Submission in Response to Broadcasting Notice of Consultation CRTC 2024-288

Comments on Canadian Content Requirements

January 14

Mr. Marc Morin
Secretary General
Canadian Radio-television and Telecommunications Commission
Ottawa, ON K1A 0N2

Filed online

Dear Secretary General Morin:

Re: Broadcasting Notice of Consultation CRTC 2024-288—*The Path Forward – Defining "Canadian program" and supporting the creation and distribution of Canadian programming in the audio-visual sector*

1. We are pleased to provide these comments on behalf of the Computer & Communications Industry Association (CCIA) to respectfully respond to the publication of the Canadian Radio-television and Telecommunications Commission's (CRTC) Broadcast Notice of Consultation CRTC 2024-288 ("CRTC consultation"),[1] to implement "Canadian program" rules and to promote the creation and distribution of Canadian programming 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 and their customers invest heavily in the thriving Canadian content sector and deliver music, film, TV, and user-generated content online to Canadian consumers.

2. CCIA members operate online undertakings that provide a range of online streaming services that are a valued and popular part of the Canadian media landscape. These services bring Canadians a diverse array of Canadian and Indigenous content that is made available not only in Canada but on a globally available ecosystem.

3. Since the bill's inception, CCIA has raised deep concerns about the *Online Streaming Act*, its impact on streaming services for both suppliers and consumers,[3] and the manner in which it burdens and discriminates against U.S. companies, including in potential violation 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

[1] https://crtc.gc.ca/eng/archive/2024/2024-288.htm.
[2] For more, please go to: www.ccianet.org.
[3] https://ccianet.org/library/ccia-comments-on-canadas-obligatory-base-contribution-for-streaming-suppliers/.
[4] https://ccianet.org/library/ccia-white-paper-on-canadas-online-streaming-act-bill-c-11/.

responds to CRTC 2024-288 on their behalf.

4. Although we realize that trade policy is outside the CRTC's purview, we believe it critical for the CRTC to consider the ramifications of pursuing policies that have implications for Canada's largest trade relationships and could expose Canada to significant retaliation, given inconsistency with Canada's CUSMA commitments. Accordingly, the comments we offer below to mitigate the detrimental trade effects of the *Online Streaming Act* should in no way be construed as an endorsement of CRTC or government policy, which we believe to be fundamentally flawed and unnecessary. Instead, these comments represent an attempt to minimize the disruptive effects and economic harms of this policy and thus the extent of resulting trade friction. For both the CRTC generally, and this proceeding in particular, the goal of minimizing future harm should be integral.

5. The CRTC, in implementing the *Online Streaming Act,* has previously decided that registered online streaming services are required to devote 5% of their gross revenues toward Canadian industry and a series of cultural funding programs, as well as funding of news programming by Canadian broadcasters, with the ability to offset only 1.5% via the production or acquisition of certified Canadian content. As detailed in previous CCIA filings before the CRTC, this mandatory expenditure is patently discriminatory and breaches several CUSMA obligations, including those in Articles 19.4 (addressing the Non-Discriminatory Treatment of Digital Products), 15.3.1 (addressing National Treatment of Services Suppliers), 14.4 (addressing National Treatment for Investment), and 14.10.1 (b) (addressing Performance Requirements for Investment).[5]

6. With this obligation and the Canadian programming expenditure requirements the Commission now contemplates, U.S. companies are subject to two methods of discrimination: an obligation to pay for Canadian content (which by definition they cannot self-produce); or contribute to funds like the Canada Media Fund that go towards Canadian content development (which they cannot, by definition, access or draw from). In short, the CRTC is proposing a regime that accords preferences to both Canadian products and Canadian service suppliers, to the detriment of those from the United States.

7. As such, the definitions for what constitutes Canadian content are central to the extent to which this regime discriminates against U.S. content and suppliers, and how workable this framework is for investment from U.S. companies.

