Intervention to Canada Radio-television and Telecommunications Commission
8663-A182-201800467 Application to disable on-line access to piracy sites

RE: FairPlay Proposal

I am a lawyer and adjunct professor at the University of Toronto Faculty of Law with long experience in intellectual property, Internet, electronic commerce, privacy and other technology-related law, and an artist. I am also a Senior Munk Fellow at the Macdonald-Laurier Institute. A biographical note is appended to this letter. I have no commercial interest. I intervene solely on my own behalf. I intervene both as a lawyer and as a creator who cares very deeply about the control of and commercial benefits from creators’ works.

I strongly support the FairPlay Proposal (“Proposal”) as presented to the Canada Radio-television and Telecommunications Commission (“Commission”).

The primary purpose of this intervention is to make clear that meaningful public opposition to the Proposal is far less than appears.

I am willing to appear before the Commission.

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1. **Key Findings**

- Many of the flaws and risks of online consultation, including those demonstrated by the consultation for Canadian copyright law reform several years ago, appear in the interventions on the Proposal. Far from being an honest sounding of the opinions of a representative cross-section of Canadians, the consultation by the Commission on the Proposal has been heavily manipulated by interested parties appealing to a narrow range of negative opinion.
- That the interventions are overwhelmingly negative is accounted for by widespread misinformation regarding the Proposal. More than one quarter directly copy and paste from misinformation disseminated by a small number of third parties; the vast majority are premised directly on the same misinformation (most notably, that the proposal would allow ISPs to unilaterally block websites of their choosing).
- The issues raised by negative interventions are already addressed in the Proposal.
- Data about intervenors are incomplete and unreliable, leaving open the clear possibility of interventions by non-Canadians and multiple interventions by the same person.
- Interventions are not demographically representative of Canada; in particular, gender diversity is appallingly low.
- No negative intervention we reviewed addressed directly the actual Proposal but rather they overwhelmingly appear to be influenced misinformation emanating from a small number of sources.

2. **Public Consultation**

The Commission is to be commended for its continued efforts to incorporate public participation into its expert decision-making. Given the dynamic described in this intervention, however, the question arises what is to be made of the consultation that has been undertaken on this Proposal? In my view, the Commission can use the public comments to identify certain public concerns that the Proposal should strive to address. Based on my review of interventions, those appear to be a belief that private companies ought not to be able to unilaterally block websites, that blocking a site should require due process, and that site-blocking should not undermine the net neutrality regime in Canada.
Having identified these concerns, however, the Commission cannot rely merely on the public consultation to assess whether the proposal does in fact address them; that is something that the Commission must do in its role as an expert administrative tribunal.

In a technocratic state made up of many highly specialized facets of government, the ability of the non-expert to meaningfully identify the policy levers that should and should not be pulled to achieve desired outcomes is usually low. While she may raise important issues that should be addressed, perhaps her input on whether they have been addressed or how to address them is uninformed. Perhaps it addresses issues that have already been closed. Perhaps it is too general. All too often, particularly on contentious issues, it reflects only the influences of proponents on one side or another, including misinformation disseminated by interested parties.

On the Proposal, this kind of “fake news” abounds.

Regarding a highly specialized, data-driven and technical exercise like pirate site-blocking, informed and expert opinions are usually more useful than opinions of non-experts. This is the case with the Proposal, making drawing conclusions based on the number of interventions problematic. Few are expert. Certainly the Commission should and no doubt will consider every intervention with equal care. That does not mean, however, that it should give any weight to any mere tally of votes. In this case, there is an appearance of substantial public opposition to the Proposal —but that appearance all but fades away completely on examination of the interventions themselves.

Internet and copyright laws, although very, very technical, have recently come to stir up a froth of public opinion—mostly, it should be said, because activists, mostly legal or computer science academics, find agitation of the public advantageous. Opposition to private property, for that is what copyright and its protection is, can be an attractive form of rebellion. It also justifies not paying for art and content consumed, creating a powerful self-interest. Such opposition, however great and however vociferous, cannot be the basis for sound innovation policy in Canada. It is thus up to Canadian government and its agencies to find a balance on behalf of the very numerous citizens whose livelihoods depend on copyright and telecommunication industries and the overwhelming majority who choose to lawfully access and pay for copyrighted works.

