ACTRA

ACTRA Submission to the Standing Committee on Canadian Heritage

Proposed Amendments to Bill C-11: *Online Streaming Act*

MAY 30, 2022

INTRODUCTION

ACTRA (Alliance of Canadian Cinema Television and Radio Artists) welcomes the opportunity to provide the Standing Committee on Canadian Heritage with our feedback and recommendations as part of the Committee's study of Bill C-11, the *Online Streaming Act*, which will update the *Broadcasting Act* (1991 Act).

ACTRA welcomes the majority of the proposed amendments outlined in Bill C-11 and is eager to see this legislation implemented as soon as possible. However, we do have significant concerns with some of the proposed changes; amendments that will significantly and detrimentally impact our industry, our jobs, and our culture. If ACTRA's concerns are not addressed, it will significantly limit the potentially positive impact this Bill may have on the Canadian audiovisual sector.

We look forward to engaging in discussions with elected officials, colleagues, industry partners, and other Canadians who have a stake in this legislation. ACTRA may have additional comments as discussions about Bill C-11 continue.

For almost 80 years, ACTRA has represented performers living and working in every corner of the country who are pivotal to bringing Canadian stories to life in film, television, sound recordings, radio, and digital media. ACTRA brings to this process the perspective of over 28,000 professional performers working in English-language recorded media in Canada.

From its earliest days, ACTRA has actively contributed to public policy development processes and played a critical policy role in Canada and internationally. Through its own work and that of its branches, ACTRA plays an indispensable role advocating for Canadian performers – the original gig workers.

Given the extraordinary developments in communication technologies and broadcasting over the past 30 years, particularly the emergence of global online streaming services, this legislative update is both urgent and significant.[1]

FOUR KEY ISSUES WITH THE NEW *BROADCASTING ACT*

The fundamental objective for ACTRA in relation to Bill C-11 is to have a revised *Broadcasting Act* that will ensure:

1. Diverse and high-quality Canadian programming choices are available to Canadian and global audiences in every medium of program transmission;
2. Canadian programs are promoted and highlighted, and are easily discoverable by audiences;
3. Appropriate rules for social media services exist; and
4. Canadian ownership of broadcasting undertakings remains a key tenant of applicable legislation.

Accordingly, ACTRA is proposing targeted amendments to Bill C-11 in this submission. While the *Online Streaming Act* is largely positive in its potential impact, there are inadequacies, loopholes and distinctions that limit its effectiveness. These are addressed below.

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[1] ACTRA is concerned with the *Broadcasting Act* in its totality. While we concentrate in this submission on four key areas, we reserve the right to comment on other issues, particularly as these may emerge from the public discussions and Parliament's consideration of Bill C-11.

At the outset of this submission, however, ACTRA proposes two key principles that should be applied to provide greater clarity with respect to Bill C-11's approach to social media services and foreign online undertakings:

1. **To confirm that all Canadians, acting in an individual capacity, are fully exempt from the application of Bill C-11 in relation to their individual use of social media services; and**

2. **In regulating foreign online undertakings, there should be a minimum annual gross revenue threshold that an online streamer must exceed to be regulated under the Act.**[2]

In ACTRA's view, a blanket exemption for natural persons from the application of Bill C-11 should alleviate any ongoing concerns that ordinary Canadians will be regulated by the *Broadcasting Act*. It is a clean, simple and effective approach that will end any lingering concerns regarding overreach. Furthermore, by instituting a revenue threshold that must be met before CRTC regulation may be imposed, concerns respecting the Bill's potential impact on online innovation can also be addressed. Language that gives effect to these key elements is reflected in ACTRA's proposals below.

ENSURING DIVERSE AND HIGH-QUALITY CANADIAN PROGRAMMING CHOICES

The most significant objectives of the Broadcasting Policy for Canada, enunciated in the 1991 Act and continued with Bill C-11, are to ensure Canadians have access to: (a) a reasonable supply of high-quality and diverse Canadian programs; (b) stories and music by Canadian artists; (c) local, national and international news and information that reflect Canadian perspectives; and (d) children's, educational, entertainment and other programs that respond to our needs and interests.

Sec. 3(1)(f) of the *Broadcasting Act* has traditionally underpinned these objectives by providing that "each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming."

To address the emergence of global online streaming services now providing programming to Canadians, Bill C-11 creates two classes under this objective – Canadian broadcasting undertakings (including domestic online undertakings) and foreign online undertakings. This approach is problematic for two reasons.

