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5 December 2008

Filed Via E-pass

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

**Re: Broadcasting Notice of Public Hearing CRTC 2008-11
Canadian Broadcasting in New Media**

Ontario Media Development Corporation (OMDC) is pleased to file the attached in response to the Commission's review of Canadian broadcasting in new media.

OMDC is an agency of the Ontario Ministry of Culture that facilitates economic development opportunities for Ontario's cultural media industries. As the central catalyst for Ontario's cultural media cluster, OMDC promotes, enhances and leverages investment, jobs and original content creation through a variety of initiatives.

OMDC requests the opportunity to appear at the Commission's public hearing commencing on February 17, 2009, to discuss in more detail the issues raised in this submission.

We now proceed to the substance of our submission and comments on the issues raised by the Commission in the Public Notice.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Thorne-Stone".

Karen Thorne-Stone
President and Chief Executive Officer
Ontario Media Development Corporation

Introduction

1. Ontario Media Development Corporation (OMDC) is pleased to file the following in response to Broadcasting Notice of Public Hearing 2008-11 on Canadian broadcasting in new media.
2. OMDC is an agency of the Ontario Ministry of Culture with a mandate to build the capacity and competitiveness of Ontario's cultural media industries. Through tax credits, programs and services for the film and television, book and magazine publishing, music and interactive digital media industries, OMDC maximizes opportunities for growth and innovation in Ontario and abroad.
3. The government of Ontario's media tax credits, co-administered by OMDC, are an important source of financing for all kinds of content creation. In fiscal 2007-08, OMDC issued over 1,000 tax certificates valued at \$180 million to support content creation in Ontario's cultural media industries.
4. OMDC also invests directly in screen-based domestic content through the OMDC Film and Interactive Digital Media Funds and in the music industry through the OMDC Music Fund. In 2007-08 forty-eight projects received production, development or marketing support through these programs.
5. Given our role as supporters of cultural media content, OMDC is pleased to have this opportunity to comment on the matters before the Commission. As a provincial Agency, OMDC acknowledges that the Commission operates in the federal arena outside the Agency's jurisdiction. OMDC offers the following comments in the spirit of working in co-operation with the Commission and with our industry stakeholders to promote Canadian content while respecting the authority of the Commission and the strictures of the *Broadcasting Act*.
6. OMDC's goal in participating in the Commission's consultation process is to promote a regulatory environment that is responsive to the business realities and needs of Ontario's cultural media industries. To that end, we are hoping that the Commission will adopt a visionary approach to the current new media broadcasting proceeding, one that acknowledges that the barriers between different kinds of content are being broken down and that supports the creation of high-quality Canadian content in a multitude of broadcast media. The traditional broadcasting and new media environments are rapidly evolving and content production, distribution and consumption have changed significantly since the Commission's 1999 New Media Exemption Order. The outcome of this timely hearing will shape how these environments continue to evolve in the years to come.
7. In preparation for this submission, OMDC consulted with its Industry Advisory Committees in the screen-based, music and interactive digital media industries. The role of OMDC's Advisory Committees is to provide input and advice to the Agency on issues that are of importance to the cultural media industries. OMDC met with its Advisory Committees in preparation for our July 11 submission in response to Public Notice CRTC 2008-44 and Committee members have had the opportunity to read and comment on our current submission. OMDC does not purport to speak on behalf of its stakeholders to the Commission, rather, our intent is to highlight some of the issues they have raised and explore some possible solutions.
8. OMDC requests the opportunity to appear at the public hearing to discuss with the Commission in more detail the many important issues raised in this submission.

Executive Summary

9. OMDC agrees in principle with the proposed interpretation of broadcasting in new media as put forward by the Commission in Broadcasting Public Notice 2008-11 and particularly with the idea that said definition should be neutral with respect to the means of transmission.
10. While OMDC recognizes that it is increasingly difficult to distinguish between “professional” and “non-professional” content in the new media broadcasting environment, we feel that this distinction will become important should the Commission choose to introduce financial support mechanisms for the creation of new media content. Professional, high-quality creative content has always been and will continue to be the most difficult type of content to finance. The Commission should look to existing federal and provincial programs as it seeks to develop a definition of “professional” content.
11. In today’s new media environment, there are very few players who fill only a single purpose. Canada’s largest cable and satellite providers are also the largest Internet and mobile service providers while at the same time having specialty and conventional broadcast interests. Ontario’s creative content companies and producers have become multi-platform storytellers who need the capacity and financial resources to create high-quality content that will attract audiences at home and abroad.
12. OMDC has heard from Ontario television producers that changes in their business model are felt early in the development process, as they are asked to create multi-platform content concepts for virtually the same license fees as have always been paid. However, the most dramatic changes in business models due to new media are seen in the music industry which has experienced a complete disruption of its value chain due to digital distribution of its content. Much of this content is distributed illegally and without compensation to content creators. Internet Service Providers (ISPs) benefit from both legal and illegal use of creative content by the customers who pay to subscribe to their services.
13. When considering whether or not all elements of the system are making an appropriate contribution to the creation and presentation of Canadian programming, OMDC asks that the Commission look at the system as a whole, rather than as a series of isolated parts. All players in the system should be required to make contributions to Canadian content.
14. Recent research, undertaken by the CRTC as well as other organizations, indicates that while there is some Canadian broadcasting and ancillary content available online, American broadcasters are outpacing their Canadian counterparts in this area by making much more content available. There is a wide variety of Canadian-created online content available that is not related to television programming, from children’s content to webisodes to educational and other kinds of games. Commercial radio broadcasters and the CBC are supplementing their licensed operations with an online presence and major and independent record labels, as well as individual recording artists, have many online options for promoting their work.
15. Even with all this content online, most producers are still struggling to find a business model that works. The two main revenue-generating models are through paid subscriptions and advertising. While advertising-supported content is currently the most popular option, it is unclear how much revenue is available from this source. As business models continue to evolve and develop, everyone in the new media environment will need to be flexible and willing to experiment in order to capitalize on bringing high quality creative content to Canadian audiences.
16. Canada has one of the highest levels of Internet penetration in the world. Canadians spend a considerable amount of time surfing the web for entertainment, including downloading and listening

to music, visiting television program websites, playing games, downloading or watching videos and listening to the radio.

