Submission in response to Broadcasting Regulatory Policy CRTC 2024-121

CCIA Comments on Canada's Obligatory Base Contribution for Streaming Suppliers

Introduction

We write on behalf of the Computer & Communications Industry Association (CCIA) to respectfully respond to this consultation following the publication of the Canadian Radio-television and Telecommunications Commission's (CRTC) Broadcasting Regulatory Policy CRTC 2024-121 ("CRTC decision"),[1] to implement rules regarding an initial base contribution pursuant to the *Online Streaming Act*. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms.[2] For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members invest heavily in the thriving Canadian content sector and deliver music, film, TV, and user-generated content online to Canadian consumers.

CCIA has raised deep concerns about the Online Streaming Act, its impact on streaming services for both suppliers and consumers,[3] and potential violations of Canada's trade obligations under the U.S.-Mexico-Canada Free Trade Agreement (CUSMA).[4] Our members include parties to this proceeding who will be subject to the conditions of service that the CRTC seeks to impose. This submission responds to CRTC 2024-121 on their behalf.

The proposed mandatory base contributions promulgated as part of the CRTC decision do not reflect a reasonable balance that would alleviate CCIA's concerns. This regime would continue to violate CUSMA provisions proscribing discriminatory measures, disincentivize investment into the Canadian content sector, and ultimately hinder U.S. suppliers' operations and weaken consumer experiences.

Further, the CRTC's process in this manner—to move forward with implementing a mandatory contribution mechanism for Canadian content while giving only a 10-day deadline for comment that is limited to the drafting of the order, all before redefining the parameters for what constitutes Canadian content—is deeply flawed and reflects a process with vast uncertainty. Any consultation about obligatory payments to funds supporting the creation of Canadian content should be deferred until the CRTC has held and concluded a robust consultation on new definitions for what qualifies as Canadian content. This 10-day comment period also appears to contravene the commitments the Canada made under CUSMA, specifically Article 29.2 that requires Parties to "provide interested persons and the other Parties a reasonable opportunity to comment"[5] on proposed regulations, laws, and other measures; and Article

[1] https://crtc.gc.ca/eng/archive/2024/2024-121.htm.
[2] For more, please go to: www.ccianet.org.
[3] https://ccianet.org/wp-content/uploads/2023/11/CCIA-Comments-to-Canadian-Heritage-on-the-Online-Streaming-Act-Regulations.pdf.
[4] https://ccianet.org/library/ccia-white-paper-on-canadas-online-streaming-act-bill-c-11/.
[5] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/29_Publication_and_Administration.pdf.

28.9.4 (Transparent Development of Regulations)[6] which provides that a Party should ensure, with respect to a draft regulation expected to have a significant impact on trade, a minimum of 60 days to submit written comments. Canada, through this CRTC proceeding, has failed to meet these standards.

The Contribution Requirement Contravenes Canada's Trade Commitments

The CRTC's structure of mandatory contributions contravenes Canada's commitments to the United States under CUSMA. Specifically, the CRTC's requirement that all online streaming suppliers earning $25 million or more "devote not less than 5% of its annual contributions revenues derived from its audio-visual broadcasting activities from the previous broadcast year to the support of Canadian and Indigenous content" implicates three provisions of CUSMA in discrimination against non-Canadian entities and products.

First, this contribution requirement discriminates against non-Canadian digital products, as Canadian digital products (*i.e.*, videos, music) receive preferential treatment as beneficiaries of these funds. The definition of "digital product" under CUSMA clearly covers the film, television, music, and other audiovisual and audio content covered by the CRTC's framework: "a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically."[7] Similarly, online streaming companies would qualify as cross-border service suppliers or investors that should be entitled to national (*i.e.*, non-discriminatory) treatment.

CUSMA Article 19.4, on the Non-Discriminatory Treatment of Digital Products, is unequivocal in laying out the commitment that digital products from each party must be treated equally:

> No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.[8]

By providing preferential treatment to Canadian content by forcibly redirecting U.S. suppliers' revenue towards the production of more Canadian content—which, by current definition, U.S. suppliers themselves cannot create—the CRTC's framework violates the spirit and letter of CUSMA Article 19.4. Although the Article excludes subsidies, this regime does not represent a subsidy, due to the fact that the funds are not originating from the government, but are siphoned off from private companies.