The *Online Streaming Act* is Discriminatory, but Definitions for Canadian Content Could Lessen the Harmful Effects of the Law

8. U.S. companies invest substantially in the Canadian media ecosystem and help produce and distribute Canadian Content both domestically and abroad, fueled in large part by

[5] https://ccianet.org/library/ccia-comments-on-canadas-obligatory-base-contribution-for-streaming-suppliers/.

the global reach of major U.S. streaming services. Foreign production accounted for 56% of all film and television production in Canada in the 2022-2023 cycle, and between 2013 and 2023, foreign production grew by 15.8%. This represented a far greater increase than that of the next major source of production (4.8% growth for Canadian television).[6] In terms of volume, foreign investment in Canada's audiovisual production sector was $7.86 billion in 2023.[7]

9. In fact, the CRTC's own report, highlighting stakeholder input on the issues of promoting Canadian content, acknowledges the importance of foreign location service productions (FLS):

> "...[T]here was widespread recognition of the positive economic impact of FLS productions. Many participants recognized that such productions are an important source of income for crews and creative personnel and have a positive impact on local economies. Most also recognized that FLS productions provide an important ground for training and professional development opportunities for members of the AV industry."[8]

10. Despite these comments, the clear benefit of FLS to the Canadian broadcast system is something the CRTC has afforded no value to within its implementation of the *Online Streaming Act* to date. The CRTC has said it seeks a framework that improves "the discoverability and exportability of Canadian content, both within Canada and globally."[9] The CRTC's stakeholder report further highlights a broad consensus that improving the competitiveness of Canadian programming on the global scale should be a central goal of the CRTC's actions.[10] CCIA believes that the CRTC should recognize the clear role global streaming services have to play in this effort and adopt policies that incentivize them to do so.

11. Defined appropriately, the exportability of Canadian content is a welcome focus from U.S. industry's perspective, and one that aligns with the goals of U.S. content and services exporters. Given their significant investment in creating content in Canada, leveraging the global reach of their services to distribute quality content globally makes economic sense and supports the vibrancy of Canada's film and television production community. Throughout CRTC 2024-138, our members argued for a modern, flexible framework that recognized the significant investments outlined above that online undertakings bring to the broadcasting system.

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[6] https://cmpa.ca/wp-content/uploads/2024/05/Profile-2023-English.pdf.
[7] https://cmpa.ca/wp-content/uploads/2024/05/Profile-2023-English.pdf.
[8] https://crtc.gc.ca/eng/publications/reports/ipsos24.htm.
[9] https://crtc.gc.ca/eng/archive/2024/2024-288.htm (in the summary, Q8, Q15, and 19).
[10] https://crtc.gc.ca/eng/publications/reports/ipsos24.htm ("Participants were generally of the opinion that a greater number of authentic Canadian productions that showcase national talent and captivate more viewers would lead to more global discovery and acclaim. Tracking exports and international distribution of CanCon was seen as a good way to measure the success of the Canadian AV broadcasting industry.").

12. For the CRTC, adopting rules for the definitions of Canadian programming that incentivize further U.S. participation in the market would further these goals. This would mean allowing U.S. companies to develop and produce Canadian programming without onerous creative, financial, and IP control mandates that preclude these programs from being deemed "Canadian." As film and television industry participants told the CRTC in its stakeholder report, "a greater number of authentic Canadian productions that showcase national talent and captivate more viewers would lead to more global discovery and acclaim."[11] Designing rules for Canadian content that support foreign investment in creating qualified Canadian content would help increase the number of programs produced by the very entities that have extensive global networks in place (from their internet-enabled services) and the ability to promote such content around the world. Conversely, restrictive definitions of what qualifies as Canadian programming will drive services to licensed and acquisition models which will lead to smaller budgets, fewer jobs, and the inability to promote Canadian programming globally.

13. Below, CCIA responds to the specific questions posed by the CRTC on these issues.

Q5. Please comment on the Commission's preliminary view that if a production includes a showrunner, a Canadian must occupy that position.

14. As a general principle, no single position in a production should be required to be filled by a Canadian for a program to be defined as Canadian. Having a points system, where a certain number of positions should be filled by Canadians, is not inherently harmful. However, to mandate that any one category be fulfilled by a Canadian for a program to be officially recognized as Canadian undermines foreign participation in the market, by artificially limiting who may be most appropriate and/or qualified for specific roles. Allowing for flexibility in how a production meets the requisite number of points is an important principle to adopt.