17. OMDC feels that the existing definitions the Commission uses for music and for live-action and animated television productions continue to be relevant in the new media environment. The Commission may want to consider expanding the definition in order to take into account that new media content draws on a wider range of creative and technical talent than traditional broadcasting does for its creation.
18. Support for the creation and promotion of Canadian content is important across all broadcasting platforms and all players have a role in ensuring that Canadian content is adequately financed and is able to find a place in the new media environment. At the same time, this financing should not come at the expense of the funds available for traditional broadcasting content.
19. OMDC feels that as broadcasting content is spread across a growing array of online and mobile platforms, it should be acknowledged that the companies that provide these services are elements of the broadcasting system and therefore have an obligation to contribute to the system.
20. In this submission OMDC will put forward a number of suggestions to support the creation and promotion of Canadian content in new media broadcasting, without making a recommendation as to which option should be adopted. Regardless of which option or combination of options are adopted, OMDC would like to emphasize the importance of appropriate mechanisms to ensure that content creators are compensated for the use of their material.
21. OMDC supports the idea that benchmarks and measurement standards will be necessary to ensure that Canadian audiences continue to have access to Canadian new media content and looks forward to working with industry and the Commission to develop these measures.
22. The Canadian independent production sector already makes a significant contribution to the creation of broadcasting content for the new media environment. If new funds are made available to those broadcasting on the Internet, they should be accessible and provide support to the independent production sector. Smaller, independent content creators face challenges related to access to large Internet portals and aggregators. They also face challenges when it comes to being able to maintain and exploit their digital media rights. For these reasons, OMDC supports the Commission's position on terms of trade between producers and broadcasters and feels that they should include the new media broadcasting environment.
23. OMDC sees no reason why the special role assigned to the national public broadcaster in the *Broadcasting Act* should not be extended to the new media broadcasting environment. Canada's public broadcasters already play a leading role in this area and this should be maintained by giving them access to whatever new financing mechanisms are introduced.
24. OMDC feels that the New Media Exemption Order remains appropriate but the time has come to introduce conditions for the ongoing exemption that establish a framework for increased financial support in the system from all players for the creation of high-quality creative content and that recognize the importance of protecting that content from illegal and unauthorized distribution.

Defining Broadcasting in New Media

Q.1. Does the Commission's interpretation of broadcasting in new media continue to be correct and are the proposed clarifications, in the paragraphs above, of this interpretation appropriate, complete and comprehensive? If not, how should the Commission's interpretation change?

25. OMDC agrees in principle with the proposed interpretation of broadcasting in new media as put forward by the Commission in Broadcasting Public Notice 2008-11. The definition of "new media", as set out in the Public Notice and in other Commission documents, adequately describes the type of content that should be the subject of this proceeding.
26. OMDC particularly agrees with the idea that "the definition of broadcasting should properly be neutral with respect to the means of transmission, that is, it would apply in the new media context to content that is downloaded, streamed, transmitted, peer-to-peer, etc."¹ This definition is sufficiently neutral that it can apply to all kinds of content delivered over the Internet, directly to a mobile device, or by whatever means are invented in the future to access and view content. Such a definition also ensures that the Commission is meeting the objectives of the *Broadcasting Act* with a definition that will remain readily adaptable to scientific and technological change.

Q.2. Given that the Commission has clearly articulated that it is not concerned with user-generated broadcasting content, to what type of broadcasting content in new media should the Commission pay particular attention? For example, should the Commission draw a distinction between professional versus non-professional content, or content aimed at commercial versus non-commercial use? If so, how should the terms be defined?

27. It is increasingly difficult to distinguish between "professional" and "non-professional" content in a new media broadcasting environment. The range of content producers spans a wide variety of creators including student filmmakers, beginners attempting to find an audience for their first projects, and so on. All of this content has the potential to find an audience in an online world and all of these producers have the potential to build professional careers out of this online exposure. OMDC would not support any regulation that inhibited producers from making their content available or that would prevent Canadian and global audiences from accessing that content.
28. However, should the Commission choose to introduce financial support mechanisms for the creation of new media content, it will become important to distinguish between professional and non-professional content creators. Professional, high-quality creative content has historically been and continues to be the most difficult type of content to finance in the traditional broadcasting world and this is equally true in the new media context.
29. Over the years, professional standards and definitions have been developed for the programs that support new media content creation, as they have been in the traditional broadcasting world. The Commission should consider elements of these existing definitions when developing its definition of "professional" content. For example, OMDC's Interactive Digital Media Fund requires that companies who are receiving our funds be incorporated and that their primary business be screen-based content creation. The products they are seeking support for must be suitable for commercial exploitation. Ontario's Interactive Digital Media Tax Credit has similar requirements in order for a corporation to be eligible for the Credit, and the eligible products must be for sale and/or licensing.

¹ Broadcasting Public Notice CRTC 2008-11, *Notice of consultation and hearing: Canadian broadcasting in new media*, 15 October 2008, para 22.