Furthermore, foreign online streaming providers are discriminated against since online undertakings affiliated with traditional Canadian broadcasters are not subject to the newly-imposed obligations. With respect to services discrimination, this proposed measure is

[6] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/28_Good_Regulatory_Practices.pdf.
[7] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf.
[8] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf.

inconsistent with Article 15.3.1[9] of CUSMA, which provides, *inter alia*, that "Each Party shall accord to services or service suppliers of another Party treatment no less favorable than that it accords, in like circumstances, to its own services and service suppliers." By imposing an obligation on foreign suppliers that like Canadian suppliers are not subject to, this measure is inconsistent with this obligation.

Although the CRTC offers companies the ability to partially alleviate their financial burden by deducting 1.5% of the 5% spending obligation, that option can only be triggered through the production or acquisition of certified Canadian content, pursuant to a 60%-40% division between English and French content, respectively. As such, Canadian content is still granted advantageous treatment, and the burden to fund the creation of new Canadian content would remain. Due to the stringent definitions of certified Canadian content that require Canadian ownership of IP, in practice, non-Canadian companies are precluded from producing such content unless they partner with a local production company.

Second, the regime promulgated by the CRTC would discriminate against U.S. suppliers in a manner that invokes the Cross-Border Trade in Services chapter, the aforementioned Article 15.3. Although both Canadian and non-Canadian streaming services will be required to contribute to funds dedicated to producing Canadian content, *only* Canadian services would be able to access these funds. As such, U.S. suppliers would be put at a competitive disadvantage, and subject to discrimination proscribed by Article 15.3.1.

Third, the CRTC's framework would violate the CUSMA Investment Chapter, specifically those governing performance requirements (Article 14.10.1 (b)) that prohibit Parties to the agreement from enforcing requirements "to achieve a given level or percentage of domestic content."[10] As the CRTC is allowing 1.5% of the 5% obligation to be relieved for suppliers if they produce or acquire certified Canadian content, that serves as a requirement for non-Canadian suppliers to achieve a given percentage of domestic content. A requirement for online streamers to spend a percentage of revenue on Canadian content and contribute to funds supporting the creation of Canadian content has a similarly limiting effect to a quota, as it ensures a minimum amount of development of Canadian content.[11]

Although Canada has the ability to invoke its cultural industries exception (at Article 32.6), as a defense for this contribution mandate, the United States retains the affirmative right to take commensurate action to compensate for the harm (now estimated, by the CRTC, at $200 million annually, most of which will be extracted from U.S. suppliers). Thus, the United States holds the ability to impose tariffs or to deny licenses applicable to Canadian suppliers benefitting from access to the U.S. market to an equivalent degree. As the U.S. Trade Representative[12] and a bipartisan collection of 19 members of U.S. Congress have raised

[9] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/15-Cross-Border-Trade-in-Services.pdf.

[10] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf.

[11] https://ccianet.org/wp-content/uploads/2023/01/CCIA_Canada-Online-Streaming-Act_Bill-C-11_Whitepaper.pdf at 9-10.

[12] https://www.ctvnews.ca/canada/new-fee-for-streaming-companies-serves-canadian-interests-at-americans-expense-u-s-1.6916359 ("The U.S. Embassy in Ottawa said it is watching developments around the Online Streaming Act closely. The new fee was ushered in as part of a regulatory process to implement the Liberal government legislation. "The United States shares Canada's interests in robust audiovisual and news industries, but

concerns about this law,[13] the specific structure of this contribution requirement will prove key to near-term Canada-U.S. trade ties.

A Five Percent Contribution Requirement Is Onerous, as Foreign Streaming Suppliers Invest Heavily in the Canadian Ecosystem

A requirement for audiovisual and audio streaming companies to pay 5% of their revenue is burdensome and unfairly punishes firms that bring vast benefits to Canadian and non-Canadian consumers and artists alike through investments into the country.

