

Submission in response to Broadcasting Regulatory Policy CRTC 2024-164

CCIA Comments on Mandatory Contributions to the Independent Local News Fund

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 2024-164 (“CRTC consultation”),¹ pursuant to the *Online Streaming Act*, to implement rules requiring online undertakings to allocate 1.5% of the annual contribution revenues derived from their Canadian audio-visual activities to the Independent Local News Fund (ILNF).

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 grave concerns about the *Online Streaming Act*, its impact on streaming services for both suppliers and consumers,³ potential violations of Canada’s trade obligations under the U.S.-Mexico-Canada Free Trade Agreement (CUSMA),⁴ and the CRTC’s obligatory base contribution for streaming suppliers.⁵ 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 2024-164 on their behalf.

A Contribution Requirement to Independent News Is Inappropriate and Onerous to Apply to Foreign Online Service Suppliers

In CRTC’s Broadcasting Regulatory Policy CRTC 2024-121, the Commission stated that it will require “certain online undertakings to allocate 1.5% of the annual contribution revenues derived from their Canadian audio-visual activities to the ILNF,” adding that this decision “recognized the importance of news, particularly news produced by independent broadcasters.”⁶ Although this consultation is focused on questions following up on this requirement, CCIA would like to state its objection to this obligation being imposed on online streamers that do not produce news and are irrelevant to the issue of independent news creation.

¹ <https://crtc.gc.ca/eng/archive/2024/2024-164.htm>.

² For more, please go to: www.ccianet.org.

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<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/>.

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<https://ccianet.org/library/ccia-comments-on-canadas-obligatory-base-contribution-for-streaming-suppliers/>.

⁶ <https://crtc.gc.ca/eng/archive/2024/2024-121.htm>.

Although there are sound policy reasons for allocating general tax revenue to local news, systematically targeting one subset of (mainly-foreign) market participants for this burden reflects a transparent and discriminatory form of revenue extraction—essentially, a tariff by another name. Although described as simply extending an obligation already borne by Canadian broadcasters to purportedly similarly-situated foreign suppliers, this “fairness” argument ignores the fact that unlike traditional broadcasters, news is not a business that most online video suppliers are in. The arbitrary and discriminatory nature of this funding mechanism is further highlighted by the fact that key competitors to online-video, cinemas, are not subject to such a burden, and nor are competitors meeting an arbitrary revenue threshold, or affiliated with a licensed traditional broadcaster.

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. If the CRTC insists on pursuing a minimum of a 1.5% contribution mandate for the ILNF, the Commission should at the very least explicitly exclude streaming suppliers that do not offer news on their platforms as a service (just as, as noted above, they do not impose such fees on cinemas).

The Broadcasting Act stipulates that broadcasting undertakings shall contribute to the implementation of CRTC objectives “in a manner that is appropriate in consideration of the nature of the services provided by the undertaking.”⁷ The nature of the services offered by online streaming providers—which are dedicated to bringing consumers film, television, and music—are not relevant to the production of news. In particular, U.S. streaming providers are not an appropriate target for extractory measures aimed at subsidizing Canadian independent news, given they themselves do not generally produce news, let alone Canadian news. The CRTC’s decision to charge online streaming suppliers—particularly foreign ones—to contribute to a fund for a product that they themselves do not produce or use contradicts the basic tenets of a fair and proportional regulatory environment.

The CRTC appears to be targeting this fundamental concern—that online streamers do not produce news and are unable to draw from the ILNF—through the following question:

“Currently only private conventional television stations that provide locally reflective news and information are eligible to receive ILNF funding. Should the Commission revise the current criteria to permit access to the ILNF by a broader range of audiovisual news providers? If so, which eligibility criteria should the Commission use?”

However, broadening the scope of the entities allowed to access the fund to include foreign online service suppliers would not solve the burdensome nature of the CRTC proposal. The companies in question are not in the news business—allowing them access to a fund specified to Canadian independent journalism would not change that fundamental fact, and the policy would remain market distortive.