30. These requirements assume a degree of professionalism and help to ensure that support is given to high quality creative content that is intended for audiences in Ontario, in Canada, and around the world. Federal funding programs also have similar requirements and it is OMDC's opinion that the Commission should look to these guidelines as it seeks to develop a definition of "professional" content.

The Significance of Broadcasting in New Media and its Impact on the Canadian Broadcasting System

Q.3. How has broadcasting in new media and the corresponding business models evolved since the issuance of the exemption orders for new media broadcasting undertakings and mobile television broadcasting undertakings? What role can broadcasting in new media be expected to play in the future, as part of the Canadian broadcasting system?

31. In Broadcasting Public Notice CRTC 2008-44, *Call for comments on the scope of a future proceeding on Canadian broadcasting in new media*, the Commission outlined a number of key factors that have contributed to the development of a world that has changed dramatically for content creators, broadcasters and audiences since the New Media Exemption Order was issued in 1999. These factors include:

- Canada's position as a world leader in broadband connectivity;
- the increased availability of audio and video broadcasting content in various forms, such as Internet television, mobisodes and podcasts;
- the accelerating pace at which professionally produced broadcasting content is being made available online;
- the fact that Canadian audiences have begun accessing broadcasting content online while traditional broadcasting consumption is experiencing little growth overall and is declining among younger audiences;
- new advertising revenue business models that are emerging in the new media business environment;
- broadcasters who are making content available online;
- new media broadcasting alternatives and business models that are evolving on a continual basis; and
- creators, aggregators and content producers who are increasingly distributing content over new media platforms.²

All of these changes are taking place at a time when broadcasting and telecommunications technologies are converging and large media companies are consolidating.

32. In today's new media environment, consumers may access content through over-the-air television, through channels provided by a cable or satellite company, over the Internet through a broadband connection at home or on their mobile device or cellphone. In rare cases all of these options are provided by different companies, but often most or all of these services are provided by the same company. In Canada today the largest cable and satellite providers are also the largest Internet and mobile service providers and also have specialty and conventional broadcast interests. These

² Broadcasting Public Notice CRTC 2008-44, *Notice of consultation: Call for comments on the scope of a future proceeding on Canadian broadcasting in new media*, 15 May 2008, para 18-24.

companies have major influence over how Canadians access all kinds of creative media content, including local news, recorded music and television programs.

33. This convergence has also had an impact on creative content producers. To meet the increasingly international demands of the digital entertainment market, Ontario's creative content companies and producers have become multi-platform storytellers. To succeed domestically, these producers need the capacity and financial resources to create high-quality content that will attract audiences at home and abroad.
34. Ontario's independent film and television production community has had to adapt in the way it develops content and deals with broadcasters in this new environment. OMDC has heard from television producers that these changes begin early in the development process, as producers must bring to broadcasters not only a concept for a television series, but also proposals that take into account new delivery platforms and new elements such as interactivity that may need to be integrated into traditional platforms. This has an impact on their business models since the development process becomes more complex and therefore more costly, while licence fees are not increasing at a commensurate rate. In essence, they are being asked to provide more content for less money.
35. The most dramatic changes in business models due to new media are seen in the music industry. While there is still a place for traditional radio broadcasting and for the sale of physical CDs, the music industry has experienced a complete disruption of its value chain due to digital distribution, both legal and illegal, of its content. A recent study done for the music industry in Ontario highlights the following key trends in the industry:
 - Recorded music is selling less, but other revenue streams in the music industry are holding their own or are increasing;
 - Digital downloading continues to increase, but the legal revenue-producing component has not replaced the decline in physical sales, nor is it likely to in the near term;
 - The Internet is making it easier for potential music customers to discover and audition new and developing artists;
 - Labels, artists and other members of the ecosystem are looking to other revenue streams to fill the piracy gap.³

Ontario's record labels have many online options to reach potential audiences, including their own robust websites, social networking sites and online radio. Downloading and listening to music online is the most popular entertainment activity for Canadians online. More than half of Canadian Internet users report having engaged in these activities.⁴ ISPs are benefiting greatly from this interest in online music which attracts customers to their services.

36. Unfortunately, it cannot be ignored that the majority of the music downloading that takes place is of content that is being distributed illegally. Illegal file-sharing has been cited as a factor in loss of revenue and jobs in the Canadian music industry and internationally Canada has a reputation as "one of the largest file-sharing populations in the developed world, with unauthorised downloads dwarfing

³ Nordicity in association with Cuto and FRUKT, *A Strategic Study for the Music Industry in Ontario*, 4 November 2008, p. 20.

⁴ Charles Zamaria and Fred Fletcher, *Canada Online! The Internet, Media and Emerging Technologies: Users, Attitudes, Trends and International Comparisons 2007*, p. 11.

legitimate music sales.”⁵ This illegal and harmful activity is taking place using the services provided by ISPs. ISPs earn revenue from their subscribers whether those subscribers are engaging in legal or illegal activity while music producers and other content creators only earn revenue when those subscribers choose legal options for accessing content. This loss of revenue means that content creators are less able to re-invest in their companies and the continued creation of high-quality, innovative Canadian content.

37. Current research, including the Commission’s own research, indicates that younger audiences are spending more time online and are often as likely to turn to new media broadcasting options as they are to turn to traditional broadcasting options.⁶ PricewaterhouseCoopers predicts that the Canadian Internet and mobile phone market will grow at a rate of 21.1% annually to US\$3.45 billion by 2012.⁷ These projections suggest that current trends in multi-platform content creation and consolidation of media companies will continue in the years to come. As the environment continues to evolve, the Commission and all government bodies will need to continue to be flexible in regulating and supporting content creators and all players in the new media environment.