The recent case of copyright reform consultation, ending in the Copyright Modernization Act brought into force in 2012, is particularly cautionary. In that instance public consultation was heavily gamed and distorted by largely illegitimate submissions. In a commentary I wrote at the time, I demonstrated that a very large proportion of submissions came from illegal game
modders\textsuperscript{1} and non-Canadians.\textsuperscript{2} Similarly, the apparent levels of opposition to the Proposal need to be put properly into context.

3. Overview

To assert the absence of meaningful public opposition to the Proposal may seem counterintuitive to the Commission, having received thousands of online interventions decrying the Proposal. But what is the validity and utility of these interventions?

The interventions are right, for instance, that private companies ought not to be able to unilaterally block websites. They are right that blocking requires due process. They are right that net neutrality is current government policy and, as properly defined, may be an important policy. And so on; we can give credit for these insights. But, the Proposal, of course, meets these concerns. It is sophisticated and carefully structured by able minds. It manages quite well to address these basic issues.

The disinformation propagated about the Proposal accounts for the remarkable volume of interventions. Many interventions have been sent using agitprop websites OpenMedia or SumOfUs; many copy posts by the same groups and their affiliates on Reddit; many more are slight variations designed to look different but repeat the same misinformation (see below for further information on these sites).

The interventions in this category are based on, and reproduce, such profound misinformation about the Proposal that they are primarily informative simply to confirm that the main objections Canadians might have in this area are actually addressed by the Proposal. The Proposal itself, framed to avoid the very criticisms intervenors echo, fully answers intervenors’ concerns.

Frighten people about the parochial, commercial corruption of the Internet, and they get agitated. Some of them even write in. One can only speculate how the same people would have acted in response to the actual Proposal, but one supposes it would be much more placidly.

It is, of course, good for people to participate in democratic processes. Each of the thousands of distinct intervenors should be credited for his impulse to get involved. It is unfortunate that in the course of doing so they have been misled by a small number of third parties.

The narrow demographic of intervenors may also contribute to the narrow range of views generally uncovered by the consultation process. The intervenors are overwhelmingly male, and, with less certainty, young (in addition to being followers of small number of interested organizations).

\textsuperscript{1} Game “modders” modify electronic games, including to allow piracy and platform portability.

\textsuperscript{2} http://www.richardcowens.com/?p=4
Another impulse to intervene arises from the recent liveliness of the Internet neutrality debate in the US. This is likely to have sensitized people to apparent attempts to interfere with Internet traffic, like the Proposal. But net neutrality is a red herring. The Internet is not and should not be open to everything—that is not what Internet neutrality means. Stolen content should no more be accessible than child pornography or hate speech. Many intervenors argue that the Proposal creates a risk of broad censorship, that the Proposal is just the first step. That first step was taken long ago, and with very good reason. Hate speech is censored and so is child pornography and so is other material. All that is left for discussion is reasonable limits. The principle is not sacrosanct in the face of illegality. It never was.

4. Analysis

I have reviewed well over 300 submissions, 250 of which were selected randomly using a random number generator to generate numbers between 1 and 8000 and the others selected less formally but also at random. For the 250 submissions the following were recorded: (1) case number; (2) name; (3) whether the name is traditionally male, female or gender-neutral; (3) whether personal information is missing from the intervention; (4) whether the intervenor uses an international email address; (4) whether the intervention has been copied from a particular online source; (4) if so, the relevant hyperlink; (5) any misinformation about the FairPlay Proposal contained in the intervention; and (6) the comment itself. These data have been submitted with this letter in pdf form.

The few supportive interventions in our sample seemed original and not copied. There is also evidence however of copying amongst supporting applications. That said, supporting interventions are far more likely to be substantial and properly composed, on letterhead and engaging with the actual Proposal.

The following illustrates certain types of misinformation in the interventions.

