Response to 8663-A182-201800467

by Russell McOrmond[1]

Summary

While is is appropriate for the courts to be able to require Internet Service Providers to block access to specific "sites"[2], it is inappropriate for vertically integrated media distributors to be allowed to do this without a court order. These media distributors are in a conflict of interest when it comes to providing lawful online distribution of media, and their business models are known to induce copyright infringement.

Given this conflict[3] we should not only be demanding that court oversight exist prior to blocking, and not as an expensive appeal process, but that government and regulators need to reduce rather than increase the influence of broadcasters and BDUs[4] over Canada's digital communications networks.

About the author

I am making this submission as an individual, and not representing my employer. I am an author of software and non-software literary works, and the fan of many works distributed via CRTC regulated digital communications services. I am not a BDU subscriber, and rarely watch broadcast television, but am a subscriber to many legal streaming services.

For some big and small-screen content I am not merely a passive viewer. I attend Comiccon events and follow the writers, actors, composers and other creative persons involved in the cultural content of which I am a fan. I learn about many movies and shows directly from the creatives involved, and fellow fans.

I have a strong interest in protecting the rights and interests of myself as an author, as well as the many fellow creators I am a fan of.

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[1] Contact information http://www.flora.ca/#contact

[2] Providers of TCP/IP services should only be managing at the IP address level, and not doing deep packet inspection to differentiate at the level required to determine what specific website is being requested. Deep packet inspection has many other implications ranging from increasing technical latency and increased costs, to introducing privacy and competitive violations.

[3] While there are many other flaws of the proposal to discuss, I will remain focused on the conflict of interest BDUs and broadcasters have with reducing infringement. Other organisations including the EFF have offered additional details of other flaws https://www.eff.org/deeplinks/2018/02/will-canada-be-new-testing-ground-sopa-lite-canadian-media-companies-hope-so

[4] Broadcast Distribution Undertakings, more colloquially referred to as Cable Television.

The Digital Transition

Some context to this submission is required[5]. When I last spoke in front of the CRTC on December 9, 2009[6], then commissioner Timothy Denton and I had the following exchange:

> 4134 COMMISSIONER DENTON: Mr. McOrmond, interesting brief. I see it is informed by an internet idea of the world.
>
> 4135 So in your preferred solution then there would be essentially some kind of bandwidth to the house, whether wired or wireless, it would be part of a municipal infrastructure such as sewage or water, and applications would float on top of that or through it.
>
> 4136 Now, what happens to the carrier in that instance?
>
> 4137 MR. McORMOND: I am essentially suggesting that we no long would have carriers in that instance. They would be replaced by a utility and a free market.

What I have is not so much an "internet" idea of the world, but an understanding of how the layered approach suggested by the Open Systems Interconnection model (OSI model[7]) applies to nearly all digital communications networks. The OSI model includes terms like: "Layer 1" (Physical), "Layer 2" (Data-Link, such as Ethernet, or DSL), "Layer 3" (Network, such as IP) and "Layer 4" (Transport, such as TCP).

When I speak of the physical infrastructure I am speaking of the physical and link layers of the network. As with all layers of the network, the next layer is built over the top of previous layers.

I see the digital transition as coming in phases, and we have only completed the first phase. The phase we need to discuss next relates to the role the existing concentrated media distribution companies.

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[5] Some of this context was provided in my submission to CRTC 2017-49 http://mcormond.blogspot.ca/2017/04/crtc-2017-49.html

[6] Transcript of proceeding https://crtc.gc.ca/eng/transcripts/2009/tb1209.html
My submission to CRTC 2009-614 http://www.digital-copyright.ca/node/5079

[7] Open Systems Interconnection model (OSI model) https://en.wikipedia.org/wiki/OSI_model

Digital Transition Phase 1

Analog communications networks were purpose built, and thus we had companies formed that provided telephone service and others which provided BDU services. Before the advent of the OSI model, telephone and BDU services needed seperate wires. With the OSI layered model of digital communications the networks are no longer tied to a specific function, this has enabled telephone companies to offer BDU services and BDU companies to offer telephone service.

This convergence can be seen as the first phase of the digital transition.

These large vertically integrated media distribution companies have manipulated regulation in Canada in order to keep competing independent companies out of the Canadian market.