Q.4. Who are the relevant players in the creation and distribution of Canadian broadcasting content in the new media environment? How are they performing financially and how are they contributing to the creation and distribution of Canadian broadcasting content in new media today? What can be expected in the future?

38. The relevant players in the Canadian new media broadcasting environment often play more than one role within the environment. Record labels who stream concert footage and sell music on their websites are acting as broadcasters and distributors. Television broadcasters with robust websites are content creators as well as content aggregators. As already noted, the large ISPs are also mobile and wireless service providers, broadcasting distribution undertakings (BDUs) and in some cases also television broadcasters. In summary, there are very few clear lines between “old” and “new” media anymore. In this increasingly on-demand world, content creators, broadcasters and distributors are challenged with providing not only the high quality creative content that audiences want, but also with providing it to them how and when they want it.
39. It is for this reason that OMDC encourages the Commission to take a holistic view of the new media broadcasting environment. When considering whether or not all elements of the system are making an appropriate contribution to the creation and presentation of Canadian programming, we ask that the Commission look at the system as a whole, rather than as a series of isolated parts. Large, consolidated media companies may be facing challenges in their conventional broadcasting operations, but they may also be reaping substantial rewards from their BDU, ISP and/or mobile operations. Conventional broadcasters and BDUs are rightly required to make contributions to Canadian content, and the ISPs and mobile service providers that also benefit from carrying this content should be equally required to do so.

⁵ IFPI, *Recording Industry in Numbers 2008*, p. 22.

⁶ *Canada Online!*, p. 125-129.

⁷ PriceWaterhouseCoopers, *Global Entertainment and Media Outlook: 2008-2012*, p. 37

Q.6. What is the current availability of Canadian broadcasting content in new media? Are there challenges related to business models with respect to the creation and distribution of Canadian broadcasting content in new media?

40. While the exact amount of Canadian broadcasting content in new media is always changing and therefore difficult to measure, some recent studies have attempted to provide snapshots of what is available at specific moments in time. Two Solitudes Consulting, in a report for the Commission, undertook a survey of the amount of television programming available to Canadians through online and mobile services in January 2008. In terms of English-language television, they found that

[m]ajor U.S. broadcasters make between 52 and 80% of their non-news evening/primetime programming available in full-episode format on-demand at their websites. Canada's two largest private English-language broadcasters, by comparison, offer much less of their content this way (CTV offers 24% and Global TV offers 15%).⁸

However, Canadian audiences have less access to this content than do their American counterparts; broadcasters tend to limit the content they make available to online audiences, through geo-blocking or other means, to U.S. viewers.

41. When it comes to ancillary content, such as webisodes or behind-the-scenes footage, U.S. broadcasters are also outpacing Canadians. Two Solitudes found that

U.S. broadcasters had some form of ancillary content for their programming an impressive 94% of the time, whereas 63% of Canadian broadcasters had no ancillary content at all. 44% of Canadian broadcasters had some degree of ancillary content for their Canadian programming and 17% had some for their U.S. programming.⁹

In addition, the study states that American consumers have more access to content through aggregators who have legitimate content available but that do not yet offer their services in Canada.

42. Finally, the Two Solitudes study found that while most mobile providers provide content for streaming and/or downloading, very little primetime television content is made available for that platform.¹⁰

43. It is more difficult to ascertain how much Canadian content is available online that is not related to television content. In its July 11 submission in response to Broadcasting Public Notice CRTC 2008-44, Telefilm Canada noted that two-thirds of the projects it funds through the Canadian New Media Fund are multi-platform productions not tied to television broadcast properties.¹¹ There is a wide variety of Canadian-created online content available, from children's content to webisodes to educational and other kinds of games.

⁸ Alan Sawyer, Two Solitudes Consulting, *Changing Channels: Alternative Distribution of Television Content*, Report for the CRTC, June 2008.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Telefilm Canada, *Comments in Response to Broadcasting Public Notice 2008-44*, 11 July 2008, para. 7.

44. When it comes to music content online, commercial radio broadcasters as well as the CBC are supplementing their licensed operations with an online presence. The CRTC's review of the new media environment released in May 2008 found that "[o]f 100 Canadian radio stations polled, 89 had a website, 59 streamed their radio broadcast live, 18 streamed sections of their audio content, 16 offered podcasts or similar downloads."¹²
45. Music content is also made available to Canadians online through a wide variety of other sources, both legal and illegal. In 2007, over 44 million digital albums were sold in Canada, representing 10.3% of album sales in Canada.¹³ In addition, major and independent record labels, as well as individual artists, have many online options for promoting their work. The impact of illegal downloading of music content on the music industry has been discussed above.
46. Even with all of the content that is available online and the continuing pressure to make all content available this way, most producers are still struggling with how to make money from online content. In general, the biggest challenge related to business models in the new media environment is the fact that most business models are still being developed.
47. The two main models for monetizing online content are through paid subscriptions and by advertising. Subscription-based services are still relatively rare in Canada. Advertising-supported content currently seems to be the norm, but it is unclear how much revenue is available to broadcasters or content creators from advertising. Although many forecasters are predicting rapid growth in online advertising over the next few years, not all of this revenue goes to online broadcasters or content aggregators. In its July 11 submission in response to Broadcasting Public Notice CRTC 2008-44, the CBC noted that less than 1% of all Internet advertising is associated with Internet video content.¹⁴ As business models continue to evolve and develop, everyone in the new media environment will need to continue to be flexible and willing to experiment in order to capitalize on bringing high quality creative content to Canadian audiences.

Q.7. What is the extent of consumer demands in Canada for broadcasting content in new media? How is the broadcasting sector responding?

