Reply Comments*

1. The Writers Guild of Canada (WGC) is the national association representing approximately 2,400 professional screenwriters working in English-language film, television, radio, and digital media production in Canada. The WGC is actively involved in advocating for a strong and vibrant Canadian broadcasting system containing high-quality Canadian programming.

2. The WGC is pleased to provide our reply comments in the second phase of this proceeding. We will focus our reply comments on the interventions of the Canadian Association of Broadcasters (CAB) and the Motion Picture Association-Canada (MPA-Canada), as the apparent representatives of a significant number of Canadian broadcasters and foreign Digital Media Broadcasting Undertakings (DMBUs).

<u>The Commission should not delay full implementation of the digital survey</u>

3. Some intervenors in this phase of the proceeding have argued that a digital survey, as currently proposed by the Commission, is premature, would be better implemented after the *Broadcasting Act* is updated, and/or should be implemented in a phased process that would result in delays. The WGC disagrees with these arguments.

4. The MPA-Canada argues that the survey is premature and that the Commission should only collect such data with "explicit statutory authority", as would presumably come from new broadcasting legislation, such as Bill C-10 or the like.[1] We submit, however, that the MPA-Canada's arguments for this position are not compelling. The MPA-Canada does not explain why an "orderly transition", as it

[1] MPA-Canada, paras. 12-16.

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describes it, is not possible now, nor why the current survey is not or cannot itself be part of such a transition. The MPA-Canada's claim that, "it would be most efficient for the Commission to determine and finalize the content of the digital media survey based on any obligations imposed as a result of legislative amendments" seems to both: a) presume there will be something novel, mysterious, or unknowable about such obligations, making it difficult for the Commission to plan for them, via this survey or otherwise; and, b) neglect the stated purposes of this survey, which does not include monitoring compliance with specific obligations, but does include gaining information in advance of such obligations and to identify trends, among other things. As for the comfort level of survey respondents with respect to confidentiality, the Commission is already seeking feedback on such concerns in this proceeding, and the MPA-Canada has made its views known in reference to existing Commission confidentiality policies and practices. We submit that making respondents "more comfortable" should not be a guiding priority of the Commission, and even if it were, legislative reform is not and should not be a barrier to doing so.

5. The CAB proposes a two-step process, in which foreign services would complete the survey by November 30 of each year, after which Canadian services would follow suit by January 31, provided that foreign services have actually participated as requested.[2] The WGC opposes this proposal. The CAB's rationales for its proposal include that to do otherwise would, "be highly prejudicial to existing licensees", and would "provide foreign services with a window into the operations of their Canadian competitors and provide the Commission and stakeholders with an incomplete data set that offers little insight into the Canadian online broadcasting marketplace." These rationales, however, appear to presume that survey data would somehow instantly appear on the Commission's public website the moment it was submitted by the survey respondents. That is not our understanding of what would happen, nor is it what would need to happen. Rather, survey results would presumably be submitted to the Commission, which would then collect, analyze, and aggregate the data before both making it public and drawing any of its own conclusions based on it. The CAB's proposal is founded on an entirely false premise that the Commission is somehow not in control of the timing of publication or other use of the data collected, which is clearly not the case.

6. Both the CAB and the MPA-Canada argue that it is "unrealistic"[3] or "very challenging"[4] to complete and submit the survey by the fall of 2021. Neither intervenor, however, provide any detail on why. Instead, they rely on a general claim that it is so. The WGC submits that better, more detailed evidence is required to support this contention, failing which the Commission should proceed with its intended timetable.

<u>The Commission should not "streamline" or otherwise reduce the level of detail in the survey</u>

7. Some intervenors argued that the survey, as currently proposed by the Commission, involves too much detail, and should be simplified or "streamlined" by removing items to be reported. The WGC disagrees with these arguments.