In the early 2000's when iCraveTV and JumpTV tried to set up BDU services without the need to manage a physical network into the home, the government response to lobbying by incumbents was the passage of Bill C-11[8] in 2002. This legislation disallowed any "new media retransmitter" from making use of the exception to copyright which allowed BDUs to retransmit broadcasts without the permission of copyright holders.

Existing BDU's transitioned to digital, meaning that their BDU and phone services are over-the-top (OTT) of the physical digital network. All services are "over-the-top" today, yet only specific companies were offered the retransmission exception for their BDU services. Bell launched FibeTV in 2010. FibeTV is an IPTV OTT BDU service! It is not significantly different from a technology standpoint from what the government disallowed only a few years earlier.

This backward-facing legislation is one example of the legislation and regulation which discourages the formation and growth of competitive domestic content distribution companies. They would make use of existing physical digital communications infrastructure. The legislation created a chilling effect against creating new Canadian services, so the only ones that could grow are foreign companies. The reason why "traditional" broadcasters feel invaded by foreign operators such as Amazon, Google and Netflix is because they promoted legislation which prevented any domestic competition.

We have streaming services that grew from DVD rentals (Netflix), book retail (Amazon) and ad-supported search (Google), and it seems obvious we would have had comparable Canadian services if the government and regulators were assisting rather than blocking that innovation.

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[8] BILL C-11: AN ACT TO AMEND THE COPYRIGHT ACT
https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c11&Parl=37&Ses=2

Digital Transition Phase 2

What some call “cord cutting”, I consider to be the second phase of the digital transition. This is a transition from vertically integrated companies where the physical network layers and OTT services are offered by the same company, to where a competitive marketplace grows that makes use of a common physical digital communications network[9].

While largely foreign competitors are entering Canada, we need to change the regulatory environment to encourage rather than put up roadblocks to Canadian OTT services. I strongly believe that the existing vertically integrated companies are a huge barrier to innovation, and thus structural separation will be required.

Structural separation can come in phases, first with the CRTC strongly regulating the private sector physical digital network suppliers, especially those which have existing OTT services. The CRTC can also provide incentives and support to municipalities who want to manage their own physical network infrastructure, in much the same way as they provide infrastructure for other utilities. Both Bell and Rogers are well aware of the need for a transition from pure infrastructure suppliers to content providers: thus their massive purchases of content companies in the past 20 years.

While copyright is outside the jurisdiction of the CRTC, recognizing the relationship the vertically integrated BDUs have with other regulations will help guide the CRTC to firmly rejecting counter-productive proposals such as FairPlay “site” blocking.

Conflicting interests

Whether it is between the provision of the physical network and OTT services, or between different OTT services, the vertically integrated media companies have multiple conflicts of interest.

In all cases, the use of private network addressing, or protocols other than TCP/IP, should never be allowed to be used as loopholes to get around regulation of OTT services. An OTT service is still an OTT service whether it is provided over the top of a TCP/IP transit service or over the top of some other digital networking service.

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[9] I made a submission to CRTC 2017-49 on this this topic: OSI model layered approach to CRTC policy required to get quality of service
http://mcormond.blogspot.ca/2017/04/crtc-2017-49.html

BDU services

Bell's own IPTV service demonstrates the feasibility of offering BDU services over any sufficiently fast data network. Since we no longer have the older technology limitations, it is clearly only a business and regulatory limitation that disallows subscribers to Bell's data service to subscribe to Cogeco, Eastlink, Rogers, Shaw, Source, Telus, or any other BDU service that wishes to offer services to those clients. As a matter of policy we need to reverse the attitude that was displayed at the time iCraveTV and JumpTV tried to enter the marketplace.

If incumbent BDUs want to continue existing vertical integration, refusing to offer their services over third party data networks, then the government should provide financial and other incentives to companies who will.

While the purpose-built analog cable services had a tie between the underlying cabling and the BDU service, this no longer exists with the digital transition. Regulators allowing the bundling of the underlying network with BDU services means that the cost of transitioning between OTT BDU services is kept artificially high, lessening competition and lessening innovation in the BDU marketplace.

The BDUs have thus far been allowed to carve out geographic markets, meaning that there is limited competition in any given location[10].

Two-way voice

There is nothing special about VOIP, unlike legacy analog telephone service, that requires any bundling with the underlying data network. This is demonstrated regularly by the fact that cable companies now bundle "home phone" services. Rather than the regulator privileging bundled services, any bundling should be closely scrutinised.

Existing vertically integrated companies have been known to shape data networks to restrict quality of service to competing voice services.