48. According to the *Canadian Internet Project 2007*, Canada has one of the highest levels of Internet penetration in the world. Nearly nine in ten Canadians 12 years or older (88%) have been online at some time in their lives. Furthermore, Canadians continue to be among the world's most frequent and heaviest Internet users: 40% of them use the Internet 15 or more hours per week. While seeking information remains the primary reason for going online, Canadians spend a considerable amount of time surfing the web for entertainment. More than half of Canadian Internet users reported having downloaded or listened to music online. Other popular online entertainment activities include visiting television program websites (46%), playing games (43%), downloading or watching videos (40%) and listening to the radio (39%). This demonstrates a significant Canadian audience for new media content.¹⁵

¹² CRTC, *Perspectives on Canadian Broadcasting in New Media*, May 2008, p. 33.

¹³ Douglas Hyatt, *An Overview of the Financial Impact of the Canadian Music Industry*, May 2008, p. 32.

¹⁴ CBC/Radio-Canada, *Comments in Response to Broadcasting Public Notice CRTC 2008-44*, 11 July 2008, para. 28.

¹⁵ *Canada Online!*, p. 11.

Are Incentives or Regulatory Measures Necessary or Desirable for the Creation and Promotion of Canadian Broadcasting Content in New Media?

Q.8. How should “Canadian content” be defined with respect to broadcasting content in new media? Are any of the definitions that the Commission uses for other platforms, such as radio and television, relevant? If so, how would they be applied?

49. The definition of Canadian content in new media should focus on the creators of that content. The definitions that the Commission uses for other platforms are relevant in that they provide objective measures that assist in determining where financial and creative control of the content lies. In defining Canadian content, the Commission may want to continue using the point systems used for music and for live-action and animated television productions. That said, the definitions should also take into account the fact that new media content draws on a wide range of creative and technical talent for its creation. OMDC has heard from stakeholders that new skill sets are required to produce content in the new media broadcasting environment. As producers continue to create the best content it can for a global audience, the Commission may want to introduce some additional flexibility into the system to allow for a wider range of projects to be considered Canadian content.
50. OMDC would also like to note that the discussion of what is considered Canadian content in the new media broadcasting environment does not begin to address the issue of how the environment affects Canadian commerce. As Canadian advertisers attempt to connect with online audiences, they are increasingly turning to popular non-Canadian portals and social networking sites to reach those audiences. This revenue is being diverted not only from Canadian broadcasters but also from the Canadian economy as a whole. While these economic issues are beyond the scope of the current review, it is important for everyone to be aware of their impact when considering the issues at hand.

Q.9. Given the level of Canadian broadcasting content in new media, are measures needed to support the creation, promotion and visibility of Canadian broadcasting content in new media? If so, what measures, and how can these be accomplished within the mandate of the Commission?

51. Support for the creation and promotion of Canadian content is important across all broadcasting platforms. When considering financing measures and incentives in the new media environment, we encourage the Commission to be open to innovative suggestions that take into account the fact that broadcasters, distributors and content creators operate across many platforms in the course of doing business. All players have a role in ensuring that Canadian content is adequately financed and is able to find a place in the new media environment.
52. We would also like to reiterate the point that the Commission does not exist in a vacuum, and its regulatory decisions have an impact on other federal and provincial programs. We ask the Commission to take a leadership role in this area by ensuring that the regulatory framework supports innovation and enables Canada, and Ontario, to leverage our creative assets while building strong, viable media businesses. All federal and provincial agencies should work together and be aware of one another's programs and decisions in order to ensure fully integrated broadcasting policies for all platforms.
53. OMDC encourages the Commission to look to innovative measures that will support the creation, promotion and visibility of Canadian broadcasting content in new media.
54. What is needed overall is more money in the system for the development, creation and promotion of high-quality Canadian content across all platforms. This could come through a variety of measures,

some of which are outside the Commission's jurisdiction. Such measures should include the renewal and expansion of the Canadian New Media Fund, federal tax incentives to support new media content creation and a regulatory environment that ensures independent players have fair access to the broadcasting and distribution system.

55. The Government of Ontario offers tax incentives to digital media content creators through the Ontario Interactive Digital Media Tax Credit and the March 2008 Provincial Budget announced an increase to OMDC's Interactive Digital Media Fund of \$7 million over four years. OMDC's pilot Screen-based Content Initiative is providing development support to screen-based content creators on whatever platform best suits their business model and OMDC is always working with stakeholders and government partners to find ways to make its programs as innovative as possible for its creative media stakeholders. The continuation and enhancement of similar measures at the federal level are necessary to ensure that high quality Canadian content is available on all new media platforms.
56. Traditional broadcast content will find its way on to new media platforms but only if it is well-financed to begin with. While we feel that there is a need to finance new media content, this financing should not come at the expense of the funds available for traditional broadcasting content. Rather, it is important to ensure that all producers have access to sufficient funds in order to continue to produce high-quality Canadian content across all media platforms. We appreciate that in an uncertain economic environment, many broadcasters are feeling pressure to control costs. However, this should not come at the expense of their obligations to support Canadian content. OMDC feels strongly that current program expenditure and programming requirements should at least be maintained and ideally be strengthened.
57. OMDC feels that as broadcasting content is spread across a growing array of online and mobile platforms, it should be acknowledged that the companies that provide these services are elements of the broadcasting system and therefore have an obligation to contribute to the system. This means that ISP and mobile service providers, who benefit from having Canadian content available for their customers, should be required to make contributions to the creation and promotion of that content.
58. There have been many options put forward by different groups on how Canadian content in new media broadcasting could be supported. It is not OMDC's intention to recommend to the Commission which of these options should be enacted. However, we would like to review some of the options put forward and discuss how these options would support content creators. We leave it to the Commission to determine, based on the evidence put forward in this process, which option, or combination of options, should be implemented. OMDC would also like to emphasize that, regardless of which strategy is adopted, appropriate mechanisms will need to be implemented to ensure that content creators are compensated for the use of their material.
59. Many creator groups have put forward the idea that a new fund should be introduced that would provide support to content developed for new media platforms. This fund would be financed through a levy on ISP and mobile service providers. Depending on the size of the levy, it is estimated that the size of this new fund could be at least \$70 million per year.¹⁶ Such a fund would serve the dual purpose of injecting greater financial resources into the system and ensuring that all players are supporting the creation and promotion of Canadian content.