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<https://www.canlii.org/en/ca/laws/stat/sc-1991-c-11/latest/sc-1991-c-11.html?autocompleteStr=broadcasting%20act&autocompletePos=2&resultId=9ec898239c49492988bca63aebc5c4ec&searchId=2024-06-28T10:00:17:145/98b9dec2fd7b4b53aa07f4076af81113>.

Further, while the production of local and independently-produced news is critical, this method is unjust, and it is unclear that supplementing this fund by imposing obligations on foreign providers that are not in the same service industry will even make an impact. As the Heritage Minister has suggested, even the largest Canadian news producers are deprioritizing news, despite receiving money from the ILNF and performing well in the market.⁸ The most prominent recipients of the ILNF—Bell, Shaw, and Rogers—are three of the four vertically integrated companies in the Canadian broadcasting sector.⁹ These companies were given permission to integrate and provided licenses with obligations to support local news:

... [W]hen the Commission approved the applications that led to their consolidation, it was to create entities with the critical mass to ensure the production and promotion of diverse and high-quality Canadian programming and its distribution through traditional and digital media...

Broadcasters are required to meet their obligations commensurate with the considerable privilege of holding a broadcasting licence, including delivering quality news and information to the communities they serve. As custodians of the television system as a public service, they have a special obligation to ensure that the system reflects the national identity, contributes to democracy and enhances safety and security.¹⁰

This proposed regime by the CRTC effectively requires U.S. suppliers to subsidize the obligations of Canada's largest media companies in a sector in which these U.S. companies are not even active.

The Contribution Requirement Contravenes Canada's Trade Commitments

CCIA has detailed that the *Online Streaming Act*—and many of the subsequent implementing regulations—violate Canada's commitments to the United States to uphold baseline rules under CUSMA. 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 is free to impose tariffs or to deny licenses to Canadian suppliers benefitting from access to the U.S. market to compensate, to an equivalent degree, for the impaired

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<https://nationalpost.com/news/politics/trudeau-calls-bell-layoffs-a-garbage-decision-and-says-company-should-know-better> ("Heritage Minister Pascale St-Onge said companies like Bell are doing well and should be stepping up to provide news. 'They are not going bankrupt. They're still making billions of dollars. They're still a very profitable company and they still have the capacity and the means to hold their end of the bargain, which is to deliver news reports,' she said.")

⁹ <https://crtc.gc.ca/ownership/eng/index.htm>.

¹⁰ <https://crtc.gc.ca/eng/archive/2016/2016-224.htm>.

market access U.S. firms will suffer. As the U.S. Trade Representative¹¹ and a bipartisan collection of 19 members of U.S. Congress have raised concerns about this law,¹² the specific structure of this contribution requirement will prove key to near-term Canada-U.S. trade ties.

However, the specific structure of the CRTC's mandatory contributions and the requirement that all online streaming suppliers earning \$25 million or more "allocate at least 1.5% of the annual contributions revenues derived from their audio-visual activities to the ILNF" implicates two provisions of CUSMA in discrimination against non-Canadian entities and products.

First, this contribution requirement discriminates against non-Canadian digital products (news videos and clips from local television stations),¹³ as Canadian news producers receive preferential treatment as beneficiaries of this fund. The definition of "digital product" under CUSMA clearly covers text, audio, and audiovisual news coverage covered by the ILNF: "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."¹⁴ 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.¹⁵

By providing preferential treatment to Canadian news producers, and by extension, to the digital products they generate, by requiring the redirection of U.S. suppliers' revenue towards these entities the proposed obligation for U.S. streaming providers to fund ILNF framework violates the spirit and letter of CUSMA Article 19.4. Although the Article excludes subsidies, this regime does not meet the formal definition of a subsidy, due to the fact that the funds are not originating from the government, but are instead taken from private firms.

