



Telecom Decision CRTC 2018-384

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Asian Television Network International Limited, on behalf of the FairPlay Coalition – Application to disable online access to piracy websites

*The Commission determines that it does not have the jurisdiction under the Telecommunications Act to implement the FairPlay Coalition’s proposed website blocking regime to address copyright piracy and, consequently, it will not consider the merits of implementing the regime. The Commission therefore **denies** the FairPlay Coalition’s application.*

The Commission acknowledges that there is evidence that copyright piracy results in harm to the Canadian broadcasting system and to the economy in general. However, there are other avenues to examine the means of minimizing or addressing the impact of copyright piracy, including the ongoing parliamentary review of the Copyright Act and the expert panel review of the Telecommunications Act and the Broadcasting Act.

Regulatory context

1. Copyright is a framework of rights that gives content creators or their assignees the legal right to determine under what terms their original work may be distributed or used by others, subject to certain statutory exceptions. Copyright piracy generally refers to the distribution or use of copyrighted content without the copyright holder’s consent and without the payment that normally flows from such distribution or use. While copyright piracy has existed for as long as copyright has, the online environment has facilitated the pirating of digital content, particularly video and audio content, for distribution to a potentially large audience at a low incremental cost.
2. In Canada, remedies for copyright piracy largely involve litigation. As part of the 2012 amendments to the *Copyright Act*, the Canadian government implemented a “notice and notice” regime to address suspected online copyright piracy. Under this regime, the copyright holder provides a notice of alleged copyright infringement to the party hosting the content (such as an Internet service provider [ISP]), and the hosting party is required to pass the notice on to the alleged infringing party. The copyright holder must go to court for relief if the alleged infringing content is not taken down voluntarily.

3. Other countries have implemented a variety of regimes to address online copyright piracy, including notice and notice, notice and take-down,¹ and various website blocking regimes. Important factors differentiating the various website blocking regimes include the extent of judicial oversight and how the blocking of websites is technically achieved. The blocking of online content can be carried out through many different technical means, each of which has advantages and disadvantages with respect to cost, effectiveness, risk of over- or under-blocking, and ease of circumvention.
4. There is debate about the effectiveness of the various regimes. It is difficult to directly measure levels of online piracy and to determine the relationship between a remedial regime and any apparent reduction in online piracy.
5. The blocking of online content gives rise to policy concerns, including the risk of censorship, the impact on technical and business model innovation, and the impact on net neutrality, which is the concept that ISPs should treat all data on the Internet equally and not discriminate or charge differently based on factors such as types of users or content.

Application

6. On 29 January 2018, Asian Television Network International Limited filed an application, on behalf of itself and a number of other persons (collectively, the FairPlay Coalition),² requesting that the Commission create a regime that would (i) identify websites and online services that are blatantly, overwhelmingly, or structurally engaged in copyright piracy and (ii) require ISPs to block end-user access to those websites and services.
7. The FairPlay Coalition defined Internet piracy as follows:

...the availability on the Internet of websites, applications, and services that make available, reproduce, communicate, distribute, decrypt, or decode copyrighted material (e.g. television shows, movies, music, and video games) without the authorization of the copyright holder, or that are provided for the purpose of enabling, inducing, or facilitating such actions.

¹ “Notice and take-down” generally refers to a regime whereby an online intermediary is required to remove access to copyrighted material upon receipt of a notice on behalf of a copyright holder claiming that the material at issue is being disseminated illegally.

² The FairPlay Coalition comprises more than 25 stakeholders, including broadcasting and telecommunications companies (e.g. Asian Television Network International Limited, Bell Canada, the Canadian Broadcasting Corporation, Cogeco Connexion Inc., Corus Entertainment Inc., Ethnic Channels Group Limited, Rogers Communications Canada Inc., and Quebecor Media Inc.), unions and organizations associated with the broadcasting industry (e.g. the Alliance of Canadian Cinema, Television and Radio Artists; l’Association québécoise de l’industrie du disque, du spectacle et de la vidéo; and l’Union des artistes), and organizations linked to the film and/or broadcasting industries (e.g. the Toronto International Film Festival and Cineplex Entertainment LP).