¹⁶ Peter S. Grant, Senior Counsel, McCarthy Tétrault, *Reinventing the Cultural Tool Kit: Canadian Content on New Media*, A Presentation to the CFTPA "Prime Time in Ottawa" Conference, Ottawa, February 22, 2008, p. 13.

60. Another proposal was contained in Telefilm Canada's July 11 submission in response to Public Notice CRTC 2008-44. In it, Telefilm Canada proposed as a long-term goal the creation of a single Canadian content fund regardless of platform. Such a fund would "support viable projects with strong market appeal, profitability and exportability, with a view to nurturing strong Canadian content companies that can return revenues on investments, thereby attracting more private financing in the long term."¹⁷ This is a forward-looking proposal that acknowledges that content creators work across several platforms in the new media broadcasting environment. Telefilm also suggests that such a fund take into account a variety of financial instruments, such as loan guarantees, advances and gap and interim financing. Such a fund would need to have enough resources to ensure existing levels of support for screen-based content creation are supplemented rather than eroded.
61. OMDC would also like to point out that any fund that is created should not put Ontario's content creators at a disadvantage in favour of regional incentives. Ontario's content creators bring diverse voices and stories to the Canadian broadcasting system and are continuing to do so in the new media broadcasting environment. Ontario is a well-established centre of excellence and policies and regulations that privilege those regions outside that centre of excellence run the risk of silencing these important voices and eroding the core strengths and critical mass that Ontario represents. Content creators face business challenges no matter where they are located in the country and policies that create additional challenges for content creators in specific communities make it more difficult for them to generate revenue, capitalize on their intellectual property and re-invest in their companies.
62. The Commission may also want to consider allowing benefits from future transfers of ownership transactions be allocated to new media projects. When transfers of ownership take place among large, consolidated media companies, there may be assets under consideration that are related to ISPs, mobile service providers or other new media operations. The CRTC's decision in 2007 to allocate a small portion of the benefits arising from the change in control of BCE to the Canadian New Media Fund was an excellent example of how benefits payments can be directed toward new media projects.
63. OMDC has also heard the suggestion that Canadian broadcasters be allowed to include spending on new media content as part of their Canadian Programming Expenditure (CPE) requirements. While this would encourage Canadian broadcasters to invest in new media content, it should not come at the expense of traditional broadcasting content. Therefore it should only be considered if CPE requirements are going to be increased or if the revenue on which CPE is based is expanded to include revenue from new media operations.
64. In an era when the market for Canadian content is global, and when audiences have access to content from everywhere in the world, ensuring that audiences can find Canadian content is as important as making sure that the content is available to begin with. This could be done by providing incentives to Internet portals and aggregators who put Canadian content front and centre on their sites or who invest in the promotion of Canadian content in some other way.
65. Access to portals and aggregators is often a challenge for Ontario's independent screen-based and music producers. The Commission may want to consider requiring that a minimum amount of shelf space is set aside for Canadian content by mobile service providers, similar to what is done in the video-on-demand space.

¹⁷ Telefilm Canada, 11 July 2008, para. 33.

Q.10. What benchmarks and measures are appropriate to assess the level of Canadian broadcasting content in new media? How should these standards be applied?

66. OMDC supports the idea that benchmarking and measurement standards are necessary to ensure that all elements of the broadcasting system are contributing to the objectives of the *Act*. Such standards will depend on the platform being considered but could include measuring website traffic as well as counting the amount of content that is available for streaming and/or download and how often consumers access that content.
67. Objective and transparent measures will be necessary to ensure that Canadian audiences continue to have access to Canadian new media content and that any new investment of public and private funds in content creation is being made responsibly. Such measures will require cooperation from industry as well as government and we look forward to working with the Commission in this regard.

Q.13. Is the Canadian independent production sector contributing in a significant manner in the environment for broadcasting in new media? If not, are measures feasible or necessary, and how would they be applied?

68. The Canadian independent production sector is contributing significantly to the creation of broadcasting content for the new media environment. Ontario's independent film and television producers create interactive content to support and supplement their traditional broadcasting content. Interactive digital media producers create a wide variety of online products for commercial and educational purposes. Ontario's game developers are active in the online and mobile gaming worlds as well as in the world of console gaming. Independent record labels also provide a great deal of popular online music content.
69. Any financial and/or regulatory incentives that are introduced to support the creation, promotion and visibility of Canadian content should be accessible and provide support to the independent production sector. The *Broadcasting Act* requires that the broadcasting system include a significant contribution from the Canadian independent production sector and the Commission's expectation that 75% of a broadcaster's priority programming hours come from independent producers supports this requirement. If new funds are made available to those broadcasting on the Internet, similar expectations in terms of the involvement of the Canadian-controlled independent production sector should be included in the new media broadcasting environment.
70. The Commission should also be aware that Ontario's independent film and television production sector, interactive digital media producers and record labels face many of the same difficulties in negotiating with ISPs, mobile service providers and content aggregators that are faced by independent producers when negotiating with television broadcasters. OMDC supports the Commission's expectation that broadcasters will have terms of trade with independent producers in place by the time of their upcoming licence renewals. These terms of trade should take into account the realities of the new media broadcasting environment.