15. Specifically on the issue of the new proposed category of "showrunner," the CRTC should proceed with caution. If the CRTC is considering adding new creative positions that, if performed by a Canadian, would help a program qualify as a Canadian program, this could result in beneficial flexibility. However, requiring companies to place Canadians in newly defined roles for programs to qualify as Canadian is a flawed approach that does little to further the telling of Canadian stories. It simply replaces the current creative point system with a similarly rigid system that is not modern or flexible.

16. It is worth noting that the definition of a "showrunner" is subjective, and has been largely adopted by the industry and media to refer to individuals who lead the development of programs. These individuals can be writers, directors, producers, or other personalities involved in a program. As such, should the CRTC adopt a new role of "showrunner," the definition must be very flexible and should not be mandatory. Given the likelihood that the definition may overlap with other creative positions for which there are obligations to have Canadian representation, caution should also be

[11] https://crtc.gc.ca/eng/publications/reports/ipsos24.htm.

heeded so as to not create a cycle which further restricts what qualifies programming as Canadian.

17. The position of "showrunner" traditionally applies to television programming, which would make it very difficult to apply outside of the television context. As the line between television and film grows murkier in the streaming era, industry would be concerned with the adoption of this new category.

Q8. Would this new, flexible approach facilitate the exportability and discoverability of Canadian programming domestically and abroad?

18. As a general matter, the CRTC's proposed framework for defining Canadian content is not sufficiently flexible to effectively promote the exportability and discoverability of Canadian programming. As discussed elsewhere, establishing criteria for programming to be determined as Canadian that incentivizes foreign streaming suppliers to create and own the rights for programs that feature Canadian creative workers, locations, and stories would be the most effective way to improve the export of Canadian narratives abroad. The very business models and existing global user bases of foreign streaming companies make them prime candidates to offer Canadian content the worldwide reach sought through this consultation and this question.

19. Even where the CRTC appears to endorse flexibility, proposals are unlikely to meaningfully achieve that goal if they retain highly prescriptive rules. For example, the CRTC proposes that for "positions occupied by more than one person (such as director or screenwriter), points be assigned to these positions if at least 80% of the people occupying a particular position are Canadian." Increasing flexibility in the definition of Canadian content is a positive focus for this proceeding, and industry appreciates this effort. However, this modest change is unlikely to materially improve the ability of the U.S. suppliers to facilitate the exportability and discoverability of Canadian content abroad.

20. For one, the selection of this number requires there to be at least five individuals in a position for this flexibility to kick in (for example, if there are four screenwriters and three of these individuals are Canadian, the position would only be 75% Canadian). This would mean that, for positions such as director, screenwriter, and producer that typically only have a small number of people occupying the role, the requirement would still effectively be that each individual must be Canadian.

21. CCIA recommends either lowering the percentage proposed, or selecting a different method to offer flexibility to foreign producers. As a general matter, U.S. producers and streaming companies should be provided with positive incentives to engage in the Canadian market, rather than punitive measures that relegate them to minority ownership while not providing these companies with incentives to make further investments.

Q14. In light of an approach based on Canadian intellectual property rights retention, should the Commission maintain the requirement that the key producer roles (producer, co-producer, line producer and production manager) be filled by Canadians to ensure Canadian financial and creative control? If not, please explain why.

22. The CRTC should not require producer roles to be filled by Canadians, a restriction that can disincentivize production in Canada. To the extent that producers hold IP in a work (which is not a given, but rather is negotiated between parties), mandating that producers be Canadian might appear to be a mechanism to expand such rights. However, imposing such rigid requirements is likely to actually shrink the overall amount of Canadian content by reducing production, since entities bearing the financial risk of production will prioritize talent and quality over any regulatory mandate.