8. The CAB proposes to reduce the information collected in the survey to a few specified categories.[5] The CAB's primary rationale for doing so, however, is based on an unduly narrow characterization of

[2] CAB, paras. 7-10.
[3] CAB, para. 27.
[4] MPA-Canada, para 24.
[5] CAB, paras. 11-13.

the purpose(s) of the survey. The CAB states that, "the primary purpose of the annual digital media survey is to understand trends" and then claims the reduced scope it proposes, "would provide the Commission with ample data to track the development of the digital media landscape in Canada." But the CAB provides no further detail or argument on why this should be the case. It does not detail what it thinks "understanding trends" means—"trends" can be very detailed and nuanced indeed—and, moreover, the CAB fails to note that the Commission identified multiple purposes in the original Notice of Consultation, set out in five bullet points, including, "to obtain baseline data in order to inform and measure the impact of any future Commission determinations affecting digital media broadcasting activities in Canada."[6] Ultimately, the Commission said it is seeking information for "understanding the full scope of [digital media] activities, and for developing effective regulatory policy."[7] The CAB's proposal to unduly narrow the scope of the survey is based on an unduly narrow reading of the Commission's specified objectives, which themselves clearly are not exhaustive, as indicated when it states, "Among the Commission's specific objectives for the survey are the following:".[8]

9. "Administrative burden" is also listed as a reason to narrow the scope of the survey, both by the CAB[9] and the MPA-Canada[10]. But while the Commission has recognized the potential for administrative burden, and indicated it would only collect the minimum amount of information necessary, neither the CAB nor the MPA-Canada provide any detail as to why the burden in this case is undue and/or necessitates narrowing the scope of the survey as they propose. Once again, both organizations simply claim that there will be such a burden, and seek to have it accepted at face value. There is no detail or quantifiable information or assessment of hours involved or dollars expended in providing this information. Neither the CAB nor the MPA-Canada describe the process(es) or personnel potentially engaged, nor is there any detail given as to why such data is not already tracked, what would be involved in doing so, how these efforts would compare to overall data-related costs to their members, or otherwise why the "administrative burden" is unreasonable or undue in the circumstances. As such, the WGC submits that these unsubstantiated arguments should be dismissed.

10. We submit that the Commission should not reduce the level of detail in the digital survey and, on the contrary, we reiterate our view that it should be expanded to include Canadian spending by programming category, as set out in the Appendix to Broadcasting Regulatory Policy CRTC 2010-808.

The need for standardization

11. Some intervenors have highlighted that different companies measure different things using different definitions. They argue, as a result, that the Commission should allow respondents to tailor the digital survey to such differences, and/or allow survey participants to make their own choices as to the survey's applicability. The WGC disagrees with these arguments. On the contrary, in our view any lack of standardization, or the existence of different methods of interpretation, do not indicate that the Commission should adjust to the practices of however many individual companies are at issue, but that companies need to adjust their reporting to a standardized model, like the one proposed in this proceeding.

[6] Broadcasting Notice of Consultation CRTC 2019-90, para. 6.
[7] Broadcasting Notice of Consultation CRTC 2019-90, para. 5.
[8] Emphasis added.
[9] CAB, para. 15.
[10] MPA-CANADA, paras. 29-30.

12. The MPA-Canada states that, "foreign digital media services…typically do not record and categorize [investments in Canadian productions] in the same manner and level of detail as required of licensed Canadian broadcasters."[11] This may be true, but that is not an argument in itself to continue to do so with respect to the digital survey. The MPA-Canada appears to be saying that foreign digital media services do not recognize or relate to certified Canadian programming as it is defined by the Commission. Yet a core purpose of this exercise, it would seem, is to gain information on the current state of Canadian programming on digital platforms. The appropriate definition of "Canadian programming" may be subject to debate, but clearly there must be one, or the term can have no meaning. The Commission has such a definition and appears to be seeking information in relation to it. That means that DMBUs must supply information in relation to that definition. The MPA-Canada states that, "Companies collect and maintain data differently and should not be required to expand their data-collection practices in order to respond to the survey."[12] But failure to do so would defeat the entire purpose of the survey. The ability to compare "apples to apples" is fundamental to virtually any analytical endeavour, this one included. The MPA-Canada appears to be saying that they want the right to define Canadian content however they already do—and, since they may not already relate to the concept at all, that means defining it however they wish—which theoretically could mean including all foreign service production shot in Canada, and potentially even other things with any connection to Canada whatsoever, no matter how distant of incidental, as "Canadian programming". This makes no sense. There must be definitional clarity and standardization in the digital survey, with respect to Canadian programming, and otherwise.