Are There Issues Concerning Access to Canadian Broadcasting Content in New Media?

Q.14. Are there practices that restrict or enhance the distribution of and access to Canadian broadcasting content delivered and accessed over the Internet and through mobile devices? If so, describe the practices and the nature and extent of their effect. Are measures necessary, and how would they be applied?

71. Smaller, independent content creators face many challenges when it comes to distributing their content in the new media environment. On the one hand, the Internet provides a gateway to the world for Ontario's content creators. On the other hand, to make oneself seen and heard on the giant worldwide stage often requires access to Internet portals and aggregators or an expensive marketing campaign. And that's assuming the creator has been able to maintain the right to distribute that content digitally.
72. On the music side, Ontario's independent record labels have difficulty accessing Internet portals and mobile telephone service providers which would provide them with a platform from which to promote and distribute their content. These providers often have their own content aggregators and are not generally inclined to deal with smaller producers. In addition, feedback from OMDC music industry stakeholders indicates that these large companies have the bargaining power necessary to ask for and obtain an ever-greater portion of the revenues that come from the downloading of music for ringtones to mobile devices and through Internet aggregators. In some cases content creators have even been asked to cover the copyright tariffs associated with the distribution of their music. This is a definite barrier to success for Ontario record labels, who already operate with the slimmest of profit margins and limited access to capital.
73. The Two Solitudes study cited previously gives an example of a significant barrier for film and television producers who wish to distribute their content either online or over mobile networks. In its review of MoboVivo, a Canadian company that sells content for downloading to portable devices, the consultants discovered the following:

In one case, episodes of a Canadian program were available, but only to Canadians – a reasonable situation. In contrast, though, for another *Canadian* program, MoboVivo has the rights to sell the content to anyone – *except Canadians*. We looked to see if the content in question was available to Canadians through any other channel but could not find it anywhere. We contacted the head of digital media at the company that produced the program. The situation – quite familiar from anecdotal stories told by producers – was that the Canadian specialty service (without whom the program would never have gotten off the ground) insisted upon all domestic new media rights for the program – and then proceeded to sit on them, doing nothing with them.¹⁸ (emphasis in original)

OMDC has also heard of such situations from its screen-based content producers.

74. By demanding and then doing nothing with new media broadcasting rights, broadcasters are erecting several barriers to accessing that content. First, the content is simply not available to Canadian consumers through legitimate channels. Second, the broadcaster who is holding on to the rights is not receiving any benefit from exploiting those rights, whether it be an increase in audience size for the program or increased online advertising or subscription revenue that could be earned by making the

¹⁸ *Changing Channels*.

content available online. Finally, the producer is prevented from exploiting the rights on his or her own. This is a waste of the resources that have been invested in the creation of this content.

75. One solution to this problem would be for producers to be able to maintain the new media rights to their content if they felt it was in their best interest to do so. However, producers often feel powerless in dealing with broadcasters on whom they depend to finance their content and bring it to an audience. This is one of the reasons that OMDC has been supportive of terms of trade between producers and broadcasters and supports the position the Commission has already taken on this issue. We also agree with the Canadian Film and Television Production Association's (CFPTA) position stated in their July 11 response to Broadcasting Public Notice CRTC 2008-44 that the "terms of trade agreements must acknowledge that Canadian new media programming is part of the broadcasting landscape and provide an exploitation model that reflects an equitable sharing of new media rights and revenues."¹⁹
76. While the Commission has announced its intention to hold a separate public proceeding on issues surrounding net neutrality, OMDC would like to reiterate here the importance of access to the new media broadcasting system for content creators as well as consumers. Terms of trade that ensure a level playing field for everyone will benefit content creators, audiences and the Canadian public as a whole.
77. OMDC has also heard from stakeholders that high data rates in the mobile space are making it prohibitively expensive for consumers to access much content on their mobile devices. Compared to other jurisdictions, the Canadian market for mobile content is relatively undeveloped. There are examples of Ontario companies who have had great success in licensing their mobile content in Europe and elsewhere but are unable to make a deal in Canada because the market here is not sufficiently developed. The Documentary Organization of Canada (DOC) also highlighted this situation in its July 11 submission in response to Broadcasting Public Notice CRTC 2008-44.²⁰ As the mobile industry becomes more competitive in the next two years, it is our hope that market forces will make data rates more affordable for Canadians.

Other Broadcasting or Policy Objectives

Q.17. Is there a special role for Canada's public broadcasters in the environment for broadcasting in new media? If so, are measures required? Describe any such measures and how these can be accomplished within the mandate of the Commission.

78. The *Broadcasting Act* sets out a special role for the Canadian Broadcasting Corporation (CBC) as the national public broadcaster. The *Act* states that, among other objectives, programming provided by the CBC should be predominantly and distinctively Canadian, reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions, actively contribute to the flow and exchange of cultural expression, and be made available throughout Canada by the most appropriate and efficient means.²¹ OMDC sees no reason why this role should not be extended to the new media broadcasting environment.

¹⁹ Canadian Film and Television Production Association, *Comments in Response to Broadcasting Public Notice CRTC 2008-44*, 11 July 2008. para. 26.

²⁰ Documentary Organization of Canada, *Comments in Response to Broadcasting Public Notice CRTC 2008-44*, 11 July 2008, para. 18-20.

²¹ *Broadcasting Act, 1991*, 3(1) (m), i, ii, iii and vii.