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[10] When I was a witness on May 4, 2004 in front of the Federal Parliamentary Industry Committee http://www.digital-copyright.ca/node/335 a lawyer representing the interests of BDUs claimed that the "duopoly" I was discussing didn't exist. He was trying to suggest that the large number of regional players at the time represented competition, and that it was reasonable that someone move their home in order to switch between BDUs. Transcript at http://www.ourcommons.ca/DocumentViewer/en/37-3/INST/meeting-14/evidence#Int-919466

Catalog streaming services

The utility of catalog services to both audiences and content creators is maximised when the number of titles simultaneously available to audiences is maximised.

This will conflict with the provision of broadcasting service where a programmer is determining what shows will be distributed when. Where broadcasters want to create restrictions on the access of alternative programming, modern catalog streaming services want to reduce or eliminate those barriers.

In cases where a BDU or broadcaster offers their own streaming service, it is often severely restricted. Bell owns Space.ca (and related SpaceGO app) previously offered an advertiser-funded streaming services to all Canadians. This service now requires users prove they are a subscriber to a BDU before they can access that streaming service. Space/Bell are offered exclusive licenses to content, and when a fan of a show asks them how to to legally stream that content without subscribing to an unwanted BDU service they claim it isn't possible[11] .

The regulator should not be allowing this type of **tied selling**, and should be coordinating with the competition bureau to fix serious problems in this sector. If a key issue is that customers should pay, as Fairplay is claiming, then an option to pay (directly to Space.ca or via CraveTV which Bell also owns) must be offered.

BDU services must be understood as an entirely different marketplace from catalog based streaming services[12]. While people like to talk about pipes and sometimes a "series of tubes" when making analogies related to the Internet, I'll use indoor plumbing.

For those of us who have already made a phase 2 transition, we think of over-the-air broadcasting as being like having having to "do your business" outside. BDUs improved the situation by bringing more channels into one place, which is like the introduction of outhouses. Moving to an era where the purchase of competing catalog-based and live streaming services are untied to the acquisition of physical digital communications infrastructure is like indoor plumbing.

While outhouses still exist, giving up indoor plumbing in order to go back to outhouses is not something most people want to do. It is no different with BDU services not being a substitute for streaming.

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[11] Space (Bell) has no Class when it comes to protecting copyright
http://mcormond.blogspot.ca/2016/10/bell-has-no-class.html

[12] Canadian Content Creators harmed when Netflix claimed to be a "broadcaster"
http://mcormond.blogspot.ca/2016/11/netflix-not-a-broadcaster.html

When Canadian audiences aren't able to find lawful streaming options offered to them, they are going to be driven to alternatives including lawful foreign services (bypassing geo-blocking with VPNs) or unlawful copyright-infringing services. They aren't going to be subscribing to a BDU if legal streaming is not offered.

This suggests two policy improvements:

- exclusive licensees for content be mandated to actually offer legal streaming options that are not bundled with BDU services.
- exclusive licenses be publicly disclosed, such that third party directories can be created to direct fans to lawful ways to stream titles in Canada. Finding legal streaming options for specific titles is currently a major problem in Canada.

Catalog streaming services

While live streaming isn't the same as a catalog service, they have the same types of conflicts when compared to BDU services. Companies with ties to a BDU service will never maximise the utility of streaming services.

Internet Transit Services

While others consider OTT to only refer to services that run over-the-top of internet transit services[13] using publicly routable addresses, I consider ISP services to itself be an OTT service that runs over-the-top of the underlying physical network. Different OTT services will sometimes need different network management policies, and trying to have a single management policy for all data will never be ideal.

Problems with vertical integration, and the conflict of interests between BDU service and Internet services, have even had an impact on standards bodies such as the IETF[14]. Some standards body participants have been concerned that new technical standards might be abused by the BDUs to circumvent network neutrality.

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[13] The term "Internet Service Provider" (ISP) is more commonly used, but I find that term conflates the different layers of the network. What I'm describing is the function of routing TCP/IP packets beyond the municipal network, including creating peering relationships with other national and international transit services. TCP/IP may be used within the Municipal Area Network (MAN) as part of other OTT services, and this should be thought of as separate from transit services. Such a setup exists today in Alberta, via the Alberta Supernet which connects most of the province with very high speed fiber.

