TekSavvy WE'RE DIFFERENT. IN A GOOD WAY.

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Filed via My CRTC Account

Mr. Claude Doucet
Secretary General
Canadian Radio-television and Telecommunications Commission
1 Promenade du Portage
Gatineau, Quebec J8X 4B1

29 March 2018

RE: Asian Television Network International Limited, on behalf of a Coalition (FairPlay Canada) ("the Applicants")**: *Application to disable on-line access to piracy sites*,** CRTC File 8663-A182-201800467, 30 January 2018 ("the Application")

Dear Mr. Doucet:

1. TekSavvy Solutions Inc. ("TekSavvy") is an independent, competitive telecommunications service provider, providing residential, commercial, and wholesale telecommunications services to more than 250,000 Canadian homes and businesses across Canada. As part of those services, TekSavvy provides DNS in a way that is consistent with Canadian[1] and international[2] guidelines.

2. If implemented, the Applicants' proposal for site blocking would fundamentally reshape how Internet services would work in Canada, including the manner in which TekSavvy provides Internet services.

3. As set out below, TekSavvy opposes the Application on the grounds first of the broad policy implications and legal issues with violating the common carriage doctrine for copyright enforcement purposes, and second of the questionable legislative authority of the Commission to implement the proposed regime at all.

A. Background

4. The Applicants propose that the Commission establish a body (the Independent Piracy Review Agency ("IPRA")) to consider applications by copyright rightsholders and other interested parties to list sites that ISPs would be required to block. The IPRA would

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1 Canadian Security Telecommunications Advisory Committee ("CSTAC"), *Security best practices for Canadian telecommunications service providers (TSPs)* Issue 1, 31 October 2013 ("The DNS is a fundamental control protocol in Internet Protocol (IP) networks that is essential for connectivity to the Internet. DNS servers provided by TSPs must be secure and resilient to security events and must provide accurate data.").

2 London Action Plan and M3AAWG, *Best practices to address online and mobile threats*, 15 October 2012, page 29 ("Best Practices for Industry and Government to Address Cache Poisoning: 1. Support the worldwide deployment of DNSSEC, to secure distribution of DNS data.").

make an informed decision as to which sites to recommend that the Commission add to the list of blocked sites, being sites that are "blatantly, overwhelmingly, or structurally engaged in piracy." TekSavvy understands the term "piracy" in this context to mean copyright infringement. The Commission would then consider the evidence and the recommendations and could then require and authorize ISPs to disable access to these sites.[3]

5. The Applicants argue[4] that this site blocking regime would be authorized under sections 24, 24.1, 36, and 70(1)(a) of the *Telecommunications Act* ("the Act")[5].

6. TekSavvy opposes the Application. TekSavvy has had the opportunity to review the intervention of its industry association, the Canadian Network Operators Consortium Inc. ("CNOC"), and fully agrees with all of CNOC's submissions.

7. In addition, TekSavvy respectfully submits the following comments, first considering the broad policy implications and legal issues with violating the common carriage doctrine for the purposes stated in the Application, and second considering the questionable legislative authority of the Commission to implement the proposed regime at all.

B. Site blocking violates the Common Carrier doctrine, and is inconsistent with the Policy Objectives

8. Section 36 of the Telecommunications Act, captioned "Content of Messages", states[6]:

> Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.

9. This long-standing requirement originated in Parliamentary debates relating to the potential involvement of a telecommunications carrier in content, culminating in specific legislative drafting to avoid it.[7] It is not a requirement that is incidental to the activity of providing telecommunications services. On the contrary, it is core to the federal regulatory scheme established for Canadian telecommunications services and the markets in which they are delivered.

10. That, for instance, is why the Supreme Court of Canada found that, with respect in particular to Internet services provided by an Internet service provider, "An ISP does not engage with … policy objectives [related to content] when it is merely providing the mode of transmission. ISPs provide Internet access to end-users. When providing

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3 Application, at paragraph 19.

4 Application, at paragraph 21 and below.

5 *Telecommunications Act*, S.C. 1993, c. 38.

6 *Telecommunications Act*, section 36.

7 *An Act respecting The Bell Telephone Company of Canada,* S.C. 1967-68, c. 48, subsections 5(2) (prohibiting Bell Canada from holding a broadcasting licence) and 5(3) (requiring Bell Canada, in exercising the authority granted it in subsection 1 to "transmit, emit or receive signs, signals, writing, images or sounds using telecommunication", to "act solely as a common carrier, and shall neither control the contents nor influence the meaning or purpose of the message emitted, transmitted or received").

access to the Internet … they take no part in the selection, origination, or packaging of content."[8]

11. More fundamentally, it is why, having enshrined this common carrier doctrine at the core of its regulatory scheme for telecommunications, Parliament cautioned that the Commission shall exercise its powers and perform its duties, including "approv[ing] otherwise", only when it is "with a view to implementing the Canadian telecommunications policy objectives".[9] Network neutrality principles and policies derive from this common carrier doctrine which is at the foundation of Canadian telecommunications law and policy.