79. The CBC already does a great deal to support Canadian broadcasting in new media. They operate Canada's most popular Canadian website which contains content ranging from news and information, podcasts and radio content to streaming of sports programming and video content. They should be encouraged to maintain this leadership position through access to whatever new financing mechanisms are introduced. OMDC would like to note, as stated previously, that this leadership position should include appropriate mechanisms for ensuring that content creators are compensated for the use of their work.
80. The Ontario Ministry of Culture's written submission to this proceeding highlights the leadership role taken by the province's public broadcasters, TVO and TFO, in the new media environment. We agree with the Ministry's position that public broadcasters play an important role as catalysts for Canadian content development and innovation and therefore that their distinct role should be maintained within the Canadian new media broadcasting environment.

The Appropriateness of the New Media Exemption Orders

Q.19. Do the exemption orders for new media broadcasting undertakings and mobile television broadcasting undertakings continue to be appropriate? Why or why not? Are measures and/or regulatory amendments required to ensure that the environment for broadcasting in new media is contributing in an appropriate manner to the achievement of the broadcasting policy objectives of the Act? If so, describe any such measures or amendments.

81. There can be little doubt that the new media broadcasting environment has changed since the original New Media Exemption Order was issued in 1999 and even since it was extended to Mobile Television Broadcasting Undertakings in 2007. We have attempted to demonstrate in this submission how these changes have affected the business environment for Ontario's content creators. While the convergence of technologies and broadcasting platforms that are becoming a reality present many opportunities for content creators they also present several challenges. It is an increasing challenge for content creators to adequately finance high quality creative content for multiple platforms. It is also a challenge for creators to protect their content from illegal or unauthorized distribution.
82. In the past, the Commission has recognized that illegal activities can have a detrimental impact on the broadcasting system as a whole. For example, in the 2004 licence renewals for ExpressVu and Star Choice, the Commission recognized that the theft of satellite signals "deprives the entire broadcasting system, including satellite and cable distributors, television broadcasters, producers, artists, technicians and program rights holders, of hundreds of millions of dollars of revenues annually."²² The theft of creative content is equally harmful to Canada's content creators. OMDC asks that the Commission recognize that illegal and unauthorized use of creative content is an industry-wide problem that has a detrimental impact on all content creators.
83. OMDC also asks that the Commission require that some support be directed to the creation and promotion of Canadian content. This could take the form of a contribution representing a proportion of broadcasting revenues realized by ISPs and wireless providers for financing new media content, or it could be one or all of the other financing options described above. Some type of contribution by all

²² Broadcasting Public Notice CRTC 2004-19, *Introductory statement to Broadcasting Decisions CRTC 2004-129 and 2004-130, which renew the licences of the ExpressVu and Star Choice direct-to-home satellite distribution undertakings*, 31 March 2004, para 86.

players in the new media broadcasting environment is required to support the promotion and creation of Canadian content.

84. That being said, OMDC feels that to attempt to license the many broadcasters and distributors in this area, some of whom are not Canadian companies, would be administratively onerous for the Commission and would not provide a significant benefit to the Canadian broadcasting system. We therefore feel that the New Media Exemption Order is still appropriate, although the time has come to introduce conditions for the ongoing exemption. As outlined here, these conditions should establish a framework for increased financial support in the system from all players, including ISPs and mobile service providers, to the creation of high-quality creative content by Canadian producers and should also recognize the importance of protecting that content from illegal and unauthorized distribution.
85. It is important to note that adding conditions to the existing exemption orders is not the same thing as attempting to regulate the Internet. The Canadian Association of Broadcasters (CAB), in its July 11 submission in response to Broadcasting Public Notice CRTC 2008-44, pointed out that there is wide concern among members of the Canadian public that the outcome of this review will be censorship or regulation of the Internet. OMDC agrees with the CAB's point that there is an ongoing need for the Commission to ensure that they continue to communicate their intentions to the public in as open a manner as possible.

Q.20. Under what conditions should the Commission revisit the appropriateness of the new media exemption orders in the future?

86. In order to ensure transparency and that the objectives of the *Broadcasting Act* continue to be met, OMDC suggests that the Commission should review the exemption orders on a regular basis. While we understand that the regular intervals for reviewing exemption orders is five years, OMDC encourages the Commission to be flexible in this case. New financing mechanisms that may be introduced as a result of this proceeding will take time to develop, implement and become effective. At the same time, the environment is constantly changing and it is difficult to say at this time when it will be appropriate to review the exemptions. We are also cognizant of the fact that such reviews themselves take time to complete. We are confident that the Commission will continue to monitor the environment and will be made aware by its many interested stakeholders when and if the exemptions are showing signs of losing their effectiveness.

Conclusion

87. OMDC submits that although the new media broadcasting environment has changed substantially since the New Media Exemption Orders were implemented, they still remain appropriate. However, we feel the time has come to impose conditions on these exemptions in recognition of the fact that there are no clear lines between old and new broadcasting and everyone should be making an appropriate contribution to the system.
88. Although it is outside the scope of the current proceeding, in the past year CRTC Chairman Konrad von Finckenstein has noted that as the broadcasting and telecommunications industries are converging, regulation and ultimately legislation must follow suit.²³ OMDC would support legislative changes that would reflect this increased convergence and the realities of the operating environment for broadcasters, distributors and content creators.

²³ Speech by Konrad von Finckenstein, Chairman, Canadian Radio-television and Telecommunications Commission, to the 2008 Broadcasting Invitational Summit, June 19, 2008.

89. Until such time as legislative change is introduced, OMDC feels that the best way to recognize the ongoing convergence of technologies and platforms is by ensuring that all players in the broadcasting environment, including ISPs and mobile service providers, make a contribution to the creation and promotion of Canadian content.

90. All of which is respectfully submitted.

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