[14] IEFT 75 (July 26-31, 2009 https://www.ietf.org/proceedings/75/) included a presentation by Mark Handley on "Network Neutrality and the IETF" https://www.ietf.org/proceedings/75/slides/plenaryt-4.pdf

I have also been suspect that the delay in rolling out IPv6 in countries such as Canada is related to the BDUs attitudes towards peer-to-peer communications that was inherent in the design of TCP/IP, and the fact that IPv4 address space issues and NAT discourage some peer-to-peer communications.

As with other services, the bundling of specific OTT services with the underlying physical network has created conflicts when it comes to peering with “competing” OTT providers. No matter what the OTT service is, the service provider should be on a level playing field when it comes to peering with physical network service within municipalities, and not requiring that competing brands of OTT services use bundled Internet transit links[15].

Copyright

While there are some who think of copyright as an absolute right of a copyright holder to control any uses of copyrightable works, I do not subscribe to that notion. Copyright, domestic and international, is a balance of rights. I believe the simplest articulation of that balance can be seen in the United Nations Universal Declaration of Human Rights (UDHR)[16] which articulates some of that balance in article 27:

> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Copyright restricts what can be done with culture and the arts for the very specific public policy purpose of protecting the moral and material interests of authors, but should never be abused to restrict for other purposes. Each generation of creators build upon works from the past, so undue restrictions on the ability to participate in cultural life is itself a restriction on authors rights.

The best and cheapest way to reduce copyright infringement for streaming content is to expand the lawful streaming options in Canada, providing multiple competing legal streaming options for any title or live event which an audience member wishes to access. Policy aimed at reducing copyright infringement should not be narrowly (and all too often counterproductively) focused on increased restrictions and enforcement, but focused on reducing any and all barriers to paying for lawful access.

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[15] Why I don't subscribe to the pizza metaphor of net neutrality
http://mcormond.blogspot.ca/2017/12/pizza-metaphor.html
[16] Universal Declaration of Human Rights (UDHR)
http://www.un.org/en/universal-declaration-human-rights/

First and third party copyright interests

In copyright policy discussions there are often lines drawn between “creators” protected by article 27(2) and “users” protected by article 27(1). We then see intermediaries between creators and their audiences line up and claim to be proxies for the interests of one of these groups.

As new technologies are created, industries form around these technologies which are eventually replaced when even newer technologies are created. Whether it was the opposition to sound recording, opposition to broadcasting, opposition to BDUs[17], opposition to VCRs[18], or now opposition to streaming, there are always industries tied to the way things were done in the past which want to stifle progress.

We must always remain focused on the interests of creators and their audiences, and not the ephemeral companies and industries that form around any specific generation of technology.

While vertically integrated BDUs offer services directly to “users”, and sometimes own subsidiaries who have studios used by “creators”, the BDUs and broadcasters do not represent either group and as already discussed are often in a conflict of interest with those of creators and audiences.

The Fairplay coalition includes a small number of creator groups along with the BDUs and broadcasters. I consider these groups to be victims of a form of stockholm syndrome rather than groups articulating the needs of creators[19]. This is unfortunately a part of all copyright reform debates, with some creators incorrectly believing that their interests are tied to those of an intermediary which is falsely claiming to be representing creator interests.

While the telecommunications industry might often downplay the importance of cultural content, with one representative demeaningly comparing culture to “happy meal toys”[20], the relationship which fans have with some cultural content is very important to them. Allowing intermediaries to deny access in violation of article 27(1) should not be seen as a legitimate option.

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[17] It is important to remember that what became known as BDUs were at first known as “pirates” by the broadcasters whose permission the cable companies were never granted.

[18] While VCRs were confirmed as legal, it is interesting to remember that unbalanced copyright law in the form of technological protection measures has effectively disallowed competitive PVRs for encrypted media. The harm to the technology sector from these laws protecting incumbents from competition, as well as inducing copyright infringement, would be too long to include within this submission.

[19] I believe we should carve-out the CBC from others in the coalition https://unfairplay.ca/ . I believe the CBC needs to be broken up such that it can’t claim to be representing the public interest while primarily acting as a broadcaster against the public interest. See: Ad free CBC? Why not shift money to creators? http://mcormond.blogspot.ca/2016/11/ad-free-cbc-why-not-shift-money-to.html

[20] Works of cultural industry are nothing like "Happy Meal" toys. http://mcormond.blogspot.ca/2015/06/works-of-cultural-industry-are-nothing.html

Fair Dealings

I believe Fair Dealings[21] should be expanded such that,

> Fair dealing for non-commercial uses of works not otherwise offered for license under reasonable terms is not an infringement of copyright.