Firstly, Bill C-11 narrows the objective by stating: "each **Canadian** broadcasting undertaking shall **employ and** make maximum use, and in no case less than predominant use, of Canadian creative and other **human** resources in the creation, production and presentation of programming…". Actors, performers and other artists working in film and television occupy a unique space in Canadian labour and employment law: federally, the *Status of the Artist Act* explicitly recognizes them as independent contractors who have bargaining rights and may be represented by professional associations. ACTRA takes the view that our members are dependent contractors, straddling the line between employment and independent contracting. Given this ambiguous legal status, ACTRA is concerned that use of the

[2] Bill C-11 provisions requiring the CRTC to avoid "… imposing obligations on any class of broadcasting undertakings if that imposition will not contribute in a material manner to the implementation of the broadcasting policy (for Canada); …" provide it with the necessary scope to make such a determination.

term “employ” may give rise to interpretations of the *Broadcasting Act* that exclude Canadian artists and performers from the benefits of Sec. 3(1)(f), which presumably is not the intent and has never been the case. As such, ACTRA prefers to avoid limiting the policy objective on the basis of employment status.

Secondly, as a principle, Bill C-11 establishes the lesser standard of “greatest practicable use” for foreign services, rather than authorizing the CRTC to make appropriate determinations depending on the nature and reach of each service. The purpose of the *Online Streaming Act* is to equalize obligations between licensed and exempt broadcasting undertakings – to ‘level the playing field’ in the words of Canadian broadcasters. There is no rationale for establishing by statute a lesser commitment from foreign online undertakings operating in Canada, given their financial strength and market clout. Foreign online undertakings are perfectly capable of meeting any standard the CRTC applies to them to create a level playing field with domestic undertakings.

Thus, ACTRA believes it is essential to redraft this provision:

ACTRA Proposed Changes 1

3(1)(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation, production and presentation of Canadian programming, and shall contribute significantly to the creation, production and presentation of Canadian programming to the greatest extent that is appropriate for the nature of the undertaking;

To “make maximum use, …” is a strong and appropriate standard that has served the country well for decades and should continue to be the standard applicable to broadcasting undertakings operating in Canada. ACTRA notes that other sections of the *Broadcasting Act* provide broad discretion for the CRTC to regulate how Canadian undertakings and foreign online undertakings must operate, and/or contribute to the creation of Canadian programs. The traditional baseline, however, must endure.

The genre of programming most important culturally and the most underrepresented in the system today is drama and scripted comedy, the centrepiece of what the CRTC has defined as Programs of National Interest (PNI). This has been the case for decades. Since Bill C-11’s proposed new Section 3(1)(ii) appropriately requires that Canadian news and information programming, as well as other categories, must be provided, it is essential PNI be enunciated specifically as well. Without such recognition, these programs could be considered of lesser importance.

A Canadian story is one told by Canadians. The story can be set anywhere and be about anything because Canadians will bring our perspective to it. In the past 25 years, Canada has developed a world-class production industry, including a rich pool of talent in every creative category. In giving guidance to the CRTC respecting Canadian content rules, Bill C-11 includes this element among five: “whether key creative positions in the production of a program are **primarily** held by Canadians;” (emphasis added). In ACTRA’s view, this is inappropriate because including the word “primarily” establishes that it is standard practice for non-Canadians to be involved. The limitation should be removed. There is ample talent in Canada to support production at all levels.

An additional factor to consider is that Canadian artists face serious economic challenges. Artists are the original 'gig workers': sporadic work opportunities, low income, few benefits, and irregular hours. According to a 2004 survey of 3,000+ professional artists in Ontario, 67 per cent reported they had to work outside their profession "in order to survive economically." Analysis of 2016 census data shows the total average individual income of those in the category of Actor and Comedian was only $29,500, lower than the average of all artists ($37,000) and almost 50 per cent lower than that of all workers ($55,200).

In response to this analysis and these realties, the changes and new language below are essential to ensuring Canada has a vibrant artistic community and that the audiovisual ecosystem can continue to deliver diverse and high-quality Canadian programs, including drama and scripted comedy.

