COMMENTS ON CANADIAN HERITAGE'S REGULATIONS RESPECTING THE APPLICATION OF THE ONLINE NEWS ACT

CCIA Comments on Canada's Online News Act

Below is a verbatim copy of comments the Computer & Communications Industry Association filed in Canadian Heritage's proceeding seeking input on its implementing regulations for the Online News Act.[1] These comments relate to Canadian Heritage's proposed regulatory text for "Regulations Respecting the Application of the Online News Act, the Duty to Notify and the Request for Exemptions" that dictate the thresholds for the designation of digital services providers to be subjected to the law's obligations and the procedures for exemption from the law.

CCIA's Comments to Canadian Heritage in the Canada Gazette, Part I, Volume 157, Number 35

Online intermediaries, including those the Online News Act defines as Digital News Intermediaries (DNIs), provide valuable benefits to news organizations and their consumers through the hosting, indexing, and linking to news content—functions core to the operation of the internet. The referral traffic DNIs generate, sending users directly to sites where news organizations can monetize interactions through advertising and subscriptions, benefits news organizations to the tune of hundreds of millions of dollars annually. Given that, the Online News Act is based on a false premise – that news organizations' voluntary reliance on these freely-available resources should trigger mandatory compensation from select DNIs, above and beyond the benefits they already receive.

The flawed approach of this act is not mitigated by these proposed regulations; in fact, in several respects, the proposed regulations exacerbate them and are likely to drive DNIs out of the Canadian market—to the detriment of Canadian consumers, most Canadian news organizations, and the implicated DNIs. How these regulations exacerbate the problem, and two suggestions for modest mitigation are identified below.

1. The scope of DNIs subject to the law remains arbitrary and unjustified. By defining the standard set out in the law (DNIs with a "strategic advantage over news businesses") as based on a combination of a company's Canadian users and global revenues, the unsupported basis for targeting specific companies is brought into sharp relief. There is no rational basis for assuming that having a specific number of Canadian users—numbers which reflect users accessing many digital services that have nothing to do with news—justifies subjecting these particular firms to special obligations vis-a-vis Canadian news organizations. Global revenues—which, like users, relates to a broad range of services unconnected to news—are an even more attenuated measure:

[1] https://canadagazette.gc.ca/rp-pr/p1/2023/2023-09-02/html/reg1-eng.html.

what bearing on "strategic advantage" in Canada does revenue in Asia or Latin America play? Given the adverse impact of being defined under this standard, this proposed rule implicates Canada's national treatment and Most-Favored Nation obligations under the Canada-United States-Mexico Agreement (CUSMA), Articles 14.4, 14.5, 15.3 and 15.4.

2. The proposed minimum contribution threshold (4% of a company's global revenue from all sources that are roughly attributable to Canada) that might qualify a DNI for exemption from the most prescriptive burdens of the law - *e.g.,* mandatory final offer arbitration – strips away the pretense that implementation is intended to involve any objective consideration of a reciprocal exchange of value between DNIs and news organizations. Since the contribution threshold is a floor, it sets what is essentially a minimum tax for the right of implicated DNIs to participate in the news segment of the Canadian market. By requiring payment to specific Canadian companies as a condition of market access, this proposed rule explicitly violates the prohibition on performance requirements that Canada agreed to in CUSMA, Article 14.10.

3. As noted above, 4% is a <u>minimum</u> contribution, underscoring Canada's failure to address a key criticism of its approach to date: the uncapped liability a designated DNI faces under this law. This flaw is exacerbated by the proposed rule at 10(1) of the proposed regulations that would allow any ten news organizations (comprising entities employing, in total, as few as 20 journalists) to oppose a DNI's exemption proposal as insufficient, potentially rendering it invalid. With hundreds of news organizations in Canada now incentivized to maximize claims of compensation, the prospects for avoiding potential veto power over an exemption proposal, absent conceding to maximalist demands, would appear marginal. Accordingly, either conceding to such demands, or subjecting oneself to the even riskier prospect of final offer arbitration both result in a similar outcome: no certainty on the price one must pay to remain in the market.

4. Also exacerbating uncertainty on qualifying for an exemption is the requirement at 6(1) of the proposed regulations that compensation offers result in generally uniform offers, within a 20 percent band. Apart from undermining market-based incentives for a news organization to produce quality journalism and seek to distinguish itself from its peers, this requirement could result in interminable negotiations and renegotiations as specific offers deviate from uniform outcomes, requiring all other offers to be re-negotiated as well to satisfy this arbitrary goal.

5. Even if a DNI qualifies for an exemption, by concluding deals that CRTC determines to meet the criteria laid out in section 11 of the Act, (coverage, level of contribution, etc.), a DNI may still not be immune from financial liability from any news organization that was not included in this collection of deals: an exemption order does not immunize a

DNI from a claim of discrimination or undue preference, pursuant to Section 51 of the Act. Accordingly, any news organization not party to a deal struck to qualify for an exemption (who may not even have sought such a deal), could, after an exemption order was issued, claim a right to compensation comparable to deals concluded as a basis for an exemption. Based on such a claim, a DNI could face yet further claims of compensation, subject to significant financial penalties. The CRTC should consider a clarification that an exemption order would immunize a DNI against such a claim based on Section 51.

For the reasons noted above, there is a high likelihood that the two DNIs targeted by this law—and any others if the thresholds determining "strategic advantage" change or other firms reach the thresholds established—will exit the market for indexing, aggregating, hosting, and linking to Canadian news for Canadian consumers. Such a step would represent a rational business decision to avoid exposure to unknowable commercial risk and economically unjustified obligations. Larger news organizations, with established, nationwide brands are already anticipating this outcome, and may even conclude that they can bolster their share of an already highly concentrated news sector–at the expense of smaller suppliers and particularly more innovative new entrants. These latter are, however, the entities Canada should be supporting, who can lay the groundwork for a more sustainable digitally-based news ecosystem.

Accordingly, Canada should consider introducing a provision in these regulations that would allow a DNI that has chosen to exit the market generally to nonetheless serve Canadian news organizations who would be willing to forego the prescriptive compensation rights established under this law, in exchange for the benefits DNIs typically offer of hosting, indexing, and linking news. To be effective, the regulations would have to create a "safe harbor" for such voluntary arrangements and clarify that they would not, if available to all, constitute an "undue preference" pursuant to provisions 51 and 52 of the Act.

However, given the high likelihood that this law will lead to market exit of the targeted DNIs and thus diminished access to information for Canadian consumers, the best approach would be for Canada to begin laying the groundwork for rescinding this law and finding a more constructive basis for supporting a sustainable market for the production and distribution of quality news. The CRTC should institute a review of the effects of this law, including a recommendation on whether the costs it entails exceed any likely benefits.