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4 8000 was the approximate number of submissions listed on the CRTC website at the time the analysis was made.
5 Positive interventions seem to become more numerous later in the timeline of the interventions, but never nearly so numerous as negative ones.
Other misconceptions about the Proposal, in order of frequency, making up the remaining 35%, include:

1) The Proposal amounts to censorship of the Internet and will result in monitoring of individual’s online activities;
2) The FairPlay Canada Coalition is challenging net-neutrality;
3) Current anti-piracy tools are sufficient and piracy is not a serious issue in Canada; and
4) There will be no right to appeal decisions of the CRTC and no judicial oversight of blocking decisions.

None of these is correct.

The following quotations from interventions are examples of the misinformation contained in them, arising from misleading fearmongering.

1) Misinformation: private companies will have the unilateral power and discretion to block websites

<table>
<thead>
<tr>
<th>INTERVENTION</th>
<th>COMMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>416</td>
<td>“Allowing an ISP to block access to any websites goes against the principles of net neutrality. We cannot let large companies dictate what we can and can’t see, on the internet or anywhere else.”</td>
</tr>
</tbody>
</table>
“Do not let companies disable access to websites at their own discretion.”

“I am strongly oppose [sic] to Bell, and any other Internet Service Provider (ISP), being given the authority to block Internet sites of its choosing.”

“Giving large corporations the right to decide what websites free citizens can access is certainly not appropriate.”

2) Misinformation: Websites with legal content will be blocked

<table>
<thead>
<tr>
<th>INTERVENTION</th>
<th>COMMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1850</td>
<td>“It starts with copyright infringement, but once the system is in place, I suspect media companies would attempt to use it for other purposes that it wasn’t originally intended for.”</td>
</tr>
<tr>
<td>2660</td>
<td>“If companies and the government start blocking sites they deem to be dangerous we may find websites that simply speak out have complaints about those companies blocked.”</td>
</tr>
<tr>
<td>2784</td>
<td>“This can open a loop hole [sic] so that [ISPs] can justify blocking competing sites.”</td>
</tr>
<tr>
<td>3551</td>
<td>“There are also serious concerns over what Bell or other companies would consider ‘piracy’; much of the traffic to so-called pirate sites would certainly be perfectly legal.”</td>
</tr>
</tbody>
</table>

The majority of interventions are premised on a belief that ISPs are seeking unfettered discretionary powers to unilaterally block websites (which may be providing legal content), and consequently, have opposed the Proposal. In reality, these interventions are not commenting on the Proposal as submitted by the FairPlay Canada Coalition, but instead, are reacting to misinformation that has been disseminated online.

5. Sources of Interventions

There are several online websites that encourage interventions and supply text to be copied and used for interventions.

A search for each of the block of 250 comments revealed that 8 percent (21 interventions) were copied and pasted from OpenMedia’s form letter and 16 percent (39 interventions) were copied and pasted from OpenMedia’s Reddit threads. Notably, many Reddit users draw from OpenMedia’s website and form letter and include OpenMedia links in posts and replies. In
total, 25 percent of the interventions in our sample were copied and pasted directly from sources that provide misinformation about the FairPlay Proposal.

To reproduce suggested text makes for a weaker intervention than one originally-drafted, but it may nonetheless reflect the honest beliefs of the intervenor. The problem with the interventions that copy directly from OpenMedia, Reddit and SumOfUs text is not primarily their plodding similarity, but rather the clear evidence that they originated from disinformation, rather than from consideration of the Proposal itself.

a. OpenMedia

OpenMedia is an activist organization based in Vancouver that campaigns against the FairPlay Proposal. OpenMedia publishes error-ridden, hyperbolic and misleading information about the Proposal. OpenMedia’s website states:

They [FairPlay Canada] want to create an official Internet censorship committee within the federal government, without court oversight. This dangerous and over-reaching proposal will lead to legitimate content and speech being censored, violating our right to free expression. [Emphasis added]7

OpenMedia provides an automated form letter to generate interventions on the Proposal. It includes the following:

This proposal would result in sweeping Internet censorship, penalize everyday online activities, and threaten Canada’s Net Neutrality rules [...] To start blocking one type of content opens the door for all kinds of other requests to block content — some of which may be legal, but just unpopular [...] Corporations should not be able to pick and choose what I see online. [Emphasis added]8

An OpenMedia graphic states in bold capital letters, “big telecom decides what you see.”9

OpenMedia messaging uses blatant misinformation about the proposed role and powers of ISP’s, pursuant to the FairPlay Proposal, to incite negative public reactions. These are from its website:

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8 Ibid.
9 Ibid.
As stated in the Proposal, the FairPlay Canada Coalition advocates an Independent Piracy Review Agency ("IPRA"), structured as a Canadian not-for-profit corporation, with an independent and diversely constituted Board of Directors. The IPRA would hold hearings and make recommendations to the CRTC, which the CRTC would then consider through an established administrative process before making a decision.