8. It noted that these types of platforms now mostly use a streaming format rather than peer-to-peer technology and that they are increasingly accessible to Canadians through the widespread availability of applications that consolidate access to numerous websites (both legitimate streaming websites and piracy websites) using a user-friendly interface.
9. The FairPlay Coalition contended that Internet piracy is a widespread and growing problem that causes significant harm to the Canadian economy, the telecommunications system, the cultural sector, the broadcasting system, and consumers. In addition to the significant and immediate harm to the economic value of the creative works whose copyrights are infringed, the FairPlay Coalition pointed to such issues as a resulting loss of investment in Canadian content; a negative impact on trust in, and therefore development of, the digital economy; lower tax revenues; serious privacy and cybersecurity risks for consumers who use piracy websites; and the fact that consumers who visit piracy websites do not benefit from consumer and social protections such as closed captioning and emergency alerting.
10. The FairPlay Coalition argued that the current legal regime in Canada is ill-equipped to deal with Internet piracy. According to the FairPlay Coalition, it is difficult and often impossible to identify the persons or companies responsible for piracy websites, and even in cases where it is possible, they are often located in foreign jurisdictions. As a result, copyright holders wishing to defend their rights must conduct expensive investigations and incur the expense and challenges of pursuing an action in foreign jurisdictions. Given that it can cost little to create a piracy website, legal action is often ineffective even if it is successful, since the sites can easily be recreated under a different name or in a different jurisdiction, and copyright pirates rarely have the financial means to compensate their victims. The FairPlay Coalition provided numerous examples of international website blocking regimes and claimed that such regimes are a common and effective means of combatting online copyright piracy.
11. To address online copyright piracy in Canada more effectively, the FairPlay Coalition proposed that the Commission implement the following measures, referred to collectively in this decision as “the proposed regime”:
 - Pursuant to sections 24 and 24.1 of the *Telecommunications Act*, the Commission would impose a condition on all ISPs to disable access to the piracy websites identified from time to time by the Commission and compiled into a centralized list (the list). The Commission would also authorize ISPs to disable access to the websites on the list, pursuant to section 36 of the *Telecommunications Act*.
 - The Commission would establish criteria to determine whether a suspected piracy website should be added to the list. A website would be added if it is found to be blatantly, overwhelmingly, or structurally engaged in piracy. Specific criteria could include the extent, impact, and flagrancy of the website’s piracy activities; disregard for copyright demonstrated by the

website's owner(s); whether the website is marketed for its infringing uses; and the effectiveness of any actions to prevent infringing activities.

- Pursuant to section 70 of the *Telecommunications Act*, the Commission would establish the Independent Piracy Review Agency (IPRA), an independent, not-for-profit organization similar in structure to the Commission for Complaints for Telecom-television Services Inc., to receive applications from copyright holders and other interested persons requesting to add a suspected piracy website to the list.
 - The IPRA would review applications using a process open to the public and designed to ensure that the owner(s) of the suspected piracy website have an opportunity to be heard. It would apply the criteria established by the Commission and recommend whether the website should be added to the list.
 - Based on the record before the IPRA and the IPRA's recommendation, the Commission would decide whether to add the website to the list, issuing written reasons for its decision.
 - The Commission could quickly or automatically extend the website blocking requirement to other locations on the Internet to which the same piracy website may relocate.
 - Persons wishing to challenge a Commission decision would have access to existing appeal mechanisms, including (i) an application to review and vary the decision pursuant to section 62 of the *Telecommunications Act*, which would trigger a public Commission process, and (ii) an appeal to the Federal Court of Appeal.
12. The FairPlay Coalition contended that the creation of the IPRA would ensure that the required Commission approvals are obtained in an efficient and timely manner, and that the Commission would benefit from the IPRA's copyright expertise to make its determinations. The IPRA would be self-funding, with its relatively low administrative costs covered by a reasonable fee charged to applicants seeking to have a website added to the list.
13. The FairPlay Coalition committed to taking a leadership role in ensuring that the proposed regime is implemented. It proposed that the Commission conduct a follow-up process to establish (i) the specific criteria to be used to determine whether a website should be added to the list and (ii) the governance structure of the IPRA. The FairPlay Coalition's members agreed to provide, on a voluntary basis, the funds necessary to establish the IPRA and to coordinate the development of proposals, which could form the basis of the follow-up process.