As noted above, the CRTC predicts that annually, this contribution would bring in $200 million in additional funding.[14] The money at risk in the streaming industries is increasing and burdening it involves significant commercial harm. In 2023, the music streaming industry earned USD$408 million, and all of the notable market players in Canada are foreign.[15] That same year, the video streaming industry brought in US$2.17 billion,[16] with most of that revenue derived from U.S. streaming suppliers.[17] Although social media services are thankfully exempt from proposed funding obligations, the CRTC has nonetheless, inexplicably, categorized them as "broadcasters" and thus they could be subject to paying into funds in the future.

As a measure targeting streamers' gross revenues, the CRTC's approach fails to acknowledge how these suppliers already invest in the Canadian market and support Canadian content. Virtually all of this investment would go unrewarded without a modernized definition of Canadian content and additional inflexibility for how online streamers can contribute to the market. Streaming services invest billions of dollars growing the Canadian music industry[18] and supporting the export of Canadian music abroad.[19] Such contributions, achieved while

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(the Online Streaming Act) appears to target U.S. companies to disproportionately serve the interests of large Canadian companies," a spokesperson said in a statement. "We encourage Canada to consider U.S. stakeholder input as it implements this bill.").

[13] https://tnc.news/2024/05/19/u-s-congress-members-online-streaming-act/.

[14] https://crtc.gc.ca/eng/archive/2024/2024-121.htm.

[15] https://www.statista.com/outlook/dmo/digital-media/digital-music/music-streaming/canada#users. U.S. suppliers make up 41% of the market, according to the latest figures, with the rest made up of Swedish (Spotify and SoundCloud) and French (Deezer) companies.

[16] https://www.statista.com/outlook/dmo/digital-media/video-on-demand/video-streaming-svod/canada#revenue.

[17] All but 12% of the market is estimated to be U.S. companies, meaning most of the US$2.17 billion targeted by the CRTC's regime would be U.S. revenue: https://cultmtl.com/2024/04/market-share-streaming-services-netflix-prime-video-disney-crave-paramount-apple-tv-ripley/#:~:text=Streaming%20guide%20JustWatch%20has%20revealed,and%20Apple%20TV+%20(5%25).

[18] https://sencanada.ca/Content/Sen/Committee/441/TRCM/briefs/TRCM_Brief_DigitalMediaAssociation_e.pdf ("The growth of online music streaming in Canada has benefitted creators and copyright owners. While industry-wide data can be difficult to identify, streaming services in Canada have paid well over $2 billion in royalties since 2016. The 2021 Study of the economic impacts of music streaming on the Canadian music industry (the "Wall Study") highlights additional relevant figures, including nearly 300% growth in streaming revenues for recorded music from 2016 to 2020. That same study estimated that Canadian rightsholders, including songwriters, publishers, performers, and record labels, earned nearly $500 million in 2019 alone.").

[19] https://sencanada.ca/Content/Sen/Committee/441/TRCM/briefs/TRCM_SM-C-11_Brief_Spotify_e.pdf ("In a given week, Spotify listeners in Canada discover over 83 times more Canadian music than Canadian songs played on broadcast radio... Eight billion streams of Canadian music or podcasts are exported every month on

operating a business model with slim margins, is something the CRTC has failed to recognize, in mirroring the same 5% obligation to music as audio-visual services.

Meanwhile, with respect to video, foreign production accounted for 56% of all film and television production in Canada in the 2022-2023 cycle—between 2013 and 2023, foreign production grew by 15.8%, far greater than the next largest growth in that time period (4.8% growth for Canadian television).[20] In terms of volume, foreign investment in Canada's production sector was $7.86 billion in 2023.[21] For both music and video streaming, Canadian content thrives on this investment, by creating jobs and exporting original content created in Canada to foreign markets.

Requiring a 5% contribution to funds that foreign online streamers themselves cannot access to develop programming only serves to disincentivize the extensive investments that U.S.-based companies have made in Canada. This is compounded by the fact that content created by foreign companies through their vast investments into Canada cannot be deducted against the 5% contribution requirement due to the fact that IP ownership has historically been fundamental to content being determined to officially be Canadian. U.S. companies cannot apply content created in Canada towards a 2% Canada Media Fund (CMF) requirement unless it is created as a minority partner collaborating with a local production company subject to limited creative control, as is needed to be certified as Canadian.