OpenMedia has also misled Canadians about the procedural fairness of the suggested structure, by stating there will be “no court oversight” and “no court orders for website blocking.” However, the Application clearly states that the CRTC is an independent, arms-length, quasi-judicial administrative tribunal that has the powers of a superior court with respect to matters of evidence and enforcement. It provides truly judicial oversight, and is itself subject to the oversight of the Federal Court of Appeal. Notwithstanding false assertions to the contrary, oversight by expert tribunals (and not courts of plenary jurisdiction) is common among nations.

The Application emphasizes:

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10 Supra note 2 at 23
11 Supra note 2 at 6.
12 “judicial”, as defined in the Shorter Oxford English Dictionary
[U]nder the coalition’s proposal ISP’s would not be required to monitor piracy nor could they unilaterally determine which websites are added to the list of piracy sites. Instead, the role of ISP’s would be restricted to implementing a legal requirement to prevent access to piracy sites, which are already unlawful, as directed and identified by the Commission.¹⁴

Furthermore,

If an applicant, website owner, ISP or relevant member of the public objects to a Commission decision identifying a piracy site, any of them could seek a review of the decision under section 62 of the Act or could seek an appeal or judicial review in Federal Court.¹⁵

Telecommunications companies will not be able to unilaterally block websites. The FairPlay Canada Coalition is advocating for an objective, independent, evidence-based process grounded in principles of natural justice.

OpenMedia has also created a separate website, which makes the same allegations and contains a link to the above-mentioned form letter.¹⁶ This website states:

Write to the CRTC through this easy-to-use tool with suggested language and talking points. Or file your comment directly through the CRTC’s (confusing and difficult to navigate) website.

OpenMedia dissuades visitors from using the CRTC’s “confusing and difficult to navigate website” and from providing the CRTC with comments in their own words.¹⁷

The Huffington Post published an article by Laura Tribe, Executive Director of Open Media titled, “Bell’s Website Blocking Plan Is Authoritarian Overkill” that makes numerous false claims about the FairPlay Proposal.¹⁸ This article reiterates that the CRTC’s website is difficult to use and encourages readers to use OpenMedia’s form letter instead, stating “over 6,000 individuals have gone directly to the CRTC's difficult to navigate website to submit individual comments.”¹⁹ In addition, the OpenMedia site directs viewers to Michael Geist’s blog, which is full of disinformation (see below).

¹⁴ FairPlay Coalition, CRTC Application, p. 22.
¹⁵ ibid p. 7.
¹⁶ OpenMedia, “Here’s how we stop website blocking in Canada”, (online): <https://unfairplay.ca/>.
¹⁷ ibid.
¹⁹ ibid.
In summary, OpenMedia has falsely advertised the following information through its Don’t Censor campaign website and form letter:

1. telecom companies will monitor the online activities of Canadians (see image below)
2. telecom companies will have the power to unilaterally and arbitrarily block websites of their choosing;
3. there will be no oversight of Commission or IPRA decisions;
4. there will be no appeal of Commission decisions;
5. Canadians will be “penalized for everyday online activities;”
6. submitting a comment through the CRTC’s website is confusing and difficult;
7. CRTC powers will be expanded so that lawful websites and digital materials will be blocked; and
8. piracy has little to no impact on content, digital services and television production.