Overview of interventions

14. The Commission received over 150,600 interventions in response to the FairPlay Coalition's application.

Supporting interventions

15. The Commission received nearly 100 form letter interventions in support of the FairPlay Coalition's application from companies involved in the production and distribution of copyrighted material. These interveners emphasized the financial impact of piracy on the Canadian entertainment industry, which in turn, they argued, hinders high-quality content creation and distribution. They also indicated that piracy is a growing problem that is difficult to combat with Canada's current copyright regime and that the proposed regime is a modern, adequate, and balanced tool that will protect Canadian artists from online piracy.
16. The Commission also received a number of lengthy and detailed interventions supporting the application. These interveners tended to suggest that piracy in Canada impacts jobs, and most of them also addressed the importance of following international precedents of blocking piracy websites. In addition, they argued that the Commission has the jurisdiction to approve the application and that website blocking could be done effectively while respecting net neutrality and the *Canadian Charter of Rights and Freedoms* (the Charter). The Canadian Cable Systems Alliance Inc. made its support for the FairPlay Coalition's application conditional on the proposed regime not imposing significant costs on ISPs.
17. Other interveners that supported the application argued, among other things, that online piracy affects the work and livelihood of independent content creators, that website blocking is an effective measure to eradicate online piracy, and that the proposed regime would respect net neutrality.

Neutral interventions

18. There were six largely neutral interventions that focused on providing factual information on issues such as the extent of piracy, compliance costs, and targeted website blocking in the United Kingdom. Sandvine Incorporated submitted four studies on the mechanics and impacts of video and television piracy. Pelmorex Weather Networks (Television) Inc. provided historical context with a review of satellite signal theft. Bragg Communications Incorporated, carrying on business as Eastlink; Friend MTS Limited;³ and the Independent Telecommunications Providers Association⁴ focused on the operational aspects of

³ Friend MTS Limited is a global provider of channel, content, and platform protection services to help companies control their video content.

⁴ The Independent Telecommunications Providers Association is a non-profit organization that represents independent local exchange carriers in British Columbia, Ontario, and Quebec to governments, their various agencies, and other industry players.

the proposed regime and related compliance costs. Another intervention focused on the interpretation of section 36 of the *Telecommunications Act* in relation to blocking illegal content.

Opposing interventions

19. There were three large petition campaigns opposing the FairPlay Coalition's application, initiated by Leadnow, OpenMedia/the Canadian Internet Policy and Public Interest Clinic (CIPPIC), and SumOfUs.⁵ These petitions raised concerns about online censorship and net neutrality, the lack of judicial oversight of website blocking decisions, the concentration of power in corporate hands, and threats to Charter-protected freedom of expression. In addition, according to the OpenMedia/CIPPIC petition, the current level of piracy in Canada is relatively low, making the proposed regime unnecessary.
20. The Commission also received about 10,000 individual interventions opposing the application. While a wide range of concerns were raised, certain dominant themes were apparent. First, the application was seen as an attack on net neutrality and freedom of expression that would unduly censor legitimate websites and/or content by blocking them accidentally, reducing user choice online.⁶ Second, some interveners described the ease with which website blocking may be circumvented.⁷ Third, many individual interveners argued that online piracy is caused, in part, by the high prices and bundled programming offerings of traditional content providers.
21. In addition to these three broad themes, the individual interveners raised a variety of other concerns. These included doubts about whether the Commission has the statutory jurisdiction to implement the proposed regime, a lack of details about the structure and processes of the IPRA, a lack of judicial oversight of the IPRA, and the risk that website blocking would expand beyond the piracy issue and be used by established industry players to reduce competition and innovation.
22. Finally, the Commission received a number of opposing interventions that provided in-depth analysis and evidence. These interveners raised the following main issues: the threat to net neutrality, including freedom of expression; the technical challenges

⁵ Approximately 23,000 interveners filed an online petition created by Leadnow, a non-profit organization that advocates for social justice in Canada. Approximately 83,000 interveners filed an online petition generated by OpenMedia and submitted by CIPPIC. Approximately 35,000 interveners filed an online petition created by SumOfUs, a global organization advocating against the concentration of corporate power.

⁶ For example, interveners argued that blocking targeted Internet Protocol (IP) addresses may unintentionally block traffic to legal and legitimate websites, since one IP address may host multiple websites.

⁷ Examples of circumvention techniques included virtual private networks (VPNs), which can circumvent blocking efforts by routing traffic through another country; open domain name system (DNS) servers, which can circumvent blocking efforts by allowing individuals to navigate directly to any website blocked by a carrier; encrypted services; and alternative peer-to-peer platforms.

of blocking websites effectively; the validity of the evidence put forward on the scope of the piracy problem and its economic and employment impacts;⁸ the validity of the examples of international website blocking regimes provided in the FairPlay Coalition's application; and the Commission's lack of statutory jurisdiction to adjudicate copyright matters or impose mandatory website blocking to address piracy.