13. The CAB argues that the Commission should allow existing licensees to, "choose to complete the survey at a company-wide level or for each individual service they offer, as is appropriate for that operator's individual circumstances."[13] Again, we struggle to understand how this lack of standardization would result in effective, apples-to-apples data for the Commission and/or the Canadian public. Given the CAB's comments elsewhere, licensees would presumably all choose to report at only the highest, most aggregated level of their company. Using the CAB's own example, this would presumably mean that Bell, for instance, would not report on Crave and iHeartRadio separately, but instead would just have a single survey for all Bell digital services. Such high levels of aggregation would provide little, if any, meaningful insight into the evolution of online business models and their impact on traditional broadcasting services.

14. As further discussed below, the WGC believes that data should be provided to the Commission, and ultimately made available to the public, on a service-by-service basis, as is currently done with respect to licensed Canadian broadcasters.

<u>Confidentiality</u>

15. Some intervenors have argued for the "highest level of confidentiality", or the like, with respect to the results of the survey. While the WGC appreciates and respects the need for an appropriate degree of confidentiality, we disagree with the exceedingly high level of confidentiality sought by some intervenors.

[11] MPA-Canada, para. 30.
[12] MPA-Canada, para. 30.
[13] CAB, para. 15.

16. Both the CAB and the MPA-Canada refer to harm that could result from public disclosure of the digital survey results, but neither organization provides any meaningful detail on specifically what that harm might be or how it could occur. The CAB states that "the potential harm to the affected services [from certain public disclosures] would far outweigh any public interest benefit".[14] But the CAB provides no analysis to that effect; it simply makes the statement and appears to seek to have it accepted on faith.

17. For its part, the MPA-Canada references Broadcasting and Telecom Information Bulletin CRTC 2010-961: *Procedures for filing confidential information and requesting its disclosure in Commission proceedings* (the Bulletin), and claims that, "Significant commercial harm could be expected if competitively sensitive information were to be released and used by one party against another." But, again, no meaningful details are provided. Notably, the Bulletin itself states that a party claiming confidentiality, "must provide a detailed rationale to explain why the disclosure of the information is not in the public interest,"[15] and cites in turn section 32(1) of the Commission's *Rules of Practice and Procedure* (SOR/2010-277) (the Rules), which state:

> The party that designates information as confidential must provide reasons, as well as any supporting documents, why the disclosure of the information would not be in the public interest, including why the specific direct harm that would be likely to result from the disclosure would outweigh the public interest.

18. The MPA-Canada references the Bulletin, and the factors it enumerates in engaging section 31(1) of the Rules, yet omits the requirement for providing detailed reasons and supporting documents set out at section 32(1) of the Rules and also referenced in the Bulletin. It is unclear if the Bulletin and the associated sections of the Rules would apply to the digital survey itself, as the survey would presumably not be a "proceeding", and no allegedly confidential information is being provided in this proceeding under this Notice of Consultation. But the MPA-Canada is citing the Bulletin and the Rules in this context, and both embody the principle that a claim for confidentiality must be supported with evidence. The MPA-Canada is seeking to make claims of confidentiality, yet is providing no evidence. We submit that this is not sufficient—claims of "significant commercial harm" must be substantiated with detailed evidence if they are to be accepted by the Commission.

19. Both the CAB and the MPA-Canada also argue that not only should the results of the survey be made public only in aggregate, but only in an especially high level of aggregation. The CAB states that the Commission's objectives can be fulfilled by, "grouping Canadian and foreign services together, which will ensure that individual service or corporate information is not identifiable," and showing, "total Canadian subscription, advertising and transactional revenue, as well spending on programming broken down between Canadian programming and foreign programming."[16] Similarly, the MPA-Canada proposes that information gathered under the digital survey should only be publicly disclosed if it is, "aggregated on an industry-wide basis or at minimum, aggregated on the basis of all Canadian and all non-Canadian digital media undertakings."[17]

20. The CAB again relies for its position on an unduly narrow reading of the Commission's objectives for the digital survey, suggesting that it is limited only to "shed light on the evolution of online business

[14] CAB, para. 21.
[15] Bulletin, para. 5.
[16] CAB, para. 21.
[17] MPA-Canada, para. 23.

models and their impact on traditional broadcasting services,"[18] when, as noted above, the objectives are broader and include, "understanding the full scope of [digital media] activities, and for developing effective regulatory policy" and, "to obtain baseline data in order to inform and measure the impact of any future Commission determinations affecting digital media broadcasting activities in Canada."[19]

21. As for the MPA-Canada, it again cites the Bulletin, in which the Commission has stated that, "the more the information is disaggregated or the greater the degree of competition, the more likely it is that the direct harm will outweigh the public interest and that the information should not be disclosed."[20] Yet the Commission has never taken this to mean that publicly available data must be aggregated on an industry-wide basis. On the contrary, the Commission already publishes data via the Aggregated Annual Returns that show detailed revenue and spending numbers for designated groups and CBC/Radio-Canada, broken down by conventional and discretionary services, as well as via Financial Summaries of individual services with similar information.