These misrepresentations are now repeated in the interventions. One has to wonder what the point is. It is a pity Open Media did not do a real service and engage seriously with the proposal. Why not?
Perhaps the answer is OpenMedia’s fundraising. It uses the Don’t Censor campaign to raise funds. In other words, OpenMedia has an incentive to scaremonger to gain media and public attention and support. It uses the Proposal to conjure monsters for its own benefit. This is not lost even on Reddit users:

OpenMedia lists as one of its tier-one funders Google. Google funds anti-copyright think tanks and academic enterprises in the EU and the US. In the politics of intellectual property, grass roots are manured by big business.

b. Ian Spence

Ian Spence, apparently a software developer, created a website called “Unfair Play” at ianspence.com/stop_fairplay.htm. His website’s homepage includes a pop-up with a link to “Submit a Letter to the CRTC,” which is a link to OpenMedia’s automatic form-letter at act.openmedia.org/DontCensor.

Spence reiterates the same misleading content provided by OpenMedia. For instance, he states:

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21 [https://www.politico.eu/article/google-campaign-for-accountability-lobbying-humboldt-ceps-astroturfing-oracle/](https://www.politico.eu/article/google-campaign-for-accountability-lobbying-humboldt-ceps-astroturfing-oracle/)
22 [https://campaignforaccountability.org/work/google-academics-inc/](https://campaignforaccountability.org/work/google-academics-inc/)
A group of media companies [...] want the Canadian Radio-television and Telecommunications Commission (CRTC) to enact a policy that would give them the authority to block websites entirely at the control of media companies.

His main web-page includes the following misleading pop-up:

![Image of a pop-up message](image)

**c. SumOfUs**

SumOfUs is an anti-corporate activist organization which also promotes interventions on the Proposal. It too offers gravely misleading text for interventions, and misrepresentations of the Proposal as a basis for intervening. Like OpenMedia it too fundraises.

The SumOfUs letter reads in large part:

This *dangerous proposal would put too much control of the internet in the hands of a few, unaccountable corporations, and would result in sweeping censorship and threaten a fundamental pillar of net neutrality in Canada.*

This proposal would threaten the open internet, a key tool that I use daily.

I am concerned about the *lack of oversight* for the “Independent Piracy Review Agency”, that would recommend sites to block the CRTC. Any process that is concerned with the restricting access to the internet should have court oversight and not be *in the hands of a few corporations.*
This proposal is designed to curb piracy which is at an all-time low. Companies like Bell have a solution that works for their bottom line and addresses a problem they have not demonstrated exists.\textsuperscript{23} [emphasis added]

d. Reddit

Reddit is an American social news website driven by user content. The content is either a link to another web page or a text blob accompanied by a title. Each submission is voted upon by users of the site, either up or down, to rank the submission. Users can also discuss the submission in a threaded comment section attached to each submission.\textsuperscript{24}

Reddit users are the source of a significant portion of the opposition to the Proposal.\textsuperscript{25} Many of the interventions we reviewed were copied from Reddit postings. OpenMedia staff members often posted on Reddit about the Proposal.\textsuperscript{26} Reddit is a source of misleading information about the Proposal. As noted in one post, “[i]f this proposal gets approved by the CRTC, Bell and other ISPs could block any website they want” with a link to OpenMedia’s website and form letter.\textsuperscript{27}

Many of the user names and comments on threads about the Proposal allude to users’ interests in obtaining pirated materials, such as one user, “The Pirate King of Ireland.”\textsuperscript{28} The user “halogrand” notes:

A lot of studies have shown that people pirating content, were unlikely to buy it in the first place at the original price. I'll download a movie, because it is easy, convenient, and free.\textsuperscript{29}

Further, “marnas86” states,

If Bell wants to restrict Game of Thrones by refusing to put it on CraveTV (even though they have the rights to do this) to only ppl with either HBO tv channel through their cable subscription or on the TMNTToGO App (but only if

\textsuperscript{23} \url{https://actions.sumofus.org/a/send-an-email-to-protect-net-neutrality-now?source=campaigns}
\textsuperscript{25} Reddit User: Post and Comments, 1 March 2018 (online): <https://redd.it/811g5q>.
\textsuperscript{27} Reddit User: Post and Comments, 04 February 2018 (online): <https://redd.it/7v9taz>.
\textsuperscript{28} Reddit User: “ThePirateKingofIreland” Comment, 31 January 2018 (online): <https://redd.it/7u7bov>.
\textsuperscript{29} Reddit User: Post and Comments, 4 December 2018 (online): <https://redd.it/7hj1v2>.
you’ve got the cable subscription) then for someone like me how can I access it legally at all except through iTunes (which charges an exorbitant $5.99 per episode). So obvi I have to torrent consequently.30

6. Verification of Intervenors

There is no certain verification of the identity or citizenship/residency status of those making submissions to the Commission, only self-reporting. In a very many cases the personal information of intervenors is incomplete, blank or blatantly false. Consequently, the Commission does not have reliable data to assess whether interventions reflect the views and opinions of Canada’s diverse population, or even of Canadians at all.