23. Such reductions in the amount of Canadian content produced by online undertakings would not only thwart the policy objectives of the *Online Streaming Act*, but also unfairly disadvantage on-demand streaming services which rely on a compelling assortment of content to drive consumer interest and harm consumers who seek variety and choice. Further, if there are obligations to spend on Canadian content or separately contribute to a fund dedicated to developing Canadian content through this law, ensuring U.S. companies have the ability to have self-produced (and owned) content qualify and the opportunity to access funding for such production would greatly assist in facilitating a cooperative framework for the implementation of this law. If the CRTC wants to catalyze the export of Canadian content, bringing foreign streamers into the fold as participants in the creation of Canadian content would be more effective than attempting to force them to pay for content that they are not able to own.

24. Further, if the CRTC were to retain the regime of requiring Canadian IP ownership (including through requiring key producer roles to be filled by Canadians), it would confirm the *Online Streaming Act* as breaching CUSMA rules. U.S. production companies and streaming providers would be disadvantaged compared to their Canadian counterparts, in violation of CUSMA obligations requiring that U.S. suppliers are not treated less favorably than domestic counterparts.

Q15. How can the Commission incorporate the use of ownership and financial control of Canadian programs to help ensure the exportability of Canadian programming and formats through its modernized regulatory framework?

25. As discussed above, financial and creative control by Canadians should not be required, and doing so will disincentivize production and hurt the overall exportability of Canadian programming. By precluding U.S. and other foreign streamers from being able to produce Canadian content, but requiring them to contribute funding (either directly or through funds), the CRTC will discourage U.S. companies from expanding their investments and operations in Canada. Ownership of Canadian content's IP by U.S. companies means they can market and showcase it in every country in which they operate. This helps justify larger production budgets as the potential payback is based on a global rather than only domestic audience. Adopting a definition that does not

allow foreign IP ownership of Canadian content would drive U.S. companies to licensed and acquisition models wherein they own rights only in Canada, and thus cannot export and market Canadian programming abroad. This would likely result in overall lower investment.

26. This is an opinion shared by Canadian undertakings. As the stakeholder report that CRTC released noted, many entities interviewed by the agency felt that "incorporating copyright into the CRTC's definition may negatively affect smaller and medium sized production companies" and that the "CRTC should be mindful that any definition should not limit their options for selling and leasing rights to foreign entities or being commissioned by a streamer for a production."[12]

Q20. Should the [Canadian programming expenditures] requirements for traditional Canadian broadcasters and foreign online undertakings be similar or different? How can the Commission impose equitable requirements that respect the different business models of the various undertakings and broadcasting groups?

27. It is unreasonable to expect Canadian broadcasters—which have a single domestic market to serve—and global streamers to contribute the same amount of their resources to Canadian content. Foreign online undertakings are fundamentally different businesses from Canadian broadcasters, and are not afforded the same benefits and protections, such as access to spectrum not available to U.S. undertakings, as Canadian broadcasters, which have also become vertically integrated due to those benefits.

28. Assigning the legacy broadcast system to modern streaming services is one of the fundamental issues CCIA has with the implementation of the *Online Streaming Act* to date, and thus, we urge caution in repeating this approach again in this context. Global streaming services invest vast amounts in local content today while curating a library that most interests their customers in-market. Undertakings with a global audience for their content need to make those investment decisions on a global basis, and rigid requirements that undermine a globally competitive return on that investment will tend to drive investment away from that jurisdiction.

29. Any requirement for Canadian programming expenditures must allow for this to continue to be driven by customer demand, rather than regulatory compliance. Additionally, any policy adopted by the CRTC should recognize, through lower expenditure requirements, that streaming services are entirely different from Canadian broadcasters.

[12] https://crtc.gc.ca/eng/publications/reports/ipsos24.htm.

Artificial Intelligence Advances Benefit the Canadian Content Sector

30. The CRTC asks several questions relating to the impact of artificial intelligence (AI) on producing and promoting Canadian programming, which we consider in turn below.

Q40. Can AI-generated material be considered Canadian content? If yes, on what basis? Please explain.

31. Questions regarding the copyrightability of AI-generated content and assignment of credit for AI-generated material for authorship are still very nascent and lack consensus. This is a completely separate question to the nationality of AI-generated content, which itself is deeply complex and the subject of much debate in the technology community. As such, the CRTC should decline to wade into this debate or set standards for when AI-generated content can be determined to be sufficiently Canadian, as it implicates deeply complex questions to which there are not yet firm answers or precedent from expert agencies and judicial bodies.