23. The adequacy of current copyright remedies and concerns over the lack of judicial oversight of the proposed regime were also common themes in these submissions.⁹ Other concerns raised related to the use of the inquiry officer provisions set out in section 70 of the *Telecommunications Act* as a basis for creating the IPRA.

Reply

24. In reply, the FairPlay Coalition responded to many of the issues raised in the opposing interventions and reiterated its arguments. It argued that online piracy is a large and growing problem for Canada and that the proposed regime is an effective response that is also practical for ISPs. The FairPlay Coalition also argued that the petition and survey interventions opposing its application were largely based on false or misleading information. To further rebut the opposing interventions, the FairPlay Coalition commissioned a public survey that indicated, among other things, that 77% of Canadians believe that Canada should have online piracy protections similar to those of countries such as the United Kingdom, Australia, and France, and 70% believe that online piracy websites should be removed from Canada through government intervention.
25. In addition, the FairPlay Coalition repeated its arguments that (i) the remedies currently available under the *Copyright Act* are insufficient and (ii) the Commission is best placed to combat online piracy and has the statutory jurisdiction to do so by implementing the proposed regime pursuant to sections 24, 24.1, 36, and 70 of the *Telecommunications Act*, which would further the telecommunications policy objectives set out in section 7 of that Act.
26. The FairPlay Coalition also submitted additional evidence that addressed a variety of topics: the economic impact of television piracy, the efficacy of piracy website blocking in the United Kingdom and in other member countries of the European Union, a description of the significant costs of pursuing piracy websites using the remedies currently available in Canada, a survey of public attitudes toward piracy, and descriptions of website blocking regimes in Portugal and Italy.

⁸ In this regard, a few interveners filed copies of a comprehensive European Union (EU) study entitled "Estimating displacement rates of copyrighted content in the EU."

⁹ Notably, a submission by the United Nations Special Rapporteur argued that the proposed regime would violate the *International Covenant on Civil and Political Rights* as it relates to restricting speech without due process.

27. Several interveners objected to the FairPlay Coalition’s reply and requested that the reply evidence be struck from the record of the proceeding or that additional process be established to allow for comment on the evidence. The FairPlay Coalition argued in response that it had properly filed the evidence to respond to arguments and evidence previously filed by other parties. The FairPlay Coalition also acknowledged that the Commission could establish additional process if it deemed it necessary to do so.

Does the Commission have the jurisdiction to implement the proposed regime?

Positions of parties

Telecommunications Act

28. The FairPlay Coalition argued that the Commission is in the best position to establish the proposed regime, given its powers under the *Telecommunications Act* and its unique policy expertise in both the broadcasting and telecommunications fields. It also argued that the proposed regime is necessary for the fulfillment of the policy objectives set out in paragraphs 7(a), (h), and (i) of the *Telecommunications Act*.
29. Paragraph 7(a) of that Act calls for “a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions.” The FairPlay Coalition submitted that piracy
- threatens the profitability, viability, and employment generated by the Canadian creative and broadcasting industries;
 - undermines the social fabric of Canada by undermining the creation and legitimate dissemination of Canadian works; and
 - harms trust in, and therefore the development of, the digital economy.
30. The policy objectives in paragraphs 7(h) and (i) of the *Telecommunications Act* are, respectively, “to respond to the economic and social requirements of users of telecommunications services” and “to contribute to the protection of the privacy of persons.” The FairPlay Coalition submitted that piracy undermines respect for, and compliance with, the laws of Canada, which have social and economic purposes, and that piracy websites are leading sources of malware and other forms of theft of personal information.
31. Moreover, the FairPlay Coalition argued that the Commission has the jurisdiction to establish the proposed regime, since
- the regulation of ISPs, whether carriers or resellers, falls squarely within the Commission’s mandate pursuant to the *Telecommunications Act*;