Another concern is the likelihood that individuals are submitting multiple comments under different names and email addresses (on the Commission website and through form letters). Such concerns are evidenced by the fact that intervenors have provided names such as “John Doe” (intervention 157), “John Bellsucks” (intervention 736) and “Concerned Citizen” (intervention 1783). In another example, an individual is listed as “John Freepeoples” with the company name “Humanity, specifically Canadians” (intervention 7879). Why hide? Further detail on missing information follows below.

Also, interventions with the same text, not apparently copied from any of the third-party sources of which we are aware, appeared.31 Hence the numbers cited herein for copied interventions are certainly low.

a. Reddit

It is estimated that only 5.7% of Reddit users are Canadian,32 therefore, it is likely that many Reddit users viewing and contributing to discussions on these threads do not live in Canada, but may make submissions to the CRTC. Further, a 2011 survey by Reddit and 2013 survey by the Pew Research Center both confirm Reddit’s predominantly young adult male demographics. Approximately 78% of Reddit users are male, 49% are between the ages of 18 and 24 years, and 35% are between the ages of 25 and 34.33 Hence, one should question the representativeness of comments generated based on misinformation in an international, biased, and predominantly young male space.

30 Ibid.
31 for example, numbers 751, 752 and 754.
b. Twitter

Blunod is a program that provides data visualizations of the use and frequency of re-tweets, to show the interconnectedness of users.\(^{34}\) By searching the hashtag “#DontCensor,” created by OpenMedia, the program analyzed 78 tweets, as well as the top 89 users of the hashtag. #DontCensor is connected, in order of frequency, to the following twitter accounts: (1) Bell; (2) OpenMedia (“Don’t Censor Canada); (3) the CRTC; and (4) FairPlay Canada. By searching #DontCensor, we found that one of the most prolific users of this hashtag self-identifies as an American, located in the United States, and based on the number of tweets, is likely to be a spam account.\(^{35}\) Further, the top account that has re-tweeted the hashtag has over 30,000 tweets and is also likely to be a spam account.\(^{36}\) Ultimately, this raises serious questions about the level of opposition to the Proposal in Canada.

7. Formal deficiencies, representation and validity

a. Missing Information

All interventions are missing personal information. The CRTC’s online submission form requests that intervenors provide: (1) intro (Mr., Mrs. or Ms.) - required; (2) first name - required; (3) last name - required; (4) title; (5) company; (6) address; (7) city - required; (8) country – required; (9) province or territory – required; (10) postal code; (11) email address; (12) telephone; and (13) fax.

None of the interventions we reviewed included all of the requested information. While one can assume that some intervenors may not have a company name or fax number, for example, 165 interventions were missing four or more categories of personal information. As such, it is impossible to verify the identities or geographic locations of the vast majority of the interveners. Non-Canadians, including those with an interest in serving illegal content or devices to the Canadian market, would be expected to use the intervention process, just as they did with respect to the copyright consultation, as described above.\(^{37}\)

b. Gender Representation

Out of 250 interventions, 85 percent were submitted by individuals with traditionally male names (“males”); 10 percent were submitted by individuals with traditionally female names (“females”); 4 percent were submitted by gender-neutral names, and 1 percent were submitted by individuals who used initials only.

Of the 39 individuals that copied and pasted their comments from Reddit, 33 are males.