The intent is not to deny money for creators, but to provide additional incentives to copyright holders to allow audiences to pay. This is an expansion of the existing "effect on the market" fair dealing criteria, given it cannot be argued that otherwise infringing activities could have an affect on a non-existent market.

When a copyright holder grants an exclusive license, they should incorporate potential lost revenue from other direct to audience licensing options into the price they negotiate. While an exclusive license should be enforceable against other commercial entities, it should not be enforceable as a way to circumvent article 27(1) rights of individual fans of the creativity.

Contributory copyright infringement

The moral panic you will hear claims there is a alleged growth of dishonesty of people who are doing the equivalent of walking into a retailer, pocketing merchandise, and walking past the cash register without paying. At the same time that physical retailers, including grocery stores, are deploying self-checkout counters, these same citizens who aren't stealing food are supposedly "stealing" television programming.

I believe it should be obvious that something different other than a decay in morality is happening. While there might be some people who are infringing because they don't want to pay, I believe a far greater number of people want to pay but have barriers to payment put up by the analog-era broadcasters and BDUs. Unlike physical retailers that have a marginal cost to items which aren't paid for, there is no marginal cost to the copyright holders when copyright is infringed: only potential lost revenue.

My own experience has been that Bell stands in the way of paying customers. Whether it is their misinformation about HBO's Game of Thrones (where they delay and never advertise legal streaming options[22]), or BBC's Class (where they falsely claimed that streaming options untied

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[21] See also: Denying access to non-Canadian Netflix is counterproductive to protecting creator and cultural rights http://mcormond.blogspot.ca/2016/02/denying-access-to-non-canadian-netflix.html

[22] #DigiCanCon Comments on @shomicanada @whoismrrobot @GooglePlay TV , @HBOCanada @GameOfThrones http://mcormond.blogspot.ca/2016/10/digicancon-comments-on-shomicanada.html

to a BDU subscription didn't exist, even though they were providing it[23]), **Bell should be recognised as inducing infringement in Canada.** Bell should be held liable to the copyright holder for that contributory infringement.

This should be seen as the second half of the fair dealings proposal. While copyright holders should not have the right to go after private citizens who are driven to infringement, copyright holders should have the right and the expectation that they go after the intermediaries who are inducing that infringement.

Virtual Private Networks

While not specifically mentioned in this Fairplay proposal, BDUs such as Bell have numerous times proposed laws blocking the use of VPNs. I believe that not only should this proposal be rejected, but VPNs used by individuals to bypass regional restrictions for non-commercial purposes be legally protected.

Like the fair dealings proposal, the purpose of the proposal would be to provide additional incentives to directly offer services to Canadians.

My own experience provides an example. Due to exclusive licensing, a technologically unusable streaming service, and the unwillingness of a broadcaster to provide a service that was paid for, I was eventually driven to hire a VPN service to access specific content I am a fan of[24].

Since that time I have watched more content, nearly entirely from The CW, which offers direct streaming of original content they also broadcast as well as original digital programming that are tie-ins to the existing CW shows I am a fan of.

I pay about $130/year to ExpressVPN for this access to The CW. While I would prefer to pay The CW directly for the service, the service is currently not offered to Canadians. Much of the content they produce isn't otherwise available in Canada at all. As a comparison, I paid $90.29 for a full year of CraveTV.

The claim that this is about money, or about me not being willing to pay, is ludicrous. I am willing to pay for streaming access to content, but am denied that ability or service is refused by Canadian broadcasters even after I have paid. I feel better about accessing The CW directly rather than infringing as at least I am watching the advertisements, and the **creators are getting paid.**

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[23] Space (Bell) has no Class when it comes to protecting copyright
http://mcormond.blogspot.ca/2016/10/bell-has-no-class.html
[24] Notes from watching Supergirl via VPN
http://mcormond.blogspot.ca/2016/11/notes-from-watching-supergirl-via-vpn.html

If Canadian BDUs and broadcasters had their way I would either not be able to access the content at all (likely their preference), or drive people to scenarios where authors don't get paid.

I consider restricting my access to this content to be a violation of UN UDHR article 27(1) rights. For these shows I am not only an audience member, but a fan. These shows have crossovers, and are written to be part of an expanded universe where fans have access to the full suite of content.