- section 36 of that Act grants the Commission the explicit power to authorize the blocking of websites;
 - sections 24 and 24.1 of that Act grant the Commission broad powers and can be used to require the blocking of websites as necessary for the fulfillment of the policy objectives; and
 - paragraph 70(1)(a) of that Act, which grants the Commission the power to appoint an inquiry officer, is sufficient to support the creation of the IPRA.
32. The parties that supported the application generally agreed with the FairPlay Coalition’s legal arguments. For example, TELUS Communications Inc. (TCI) submitted that the proposed regime is supported by an objective common to the *Broadcasting Act* and the *Telecommunications Act*, namely to safeguard, enrich, and strengthen the social and economic fabric of Canada.
33. Many of the parties that opposed the application focused their legal arguments largely on the proposed regime’s potential to violate Charter rights (particularly the right to freedom of expression) and to impact net neutrality, as well as on whether the Commission has jurisdiction under the *Telecommunications Act* to implement the proposed regime. They also expressed considerable concern over the lack of judicial oversight of the proposed regime.
34. Many interveners, including the Canadian Network Operators Consortium Inc. (CNO), Canada’s Forum for Research and Policy in Communications (FRPC), Professor Michael Geist, the Internet Society Canada Chapter (ISCC), OpenMedia/CIPPIC, the Public Interest Advocacy Centre (PIAC), TekSavvy Solutions Inc. (TekSavvy), and l’Union des consommateurs, submitted that the proposed regime does not advance, and even undermines, the policy objectives set out in section 7 of the *Telecommunications Act*. In general, most of these interveners submitted that blocking websites engaged in copyright infringement would be ineffective, unjustified, and detrimental to achieving the policy objectives, and would run against the principles of common carriage. Some interveners also argued that if the Commission were to accept such a broad interpretation of section 7, its jurisdiction would extend into practically all public policy domains.
35. With respect to the policy objective in paragraph 7(a) of the *Telecommunications Act*, the FRPC submitted that the FairPlay Coalition failed to explain how eliminating the principle of common carriage would make the Canadian broadcasting and creative sectors stronger and enable the “orderly development” of the Canadian telecommunications system. PIAC argued that Commission approval of the FairPlay Coalition’s application would effectively disconnect Canadians, not connect them.

36. Professor Geist submitted that the proposed regime is contrary to the policy objectives in paragraphs 7(b), (c), and (f) of the *Telecommunications Act*¹⁰ for the following reasons:
- website blocking would undermine reliable and affordable telecommunications services;
 - smaller ISPs would face an economic disadvantage that would affect marketplace competitiveness; and
 - website blocking is a disproportionate remedy, leads to over-blocking, is ineffective, and risks violating net neutrality and privacy rights, all of which run contrary to fostering increased reliance on market forces.
37. Regarding the policy objective in paragraph 7(h), CNOC claimed that the proposed regime would impose additional costs on ISPs and consumers, which would hinder the achievement of the policy objectives regarding efficiency, proportionality, affordability, and competition. The FRPC submitted that if the Commission were to accept the FairPlay Coalition's broad interpretation of that policy objective, the Commission's jurisdiction would be virtually unlimited in social and economic matters. PIAC submitted that the alleged benefits of the proposed regime would apply only to the economic requirements of broadcasting service users, not to those of telecommunications service users.
38. With regard to the policy objective in paragraph 7(i), the FRPC, Professor Geist, and PIAC submitted that the proposed regime fails to further that objective because it does not protect privacy.
39. With respect to sections 24 and 24.1 of the *Telecommunications Act*, the Canadian Association of Broadcasters and TCI submitted that the proposed regime fits within the Commission's authority by virtue of those sections, which empower the Commission to impose conditions of service on common carriers and telecommunications service providers (TSPs).
40. In contrast, PIAC submitted that interpreting sections 24 and 24.1 in light of the general scheme of the *Telecommunications Act* reveals that the Commission is authorized to use its regulation-making power only within the scope of the objectives set out in that Act, which do not include copyright enforcement. PIAC argued that in the rare instances when the *Telecommunications Act* authorizes the regulation of telecommunications content or the blocking of content, it does so in explicit language, such as in section 41, which deals with unsolicited telecommunications.

¹⁰ These objectives are: 7(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; 7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and 7(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective.

According to PIAC, the lack of similar explicit language in sections 24 and 24.1 means that these sections cannot be read as giving the Commission jurisdiction to order the blocking of content for copyright purposes.