\(^{34}\) Bluenod (online): <https://bluenod.com/>.
\(^{36}\) Twitter User: @BrurellSue (online): <https://twitter.com/BrurellSue>.
\(^{37}\) http://www.richardcowens.com/?p=4
c. Journalistic Responses

Reactions to the Proposal in traditional Canadian media have been positive. Several Canadian news outlets have published opinion pieces in support of the Proposal. On January 29, 2018, Greg O’Brien published an op-ed that discussed the necessity for, and benefits of, the proposed IPRA, astutely pointing out in its headline, “4,700 People can be wrong”. On the same day, the Globe and Mail published an article emphasizing FairPlay Canada’s broad support for net-neutrality and the implementation of a neutral, independent review agency. This was followed by an op-ed in the Globe and Mail by Barry Sookman, in defence of the Proposal.

An article in MobileSyrup states, citing figures far exceeding interventions yet posted on the CRTC web site,

As of the writing of this article, 60,809 comments have submitted to the CRTC through OpenMedia’s Don’t Censor Canada website (a tracker on the website provides a near live count of the number of comments). Another approximately 33,000 comments have

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been submitted to the CRTC through the SumOfUs website, according to OpenMedia — the two organizations partnered on opposing the proposal.\(^{41}\)

This is further evidence that the overwhelming majority of submissions originate from tainted sources.

d. Michael Geist

Another important source of disinformation about the Proposal is the blog of Michael Geist. Professor Michael Geist of the University of Ottawa has written a long series on his blog against the Proposal. His views and comments are highly selective, misleading, or just wrong. Geist writes to further his idiosyncratic anti-copyright ideology. A thorough canvassing of Geist’s views and how very wrong they are has been prepared by Barry Sookman, perhaps Canada’s leading intellectual property law scholar and lawyer.\(^{42}\)

As a Canada Research Chair, Geist ought to be more even-handed. Someone who bothers to write a twenty-part (and counting) anti-FairPlay diatribe on his blog is an activist, not a neutral commentator. He even promotes OpenMedia and the OpenMedia day of protest on his blog.\(^{43}\)

Since he reflects the popular opinions of a class of hard-core “neterati”, he is a popular writer with a considerable audience and OpenMedia draws from his work. Indeed, he is the source of a lot of the misinformation about the Proposal.

Ironically, and presumably in anticipation of a critique such as this one, Geist writes on his blog that the interventions opposing the proposal are actually quite varied. One can only suppose that he is satisfied by the narrow range of variation on the OpenMedia text written in by some users.\(^{44}\)

The OpenMedia misrepresentations are generally included among Geist’s more comprehensively misleading assertions:

- Site blocking is rare
- Canada would be a virtual outlier if it adopted site blocking without court orders
- Blocking orders must be made by courts
- Human rights norms require courts to make blocking orders
- The proposal will violate net neutrality rules
- Website blocking is not effective
- The proposal will lead to widespread over-blocking
- Website blocking may violate human rights

\(^{41}\) [https://mobilesyrup.com/2018/03/22/100000-canadans-fairplay-canada/](https://mobilesyrup.com/2018/03/22/100000-canadans-fairplay-canada/)

\(^{42}\) [www.barrysookman.com](http://www.barrysookman.com)


• The proposal will lead to higher Internet costs for all
• The proposal will increase the privacy risks for Canadians
• The proposal will result in blocking for other IP purposes
• The proposal will result in blocking for other non-IP purposes
• The proposal will result in the CRTC becoming an Internet Content Regulatory Authority
• Canada has robust laws and doesn’t need more tools to target offshore pirate sites
• Evidence is weak on the state of Canadian piracy
• Piracy is having little impact on thriving digital services and tv production
• It is inconsistent with the CRTC policy direction
• It fails to further the Telecommunications Act policy objectives
• It undermines the Telecommunications Act policy objectives

These arguments are the backbone of the Geist attack. He raises every conceivable bogeyman to spook his audience. But he does not study his assertions seriously or comprehensively, as Sookman does, who thoroughly demolishes them. Geist is content to say “something bad could happen” and leave it at that.

8. Impact of the interventions

No negative interventions led me to question or moderate my support for the Proposal. While many asserted strong principles, law and policy are usually about narrow exceptions to some principles in favour of others and these trade-offs were understandably not grappled with in most interventions. For instance, it is frequently asserted in interventions that no one should interfere with Canadians’ access to information. Access to information is of course important, but (i) any of the pirated material that would be blocked is of course readily accessible through legal sources and (ii) laws interfere all the time with access to information—laws against hate speech, fraud, misleading advertising, securities laws, copyright laws and trade secrecy laws—all these are but a few examples of how we, as a society, form policy around carefully crafted and justified exceptions to the principle of free access to information.