32. For example, as a general matter, material that is produced by an AI algorithm or process, without human curation, should not qualify as a work of authorship. Therefore, determining a nationality for such works, where there was insufficient human participation, becomes extremely complicated, if not impossible. Given the vast inputs from broad-based training data sets, it would not only be impractical, but also contradictory to the fact that the data that powers AI services come from all over the world. The criteria that the CRTC adopts for determining whether programming is Canadian—such as the filling of creative and financial roles associated with films, television, and music—simply do not translate to the AI space. Would an AI-generated output engineered by a non-Canadian national, but that was trained on data that included Canadian inputs, count as Canadian content? Conversely, if the data is culturally Canadian, but held in data centers abroad, would it count as sufficiently Canadian? The specific characteristics of AI systems and use cases render it an ill-fitting subject for cultural quotas. As such, any AI-produced content that would not otherwise be considered as copyrightable under the law—in other words, content that does not involve sufficient human curation—should be disregarded for the purposes of determining whether the content is Canadian.

33. Due to these complications, and pursuant to the goals of this law and this consultation, CCIA also suggests that the CRTC decline to pursue any requirements relating to AI-generated material for content to be considered Canadian. Given the lack of rationale for determining AI-generated content or outputs as Canadian, requiring film or television programming to have a certain amount or ratio of AI-generated content as "Canadian" would be an extremely unreasonable obligation.

Q41. What could the potential impact of AI be on pre- and post-production, including but not limited to tasks such as visual effects?

34. AI services are already being leveraged to positively revolutionize dubbing,[13] subtitles,[14] animation,[15] visual effects,[16] video editing,[17] and even analysis of best actor or location matches.[18] These technologies help employees at every stage of the film and television making processes improve their products, and can play a key role in catalyzing the Canadian media development industry. The benefits from integrating AI into programming production and development are already advancing the industry and creative new methods for storytelling.

35. AI is not merely a like-for-like substitute with employees, it is a tool used by creative staff to enhance existing operations and expand how narratives are portrayed on television and film. In this vein, the CRTC should view many AI services and technologies as an additional and new tool used in pre- and post-production, rather than a replacement for existing roles and positions. On the other hand, to the extent that prescriptive mandates artificially increase the need to employ Canadians and thus discourage the use of AI in audiovisual production, the CRTC risks hindering the adoption of this evolving technology, and thus reducing the competitiveness of the Canadian production market.

Q42. How could the use of AI impact discoverability of Canadian content?

36. Algorithms for content discovery are constantly being updated by companies, including through the integration of burgeoning AI tools. These improvements to search and browsing experiences ensure consumers are better able to find new programs that match their interests and preferences. For streaming services, these benefits apply to consumers in Canada, but also around the world. These algorithms pre-date what is considered to be AI today, but developments in AI can power their advancements. Discovery technologies, including those that leverage AI will boost the reach of Canadian television shows and films in foreign markets where audiences may not know to search for certain stories, actors, or directors, but otherwise would enjoy the content.

37. As such, streaming companies should be incentivized to innovate and adopt the newest iterations of AI technologies and services in their search and browsing, and the CRTC should avoid imposing requirements for promoting Canadian programming that

[13] https://www.fastcompany.com/90981017/ai-dubbing-film-television-marz.
[14] https://variety.com/2024/digital/news/warner-bros-discovery-max-google-gen-ai-closed-captions-1236154296/.
[15] https://www.sae.edu/gbr/insights/the-role-of-ai-in-assisting-animation-production-unlocking-new-creative-possibilities/.
[16] https://www.wsj.com/podcasts/wsj-the-future-of-everything/how-ai-is-transforming-hollywoods-visual-effects-industry/c5cc9ed7-6fd9-4e58-9691-127eba648cc0.
[17] https://variety.com/vip/how-artificial-intelligence-will-augment-human-creatives-in-film-and-video-production-1235672659/.
[18] https://www.forbes.com/sites/neilsahota/2024/03/08/the-ai-takeover-in-cinema-how-movie-studios-use-artificial-intelligence/.

interfere with companies' business plans that are designed to address consumer desires.[19] The *Online Streaming Act* directs the CRTC to "ensure the discoverability of Canadian programming services and original Canadian programs… in an equitable proportion."[20] This mandate requires the CRTC to enable online undertakings to do what they do best—which is innovating to meet customer demand—rather than impose requirements that could lead to interference in companies' curation of content and recommendations that are designed to enhance customer choice and experience.