41. The Canadian Media Concentration Research Project (CMCRP) submitted that section 24 of the *Telecommunications Act* has traditionally been applied to a narrow range of clear telecommunications policy objectives. It added that where that Act has authorized the Commission to regulate telecommunications content, it has done so using explicit language (e.g. unsolicited telecommunications). Interveners opposed to the application, such as the CMCRP, CNOC, the FRPC, OpenMedia/CIPPIC, PIAC, and TekSavvy, submitted that the object of section 36 is to preclude TSPs from controlling content, not to create a mandatory regime for content blocking.
42. Interveners also addressed the Commission's jurisdiction to create the IPRA under section 70 of the *Telecommunications Act*. TCI submitted that the Commission has the jurisdiction to establish an anti-piracy agency by virtue of paragraph 70(1)(a). In contrast, interveners such as the CMCRP, the FRPC, and TekSavvy submitted that section 70 does not grant the Commission an express authorization to appoint an investigative body acting indefinitely in online copyright matters.

Broader statutory context

43. The FairPlay Coalition situated the *Telecommunications Act* within a framework of related federal legislation (the *Broadcasting Act*, the *Radiocommunication Act*, and the *Copyright Act*) and submitted that implementing the proposed regime would be appropriate within that framework. In particular, the FairPlay Coalition argued that the proposed regime does not conflict with the *Copyright Act*.
44. While the FairPlay Coalition acknowledged that the *Copyright Act* is an exhaustive code of rights and remedies, it argued that creating the proposed regime under the *Telecommunications Act* would not conflict with Parliament's intent in establishing that code. The FairPlay Coalition pointed to the remedies relating to pirating signals under the *Radiocommunication Act* as evidence that Parliament intended that copyright remedies in other federal legislation could co-exist with the *Copyright Act*.
45. The FairPlay Coalition also addressed the fact that in the context of the recent amendments to the *Copyright Act*, Parliament considered a number of different responses to online piracy and ultimately chose a notice and notice regime as the appropriate response.
46. The FairPlay Coalition argued that there are significant differences between the proposed regime and the notice and take-down regime previously rejected by Parliament; therefore, implementing the proposed regime would not be inconsistent with Parliament's intent in rejecting that regime. The FairPlay Coalition added, for example, that the notice and take-down regime that Parliament considered was targeted toward copyright-infringing materials hosted by ISPs, not access to piracy websites, and that such a regime would not have been procedurally fair, since no independent party would assess the claim of infringement.

47. A number of interveners opposed to the FairPlay Coalition's application submitted that the proposed regime conflicts with the *Copyright Act* in that it disrupts the existing and finely balanced copyright remedies and is contrary to Parliament's intent.
48. Many opposing interveners argued that the proposed regime is primarily focused on copyright enforcement and has no place under the *Telecommunications Act*. CNOC, Professor Geist, the ISCC, OpenMedia/CIPPIC, the Open Privacy Research Society, and PIAC submitted that the Commission lacks the jurisdiction to implement the proposed regime because it would have to make a finding of copyright infringement and the *Telecommunications Act* does not empower the Commission to issue determinations on copyright matters. Some of these parties suggested that Parliament would have to grant the Commission additional jurisdiction to enable it to implement the proposed regime.
49. The Canadian Association of Research Libraries, CNOC, and OpenMedia/CIPPIC noted that the Supreme Court of Canada has held that the Commission cannot make regulations that conflict with the *Copyright Act*. OpenMedia/CIPPIC added that the proposed regime conflicts with the *Copyright Act*'s carefully balanced "enabler regime," which allows copyright holders to sue anyone who provides services primarily for the purpose of enabling online infringements.
50. Professor Geist submitted that the 2012 *Copyright Act* amendments included new provisions intended to target entities that enable copyright infringement. He argued that these amendments are a powerful tool that may be used to award significant amounts through statutory damages and to obtain injunctive relief against innocent third-party intermediaries in certain circumstances, as illustrated by the Supreme Court of Canada's decision *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 SCR 824.
51. The ISCC submitted that a harmonious interpretation of the legislation gives no indication that Parliament intended for the Commission to use its telecommunications mandate to administer other statutes.
52. The Canadian Association of Research Libraries, the FRPC, OpenMedia/CIPPIC, and PIAC argued that website blocking, which is the proposed regime's only remedy, overrides the meticulous remedies, limitations, exceptions, defences, and judicial oversight that the *Copyright Act* offers. PIAC also argued that the proposed regime would conflict with the *Copyright Act* by imposing copyright obligations on ISPs when that Act exempts intermediaries such as ISPs from such obligations. CNOC submitted that the rights and remedies under the *Copyright Act* are exhaustive and that the proposed regime would render irrelevant that Act's notice and notice regime.
53. L'Union des consommateurs submitted that implementation of the proposed regime would result in the creation of a new remedy for copyright holders, which would require statutory change.