The purpose of this intervention is to analyze the nature of submissions, much less to make arguments in favour of the Proposal. Still, we believe in the Proposal, as stated above. In that regard it might be noted that although many fewer in number, the positive interventions are far more likely to have completely identifiable intervenors. They often represent collectives, organizations or companies, and hence bring more opinions and support to bear. They typically engage with the actual Proposal. And creators have so much more at stake in the debate—including their honestly held property rights.

45 www.barrysookman.com
9. Conclusions

In addition to the negative interventions addressed in this submission, there may be others that engage more deeply with the proposal. I hope so. They are clearly, however, scarce and hard to find.

This case, just as did the latest round of copyright law reform completed in 2012, demonstrates some of the challenges associated with public consultation. Public consultation regarding that reform was extensive, and both live and written, and nevertheless was manipulated by a small number of parties in such a way that the results could only inform policy, if at all, after being put into proper context. The same is the case here. While users can and should express their issues and values there is only so much a person unschooled in copyright can usefully say about the technical details of copyright reform or piracy site blocking, just as there is only so much public opinion can do to usefully support a review of isolation standards for class 5 pathogen labs. This area of the law takes a lot of rare expertise.

There are numerous concerns that this sample study has raised. First, at least a quarter of the interventions reviewed have been copied and pasted directly from OpenMedia and Reddit, which provide blatant misinformation about the Proposal. It can be inferred that many more interventions, that were not directly copied and pasted from these websites, were nevertheless informed exclusively by their content; indeed, the majority of interventions reproduce precisely the same points of misinformation. For instance, 51 percent of intervenors explicitly express the mistaken belief that, under the Proposal, ISPs will have the unilateral discretion to block websites. OpenMedia and others pushing this intervention campaign have deliberately cultivated that incorrect understanding.

Second, the identity of the intervenors generally cannot be verified and there is no reason to believe the interventions reflect the views and opinions of Canada’s diverse population. Notably, information about the Proposal provided by users on Reddit may come from individuals outside Canada. In some cases, intervenors use initials instead of names and do not provide their email addresses. The interventions also are not balanced in terms of gender, with males providing 85 percent of the submissions to the CRTC.

As such, the CRTC should not interpret the interventions as overwhelming public opposition to the Proposal, but rather, as an understandable reaction to controversial, erroneous information provided by a handful of sources.
Richard Owens is a lawyer who has specialized in business and commercial law, regulation of financial institutions, intellectual property and technology laws. He has served financial services providers, technology companies, drug companies and others in Internet, technology, intellectual property strategy and patent law, M&A, outsourcing, strategic alliance and joint ventures, regulation, IP licensing and other areas. He has been repeatedly recognized as among Canada’s best lawyers in technology law and attained the highest rating on Martindale Hubbell. He carried on his practice with three of Canada’s leading law firms. Richard is past chair of the board of directors of the University of Toronto Innovations Foundation, and past member of the advisory committee to the Office of the Privacy Commissioner of Canada. He is a member of the board of the Centre for Innovation Law and Policy at the University of Toronto Faculty of Law, and served as a director of the International Technology Law Association. He is on or has served on the boards or advisory boards of other companies and not-for profit enterprises, and chairs the board of Women on Web. Richard is an adjunct professor, teaching courses on the law of information technology and electronic commerce, innovation law and policy, intellectual property, digital content and the creative economy, and the law and policy of biotechnology, all at the University of Toronto Faculty of Law, where he has taught for approximately 25 years and served full time for almost 6 years as the Executive Director of the Centre for Innovation Law and Policy. Richard has written and published widely on intellectual property law, the law of information technology, privacy, and the regulation of financial institutions. Richard is a Senior Munk Fellow with the Macdonald-Laurier Institute, dealing primarily with intellectual property issues. He is a yogi and trained yoga teacher, a poet and photographer when he is not messing in legal debates.