12. Section 7 of the Telecommunications Act sets out nine Canadian telecommunications policy objectives.[10] Not one of these objectives would authorize the deputizing of telecommunications services as a first-recourse method for blocking undesirable content, in violation of the common carrier doctrine enshrined by section 36.

13. Indeed, notwithstanding detailed and lengthy deliberations as to this very question by the Commission which is expert in the interpretation of the *Telecommunications Act*, such authorization has never been found. Rather, the Commission has found time and again that the Telecommunications Act provides only narrow authority to violate the common carriage doctrine by interfering with online traffic. For example, in the Commission's 2009 decision on traffic management practices, after considering thousands of pages of evidence and listening to days of oral hearings, the Commission concluded that only "exceptional circumstances" would authorize such influence, such as relating to "network security and integrity".[11] In the 2016 decision concerning the website blocking regime in the *Quebec Budget Act*, the Commission reaffirmed this view and further determined that "blocking would only be approved where it would further the telecommunications policy objectives set out in section 7 of the Act."[12]

14. Rather than advancing the telecommunications policy objectives, the approach proposed in the Application to policing content on the Internet is in direct opposition to many of those objectives:

    - Section 7(a) of the Act requires the "orderly development throughout Canada" of the telecommunications system. For another entity to hear evidence in ex parte procedure, and make recommendations to the Commission concerning sites to be blocked, with an appeal only to Federal Court of Appeal as proposed in the Application, where site blocking is known to affect content and sites other than those targeted does not facilitate the orderly development of the telecommunications

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8 *Reference re Broadcasting Act*, [2012] 1 SCR 142, paragraph 5.

9 *Telecommunications Act,* section 47.

10 *Telecommunications Act,* subsection 2(1) ("telecommunications policy objectives").

11 *Review of the Internet traffic management practices of Internet service providers,* Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, paragraphs 122 and 44-45 ("ITMP Decision").

12 *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act*, Telecom Decision CRTC 2016-479, 9 December 2016, paragraphs 7 and 18 to 21 ("Bill 74 Decision").

system. Rather, it promotes the opposite—a fragmented communications platform that, portions of which are consistent with the Canadian telecommunications policy objectives, and other portions of which may not be.

- Section 7(b) of the Act requires such services to be "reliable", in English, and safe ("sûr"), in French. Blocking particular sites compromises security protocols such as DNSSEC.[13]

- Section 7(c) of the Act requires an approach that will "enhance the efficiency and competitiveness … of Canadian telecommunications". A unified national approach that looks first to other methods to address undesirable content, and respects common carriage, is such an approach. One that limits Internet content, raises the operating costs for ISPs, and focuses efforts on enforcement rather than on innovation, is not such an approach.

- Section 7(f) of the Act requires ensuring that "regulation, where required, is efficient and effective". It is well-documented that blocking individual web sites is difficult and expensive and even so relatively trivial to circumvent. Indeed, a substantial number of Canadians already employ tools for security purposes—such as Virtual Private Networks and alternative DNS services—that would also circumvent such site-blocking. As a result, site-blocking is neither efficient, nor effective.

- Section 7(i) of the Act requires that telecommunications policy "contribute to the protection of the privacy of persons". Causing telecommunications service providers to involve themselves in the content of the messages they carry plainly has the opposite result.

15. For these reasons, reducing the rate of copyright infringement is not the kind of exceptional circumstance that, with reference to section 7 of the *Telecommunications Act,* would authorize an exception to the common carrier doctrine enshrined in section 36 of that Act, and the network neutrality principles that flow from it. In short, the goals as stated in the Application do not provide the policy rationale required to violate the common carrier doctrine in section 36 of the Act.

C. <u>The Act does not authorize the Commission to establish an agency to identify copyright infringing websites</u>

16. The Commission has determined in both the ITMP Decision and the Bill 74 Decision that, although the power is circumscribed by the *Telecommunications Act* as discussed above, it has the power to block sites.[14] However, as further set out below, it does not have the legislative authority to establish an independent body to identify sites to block and to recommend to the Commission that they be blocked.

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13 See, *e.g.* ACM US Public Policy Council, "Analysis of SOPA's impact on DNS and DNSSEC", attached as Appendix A; and Ofcom, " 'Site blocking' to reduce online copyright infringement" ("[t]he implementation of DNS Security Extensions (DNSSEC), a technology used to authenticate and verify domain name queries to reduce incidences of fraud online (through malicious sites), is likely to be incompatible with DNS blocking"), attached as Appendix B.