54. The ISCC noted that by virtue of section 41.24 of the *Copyright Act* and subsection 20(2) of the *Federal Courts Act*, the jurisdiction to provide remedies for copyright infringement rests with the Federal Court and the courts of the provinces.

Commission's analysis and determinations

55. The Commission must establish its statutory jurisdiction under the *Telecommunications Act* to address the subject matter of the FairPlay Coalition's application before it can assess any other aspect of the application, including the impact of online copyright piracy, whether that impact justifies the Commission acting, and if so, whether the proposed regime constitutes an appropriate response. In order to make such a determination, the Commission must engage in an exercise of statutory interpretation.
56. The accepted approach to statutory interpretation in Canada is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."¹¹ Therefore, the Commission must assess whether the ordinary and grammatical meaning of the words of the relevant provisions in the *Telecommunications Act* would support the adoption of the proposed regime. The Commission must also assess whether its statutory interpretation is supported by the purpose of the relevant provisions, as revealed by the surrounding provisions and the *Telecommunications Act* as a whole. In addition, the statute should be interpreted harmoniously with other federal legislation dealing with related subject matter.
57. The FairPlay Coalition relied on sections 24 and 24.1 of the *Telecommunications Act* to establish the Commission's jurisdiction to order ISPs to block specific websites, which lies at the heart of the proposed regime. Viewed in isolation from the rest of the *Telecommunications Act*, a narrow textual analysis of these sections suggests a significant granting of powers. However, when sections 24 and 24.1 are interpreted in the broader context of related federal legislation, it is evident that the expansive interpretation of the sections necessary to provide the Commission with the jurisdiction to implement the proposed regime would create direct conflicts with the *Copyright Act* and with Parliament's intent with respect to copyright remedies.
58. Similarly, when sections 24 and 24.1 are interpreted in the context of the *Telecommunications Act* as a whole, a purposive and contextual analysis demonstrates that they do not provide the Commission with the jurisdiction to implement the proposed regime.
59. The Supreme Court of Canada has recognized the *Telecommunications Act* as being part of a broader scheme of federal legislation dealing with related subject matter, which also includes the *Broadcasting Act*, the *Radiocommunication Act*, and the

¹¹ See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, at paragraph 26, citing Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), at page 87.

Copyright Act.¹² These Acts are presumed to have been drafted with one another in mind so as to offer a coherent and consistent treatment of the subject matter.

60. Parliament created the *Copyright Act* as an exhaustive copyright regime. Consequently, clear statutory language is required in another Act if that Act seeks to address rights and remedies related to copyright outside the *Copyright Act*. For instance, section 18 of the *Radiocommunication Act* uses express statutory language to establish additional copyright remedies.
61. However, sections 24 and 24.1 of the *Telecommunications Act* do not contain explicit language conferring copyright jurisdiction on the Commission. The creation of new copyright remedies under the *Telecommunications Act* in the absence of clear statutory language would conflict with Parliament's intent in creating an exhaustive copyright code in the *Copyright Act*.
62. The proper interpretation of sections 24 and 24.1 of the *Telecommunications Act* is also influenced by the fact that when Parliament amended the *Copyright Act* in 2012, it considered and rejected notice and take-down regimes similar to the proposed regime, in favour of a notice and notice regime. Interpreting sections 24 and 24.1 as giving the Commission the jurisdiction to mandate the proposed regime would conflict with the purpose and scheme of the *Copyright Act*.
63. There is also a clear conflict between the proposed regime and the ISP exemptions set out in paragraph 2.4(1)(b) and section 31.1 of the *Copyright Act* regarding the role that TSPs (such as ISPs) should play in enforcing the rights created by that Act. Paragraph 2.4(1)(b) expressly exempts persons who merely provide the means of telecommunication from responsibility for communicating copyrighted works. Section 31.1 exempts a number of network functions commonly carried out by ISPs (such as caching and hosting) from liability for copyright infringement. The proposed regime conflicts with the *Copyright Act* because it seeks to impose new copyright obligations and remedies on ISPs, while that Act specifically exempts entities that act as telecommunications conduits from responsibility for copyright enforcement.
64. As outlined above, the proposed regime requires sections 24 and 24.1 of the *Telecommunications Act* to be interpreted in a way that creates a direct purposive and contextual conflict with the *Copyright Act*. Moreover, such an interpretation of the jurisdiction granted to the Commission by the *Telecommunications Act* runs contrary to the principle of interpreting sections harmoniously with related legislation.
65. The sections adjacent to sections 24 and 24.1 of the *Telecommunications Act* do not support the theory that the Commission's general powers under sections 24 and 24.1 are intended to extend to the blocking of websites for the purpose of combatting copyright piracy. Sections 24 and 24.1 exist within a group of related provisions

¹² See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489, at paragraph 34.

focusing on the rates, terms, and conditions for the offering and provision of telecommunications services. Those sections do not mention intervention in copyright matters as expressly set out in the *Copyright Act*.