22. This level of detail is entirely consistent with data being aggregated. The question is not, "Should data be aggregated or not?", but, rather, "At what level should that aggregation occur?" "Aggregation" is not a binary concept. Traditionally, the Commission's concerns about data aggregation have been focused on individual program budgets and licence fees. The Commission has considered that the precise production budgets for individual programs, and what broadcasters have paid in licence fees or other compensation in exchange for the rights in those programs, should be treated as confidential information. Knowing how much broadcasters have paid for which rights may indeed be competitively sensitive information. That is not the same, however, as the overall revenues and expenses for a given service, and the Commission does not treat them as confidential for licensees now.

23. Given that intervenors like the CAB and MPA-Canada have not placed any detailed information on the public record speaking to the specific commercial or competitive harms they allege, we are left to question exactly to what they are referring. Indeed, it hardly seems likely that, as the CAB itself points out, a $5 billion Canadian Internet-based audio and video market dominated by Netflix, Amazon Prime Video, YouTube, and iTunes,[21] which has nearly doubled in just two years,[22] exists in Canada because these foreign players somehow got access to information on Corus's streaming services, or CBC Gem's financials. Rather, foreign digital media services are massive and growing because of the deep financial pockets they started out with, built upon American and international markets that are much larger than Canada's, and they offer incredibly expensive, highly polished content that Canadians want to watch. Collecting and making public service-by-service data of all major digital players in Canada should give no competitive advantage to any one player in particular. On the contrary, it would achieve the Commission's stated objective, "to inform the industry and all stakeholders on the state of digital media broadcasting in Canada through the publication of aggregate data,"[23] such data having been aggregated from individual productions on the services. The WGC submits that the Commission should collect and publish this data, just as it currently does for licensed broadcasters without any credible claim that those broadcasters are competitively disadvantaged as a result.

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[18] CAB, para. 21.
[19] Broadcasting Notice of Consultation CRTC 2019-90, paras. 5-6.
[20] MPA-Canada, para. 22.
[21] CAB, para. 6.
[22] Compared with $2.7 billion in revenues: see CRTC, "Communications Monitoring Report 2018", pg. 192.
[23] Broadcasting Notice of Consultation CRTC 2019-90, para. 6.

Thresholds

24. On the question of minimum thresholds for participation in the digital survey, the CAB has proposed a revenue-based threshold,[24] whereas the MPA-Canada has proposed one based on number of subscribers[25].

25. Having reviewed the submissions of other intervenors, and given the variety of business models currently used by DMBUs, the WGC remains concerned that focusing on any single metric could inadvertently exclude large services that should rightly be included in the digital survey. For example, a service like Amazon Prime, which uses its video streaming service, at least in part, to support its retail marketplace service, could have very high subscription and viewership numbers, but ascribe the revenues generated largely to the retail marketplace side of its business. Similarly, an ad-based service like YouTube might have far fewer subscribers than its views and/or revenues would reflect.

26. For these reasons, the WGC continues to advocate for a flexible, multi-factor approach. Such an approach would set *multiple* thresholds for various metrics, including revenue numbers, subscription numbers, and viewership numbers. Any service that met *any* one of those thresholds would be required to participate in the survey, notwithstanding that it may not meet any or all of the others. This flexible, adaptable approach would be more appropriate given the variety of business models in use on the Internet.

27. The WGC is not in a position to comment on the specific thresholds proposed by other intervenors at this time.

Conclusion

28. The WGC is pleased to provide comments in this proceeding, and we thank the Commission for the opportunity to do so.

Yours very truly,

Maureen Parker
Executive Director

c.c.: Council, WGC

[24] CAB, paras. 18-19.
[25] MPA-Canada, para. 32.

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