38. Sophisticated recommendation engines are one of the most notable and unique positive aspects of an interactive video and audio experience for both consumers and content producers. The government acknowledged this benefit, and in its policy directions to the CRTC, stated that the implementing regulations should *not* meddle with firms' decisions and design of algorithms. The CRTC should align its approach with the government's directions:

> In making regulations or imposing conditions in respect of discoverability and showcasing requirements, the Commission is directed to prioritize outcome-based regulations and conditions that **minimize the need for broadcasting undertakings to make changes to their computer algorithms that impact the presentation of programs.**[21]

User-Generated Content Should Not Be Subject to Canadian Content Requirements

39. The CRTC has stipulated that services associated with user-generated content are not liable for the obligatory base contribution.[22] However, user-generated content hosting providers are required to register with the CRTC as online broadcasting undertakings and therefore subject to mandatory regulatory fees. Even assuming the CRTC perpetually retains this stance of not requiring user-generated social media services and user-generated content hosting providers to contribute to the production and development of Canadian content, the inclusion of these entities under the law brings problematic externalities. As content uploaded by users is not liable for the obligatory base contribution, and therefore does not implicate associated regulatory oversight, regulatory fees for services associated with user-generated content are unjust and should be eliminated.

40. A persistent threat looms over user-generated content suppliers that they could potentially be subjected to promoting Canadian content through their services. The definitions for what programming can be deemed to be sufficiently "Canadian" do not translate to services with more organic content, where as few as only a single person could be involved in production. Further, attempting to create new definitions for

[19] https://ccianet.org/wp-content/uploads/2023/11/CCIA-Comments-to-Canadian-Heritage-on-the-Online-Streaming-Act-Regulations.pdf.
[20] https://www.parl.ca/DocumentViewer/en/44-1/bill/C-11/royal-assent.
[21] https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html (emphasis added).
[22] https://crtc.gc.ca/eng/archive/2024/2024-121.htm.

Canadian content in the social media and user-generated content sphere introduces complications that would undermine the best aspects of these services. Internet-enabled services are global by nature and introducing obligations to boost content from a certain country would create services that are forced to display different content depending on where a consumer accesses the information.

41. If applied to social media services, this approach would undermine content creators in several ways. The Internet Society detailed these potential harms to the Senate during the pre-study of the law, and these potential harms remain a live issue today—these include potentially lengthy certification periods, high costs passed onto creators to cover firms' compliance, and that Canadians would ignore the artificially-boosted Canadian content, therefore leading algorithms to determine the content is unappealing and therefore demote its availability outside of Canada where there are no requirements to promote this content.[23]

42. As such, short of removing user-generated content hosting providers and social media providers from the scope of the entire law, the CRTC should clarify that the Canadian content guidelines do not apply to user-generated content. Doing so would ensure that the CRTC does not intend to apply broadcast-era regulations for internet services that are ill-suited for promotion mandates.

Conclusion

43. CCIA appreciates the opportunity to respond to the CRTC's plan to implement the *Online Streaming Act* by updating its definitions for what qualifies as Canadian content. The CRTC should ensure it focuses its efforts in defining Canadian-qualifying content in a way that incentivizes greater foreign investment and on the exportability of Canadian programming abroad. Flexibility on IP ownership and the points system are critical to achieving these ends and towards the growth of the Canadian broadcast system as a whole.

[23] https://sencanada.ca/Content/Sen/Committee/441/TRCM/briefs/2022-09-14_TRCM_Brief_ISCC_e.pdf at 8.