14 See footnotes 11 and 12.

17. Rather than asking for specific sites to be blocked, the Applicants are asking the Commission to establish a new body, the IPRA, to consider requests to block sites and to make recommendations to the Commission. The need for the IPRA, according to the Applicants, is to "create a significantly more timely and efficient process for considering applications than would be possible for the Commission. The efficiency of the process is crucial, given the pace at which piracy [*i.e.* copyright infringement] can evolve online."[15]

18. For the legislative authority to establish the IPRA and to give it the proposed powers, the Applicants point to Section 70(1)(a), stating that it "empowers the Commission to appoint the IPRA to inquire into and report to the Commission on the matter of identifying piracy sites [*i.e.* sites that are blatantly, overwhelmingly, or structurally engaged in copyright infringement]."[16]

19. That is not correct. Under section 70(1)(a) of the *Telecommunications Act*, "The Commission may appoint any person to inquire into and report to the Commission on any matter (a) pending before the Commission or within the Commission's jurisdiction under this Act or any special Act…."[17]

20. As important a matter of public policy as it may be, Canadian copyright policy and the enforcement of copyright law are not within the jurisdiction of the Commission. Specifically, neither is the matter of identifying sites that are blatantly, overwhelmingly, or structurally engaged in copyright infringement. It is therefore not within the Commission's powers to appoint a body under section 70 to inquire into and report to the Commission on the matter of identifying sites that are blatantly, overwhelmingly, or structurally engaged in copyright infringement.

21. The Applicants suggest the IPRA would be established and structured similarly to the Commission for Complaints for Telecom-Television Services ("CCTS").[18] Tellingly however, the CCTS was established not under the authority of section 70, but pursuant to an Order in Council[19] that described the mandate of a "Consumer Agency" and directed the Commission to report to the Governor in Council on the establishment of such a Consumer Agency. The Commission acted on that Order in Council by initiating a consultation process[20] and finally deciding on the structure and operation of the CCTS[21]. In short, even though the activities of the CCTS are clearly within the jurisdiction of the Commission, it was established through an Order in Council and not through the unilateral action of the Commission.

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15 Application, paragraph 88.

16 Application, paragraph 21.

17 *Telecommunications Act*, section 70(1)(a).

18 Application, paragraph 99

19 *Order requiring the CRTC to report to the Governor in Council on consumer complaints*, P.C. 2007-533, 4 April 2007.

20 *Proceeding to consider the organization and mandate of the Commissioner for Complaints for Telecommunications Services*, Telecom Public Notice CRTC 2007-16, 22 August 2007.

21 *Establishment of an independent telecommunications consumer agency*, Telecom Decision CRTC 2007-130, 20 December 2007.

22. The analogous and appropriate way to establish a body that identifies sites that are blatantly, overwhelmingly, or structurally engaged in copyright infringement and recommends to the Commission that access to them be required to be blocked—an activity that is not within the jurisdiction of the Commission—would be for Parliament or the Governor in Council to create that body through statute, regulation, or delegated authority. This is appropriate from a policy perspective since Parliament is better placed than the Commission both to consider the broad policy implications of blocking sites on the Internet to curb copyright infringement activities, and to engage the appropriate agencies and branches of government implicated by such a policy, including the Commission as well as, potentially, Innovation, Science and Economic Development Canada (ISED); the Department of Canadian Heritage; the Office of the Privacy Commissioner of Canada; the Competition Bureau; and the Copyright Board.

23. Indeed, Parliament is soon to undertake reviews of the *Telecommunications Act*, the *Broadcasting Act*, and the *Copyright Act*,[22] which presents a timely opportunity for Parliament and the Governor in Council to hear the concerns and proposals of the Applicants, as well as other interested parties, and to consider the appropriate course of action.

D. Conclusion

24. TekSavvy therefore respectfully submits that the Commission should reject the Application on the grounds set out above: site blocking for the purposes put forward in the Application would violate the common carrier doctrine and is inconsistent with the Canadian telecommunications policy objectives; and the Commission lacks the authority to create an independent body to identify sites that are blatantly, overwhelmingly, or structurally engaged in copyright infringement.

25. Alternatively, in light of the imminent comprehensive review of the relevant statutes, TekSavvy respectfully submits that the Commission should suspend proceedings until Parliament has completed their expected review of the legislative frameworks for telecommunications, broadcasting, and copyright.

Thank you for the opportunity to submit these comments. TekSavvy may provide further comments on the Application and other interventions and responses at subsequent stages of this proceeding.

Yours truly,

[transmitted electronically]

Andy Kaplan-Myrth
VP, Regulatory and Carrier Affairs

Encl.

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[22] *Parliament to undertake review of the Copyright Act*, Innovation Science and Economic Development Canada, 14 December 2017.

Launch of Creative Canada - The Honourable Mélanie Joly, Minister of Canadian Heritage, Canadian Heritage, 28 September 2017.

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