66. Other sections of the *Telecommunications Act* use explicit language in provisions that address intervening in content for a specific purpose. For example, section 41, which deals with unsolicited telecommunications, uses clear statutory language enabling the Commission to regulate the use of telecommunications based on their content. When read in the broader context of the *Telecommunications Act*, sections 24 and 24.1 grant the Commission the power to impose conditions on the offering and provision of telecommunications services, but not the power to intervene in content for copyright purposes.
67. Section 36 of the *Telecommunications Act* limits the ability of carriers to control the content of messages carried over their networks without prior Commission authorization. While this section gives the Commission the explicit power to authorize an ISP to block a website, the proposed regime would go further and require such blocking pursuant to a Commission order. Because section 36 confers an authorizing power and not a mandatory power, the power to mandate blocking must be found elsewhere and must relate to subject matter that is clearly within the Commission's jurisdiction under the *Telecommunications Act*.
68. Moreover, section 47 of the *Telecommunications Act* requires the Commission to exercise its powers and perform its duties under that Act, including those under sections 24 and 24.1, with a view to implementing the telecommunications policy objectives set out in section 7 of that Act, among other things.
69. Generally speaking, the policy objectives in section 7 of the *Telecommunications Act* address the development and ownership of telecommunications infrastructure and services, as well as the conditions for provisioning telecommunications services to wholesale and retail users. The Supreme Court of Canada summarized the purpose of the *Telecommunications Act* in light of the policy objectives as being "to encourage and regulate the development of an orderly, reliable, affordable and efficient telecommunications infrastructure for Canada."¹³ In the Commission's view, the proposed regime can be said to target the policy objectives in only a tangential way, in the sense that they address a social or economic need. The Supreme Court's findings with respect to the objectives in the *Broadcasting Act* are equally applicable to an interpretation of the policy objectives in the *Telecommunications Act*: "establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the [*Broadcasting*] Act is [not] a *sufficient* test for conferring jurisdiction on the CRTC."¹⁴

¹³ See *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 SCR 476, at paragraph 38.

¹⁴ See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489, at paragraph 25.

70. The policy objectives in the *Telecommunications Act* give the Commission extensive leeway to address social and economic needs broadly. For example, the Commission has addressed issues of public safety (e.g. through 9-1-1 and wireless public alerting regulation) and accessibility (e.g. through video relay service regulation). However, in the case of the proposed regime, which relates at its heart to the enforcement of the *Copyright Act* in the absence of a specific enforcement mechanism established by Parliament, any link to the policy objectives in the *Telecommunications Act* is tenuous, such that the Commission cannot support a finding of jurisdiction.
71. In light of all the above, the Commission determines that it does not have the jurisdiction under the *Telecommunications Act* to implement the proposed regime and, consequently, it will not consider the merits of implementing the regime. The Commission therefore **denies** the FairPlay Coalition's application.
72. The Commission acknowledges that the record of this proceeding demonstrates that there is evidence that copyright piracy results in harm to the Canadian broadcasting system and to the economy in general, but the information provided was not sufficient to quantify the nature and extent of that harm.
73. The Commission notes that there are existing enforcement mechanisms for addressing online copyright piracy. There are also other avenues to further examine the means of minimizing or addressing the impact of copyright piracy, including the parliamentary review of the *Copyright Act* and the expert panel review of the *Telecommunications Act* and the *Broadcasting Act*. Both of these reviews are currently underway.

Procedural requests

74. Intervenors made a number of procedural requests for additional opportunities to provide submissions and evidence. Requests were also made for the Commission to either strike certain reply evidence from the record or provide parties an opportunity to respond to it. In light of its determination to deny the FairPlay Coalition's application on jurisdictional grounds and not to take further action at this time, the Commission **denies** these procedural requests.

Secretary General