The CRTC's decision to adopt mandatory contribution rates before updating the definition of what qualifies as Canadian content fosters uncertainty among suppliers and workers in the industry alike. The ordering of these decisions has put a mandated fee before the redefining of the key concept in question that would dictate where some of the proceeds will be directed. For companies to plan programming, they must have a solid understanding of obligatory fees such as this 5% rate and what could qualify for the 1.5% deduction. This is currently not the case.

Further, many of the streaming companies targeted by this contribution requirement are the target of Canada's imminent digital services tax (DST). The revenue targeted by both this and the DST regime are in many cases the same (*e.g.*, advertising), meaning these U.S. firms would be doubly-charged on the exact same gross revenue derived from Canadian investments. Such a regime is not only discriminatory, but, after time, it could become untenable for certain businesses, including CCIA members. Canada's proposed digital services tax would cause an estimated $0.9 billion USD to $2.3 billion USD in losses annually for U.S. companies that operate in Canada, while resulting in thousands of full-time U.S. job losses.[22] To be charged hundreds of millions of dollars annually on the same revenue would represent an unreasonable levy in exchange for market access.

Spotify. The top 9 international markets for Canadian artists provide 7.2 streams of Canadian content for every one in Canada.").

[20] https://cmpa.ca/wp-content/uploads/2024/05/Profile-2023-English.pdf.

[21] https://cmpa.ca/wp-content/uploads/2024/05/Profile-2023-English.pdf.

[22] https://ccianet.org/research/reports/impacts-canada-proposed-digital-service-tax-united-states/.

The CRTC Should Clarify Affirmatively that User-Generated Content and Social Media Services are Not Implicated Under the Online Streaming Act

The status of user-generated content and the services which host such content—such as social media services—warrant clarification by the CRTC as it continues the process of implementing the Online Streaming Act.

The decision by the CRTC to definitively exclude "advertising and subscription revenues associated with the broadcast of user-generated content" is a positive step towards ensuring social media services and others that thrive on user-generated content are not included under a regulatory and contribution regime designed for broadcast services.

However, social media services have still been required to register as broadcast undertakings as part of the CRTC's application of this law, leaving these services with great uncertainty regarding their future obligatory fees and leaving them open to broadcast-era regulations that could undermine their operations and worsen their services for users. Inexplicably, although not subject to prescriptive regulatory obligations, social media services will be required to fund the CRTC's operations. The CRTC should clarify once and for all that social media services are *not* considered broadcasting undertakings for the purposes of payment obligations or broadcasting regulations (or funding of the regulator) to ensure such confusion is put to rest.

Further, the definition of "user-generated content" pursued by the CRTC leaves great uncertainty for many video-hosting services. The current definition for "user-generated content" focuses on content that is "generated and uploaded by a user of a social media or similar service for the primary purpose of interaction with other users of the service." However, absent a comprehensive definition for "user," it is unclear whether an amateur songwriter or a history teacher's lesson, for example, would be included in the same realm as music videos, official movie trailers, and short films/documentaries.

Video-hosting services would be required to split their services—at the very least, in their accounting—between "official" videos and "organic" videos. Such a task would not only prove grossly burdensome and very difficult to administer, but such a mandate would completely undo the very aspect of these services that make them so innovative and attractive to consumers: the line between "official" (singers, celebrities, influencers, etc.) and "unofficial" users is now increasingly blurred, allowing for interaction and intermingling between the two. By scoping even part of this business model into the traditional broadcasting world, the CRTC risks pushing internet-enabled services that have transformed communication back into the television era.

Conclusion

CCIA appreciates the opportunity to respond to the CRTC's plan to implement the *Online Streaming Act*. The current regime, as set out by the CRTC decision, would undermine streaming services' operations in the country, likely weaken user-friendly services in Canada, and undermine U.S.-Canada trade relations by violating the commitments struck in CUSMA.