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<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 (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.").

12 <https://tnc.news/2024/05/19/u-s-congress-members-online-streaming-act/>.

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<https://www.canada.ca/en/radio-television-telecommunications/news/2016/06/crtc-improves-support-for-local-news.html>.

14 <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf>.

15 <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf>.

Second, this contribution requirement discriminates against non-Canadian service providers, as guaranteed for U.S. companies under CUSMA Articles 14.2 and 15.3.1.¹⁶ First, the threshold of \$25 million in revenue proposed by the CRTC to qualify for the required contributions to the ILNF strongly suggests a National Treatment violation, as many Canadian streaming companies are likely to be spared from the obligation. Although difficult to definitely state without knowing the revenues of the smaller streaming suppliers in Canada, it is highly likely that several of the smaller streaming services that are unaffiliated with broadcasters will not have to contribute to the ILNF due to the threshold chosen by the CRTC, while U.S. suppliers *would* be required to do so.

Similarly, exempting streaming suppliers that are affiliated with licensed broadcasters (which, by definition, can only be Canadian) raises additional issues of discrimination under the same provisions. The fact that a company like Crave is affiliated with a licensed broadcaster (whose business model includes news production) does not excuse the fact that this exemption accords Crave a competitive advantage vis-à-vis foreign competitors that CUSMA rules should prevent.

Third, the benefits of the fund only go to Canadian companies, as many of the largest broadcasting entities in Canada that have their own streaming platforms can access the ILNF, while U.S. streaming suppliers will not be beneficiaries of the fund (as they do not produce news content). Consider that, between August 2019 and August 2020, Bell TV received the largest portion of the fund (up to \$4 million between all of its properties), while also serving as a prime local competitor to U.S. streaming companies through its own online streaming platform and through a separate Canadian streaming service that it owns, Crave.¹⁷ Other major beneficiaries that year included Rogers, Shaw, and Telus, all of which compete with U.S. streaming companies as content platforms and newer streaming offerings.

Meanwhile, the U.S. companies in the market do not produce or offer news that would qualify for a local, independent news fund, and are therefore disadvantaged compared to their prime competitors in the market. In fact, even if U.S. companies *did* produce journalism in these communities, it is unclear whether they would be able to receive disbursements, given the CRTC's definitions for locally-relevant news content that require local presence,¹⁸ among other characteristics that would effectively only be met by Canadian companies. As such, U.S. companies qualify as cross-border service suppliers or investors that should be entitled to national (*i.e.*, non-discriminatory) treatment. Thus, the regime is also inconsistent with CUSMA Article 15.3.1.

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<https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/15-Cross-Border-Trade-in-Services.pdf> (“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.”).

¹⁷ https://crtc.gc.ca/eng/BCASTING/ann_rep/ILNF_Annual_Report_19-20_Abridged.pdf.

¹⁸ <https://crtc.gc.ca/eng/archive/2016/2016-224.htm> (“... [T]he Commission considers that one of the means that local television stations may use to meet their obligation to provide locally reflective news is to maintain a local physical presence, which may include: providing seven-day-a-week original local news coverage distinct to the market; ensuring that editorial decisions on content are made in the market; employing full-time journalists on the ground in the market; and operating a news bureau or news gathering office in the market.”).



Conclusion

CCIA appreciates the opportunity to respond to the CRTC's plan to implement the *Online Streaming Act*. The CRTC should reconsider its plan to require foreign online service providers to pay into a fund for independent local news that these providers are themselves unable to draw from, or at the very least make clear that streaming companies that do not produce or showcase news are not subject to this requirement. The proposed regime would divert funds from foreign companies to fund domestic interests that are unrelated to their business models.

Further, more generally, the CRTC's current trajectory with regard to the *Online Streaming Act* threatens to make Canada an overly-burdensome market for foreign streaming and online content providers, ultimately harming the Canadian consumers that enjoy the offerings of these firms.