ACTRA Proposed Changes 2

(<u>NEW</u>) **3(1)(i)** The provisions of the *Status of the Artist Act* apply to all broadcasting undertakings that contribute, create, produce or present programming to Canadians when they engage or employ one or more artists; (renumber remaining)

…

3(1)(j) the programming provided by the Canadian broadcasting system should …

> **(ii.1)** include programs produced by ~~Canadians~~ Canadian broadcasters and producers that cover news and current events — from the local and regional to the national and international — and that reflect the viewpoints of Canadians, including the viewpoints of Indigenous persons and of Canadians from racialized communities and diverse ethnocultural backgrounds;
>
> (<u>NEW</u>) **(ii.2)** include drama and fiction, scripted and unscripted comedy, music, and other entertainment, arts and information programs created by Canadians; (renumber remaining);

…

10 **Regulations — Canadian programs**

(1.1) In making regulations under paragraph (1)(b), the Commission shall consider the following matters; …

(b) whether **all** key creative positions in the production of a program are ~~primarily~~ held by Canadians; …

ACTRA notes that using "all key creative positions" to be held by Canadians as a benchmark does not preclude the CRTC from having rules that permit the use of non-Canadians in exceptional circumstances.

It also does not change coproduction treaties that permit the use of nationals from each of the coproduction partners in key creative positions.

FINDING CANADIAN STORIES AND MUSIC

Bill C-11 proposes rules to ensure promotion and discoverability in Sec. 3(1)(q)(i) and Sec. 9.1(1)(e). The latter empowers the CRTC to impose conditions requiring: “the presentation of programs and programming services for selection by the public, including the showcasing and the discoverability of Canadian programs and programming services.” As tools for the promotion of Canadian storytelling and talent, ACTRA supports these measures.

However, C-11 introduces a restriction on the ability of the CRTC to regulate discoverability in subsection 9.1(8). Restricting the ability of the CRTC to require the use of a specific algorithm or source code raises the spectre of opposition by online undertakings to reasonable measures proposed by the CRTC on the grounds that the outcome sought by the CRTC can only be accomplished by way of a *specific* algorithm or source code change. This could defeat the fundamental objective of the section. Given the CRTC would have no access to a platform’s source code, it would be in no position to contest such an argument. To avoid such a scenario, ACTRA would prefer to see this limitation removed.
In the alternative, ACTRA suggests amending the language of subsection 9.1(8) to stipulate that CRTC orders must be outcomes-based, rather than algorithm-based.

ROLE OF SOCIAL MEDIA

In the public debate around the previous Bill tabled in the last Parliament, one of the most contentious issues was whether the proposed Act would allow the CRTC to regulate the grandmother who posts cute videos of her cats on Facebook or the budding 15-year-old filmmaker telling a story with their friends and family.

In Bill C-11, Section 2.1 attempts to provide an exclusion for these individuals. In addition, sections 2.2 and 2.3 exclude other entities uploading material to social media services. Section 4 exempts a “program” on a social media service but, using double and triple negatives, seeks to limit this exemption and thus retain authority for the CRTC to regulate certain programs on a social media service. **As drafted, these sections are not only convoluted and impenetrable, they are also completely inadequate**.

There is a fundamental flaw with the proposed language of Section 2.1. Most would understand the purpose of using the word “person” is to exclude the grandmother and youth. However, pursuant to CRTC policies and regulations, as well as the federal *Interpretation Act*, a corporate entity is a “person,” and thus could avail itself of the exemption contained in Sec. 2.1 unless it is amended or clarified. Moreover, the language opens the possibility of licensees using section 2.1 to distribute content over social media networks to avoid regulation. Section 2.3 adds further confusion as it excludes a “person” transmitting programs over the Internet, where it “is ancillary to a business not primarily engaged in the transmission of programs to the public and that is intended to provide clients with information or services directly related to that business.”

Under the current language of sections 2.1 and 2.3, consider the following examples:

1. Amazon could avoid the regulation of Amazon Prime by arguing its primary business is that of an online retailer or a cloud computing company, or; with Amazon Prime now offering Paramount+ as an add-on service, Amazon could avoid Amazon Prime's regulation as a Broadcast Distribution Undertaking, once again by arguing that it is a service ancillary to its primary business.
2. Google could avoid the regulation of YouTube by arguing its primary business is that of a search engine or online advertiser.
3. Apple, which recently announced the launch of Friday Night Baseball with Major League Baseball, could avoid the regulation of AppleTV+ by arguing its primary business is that of a manufacturer of high-end electronics.
4. Disney could avoid the regulation of Disney+ by arguing its primary business is that of a film production company.
5. If Crave is owned by Bell Canada rather than Bell Media, it could argue Crave should be exempt from regulation as Bell Canada is primarily a telecommunications company and, therefore, not subject to broadcasting regulation.

These are some of the potentially disastrous outcomes that could emerge from the current approach to regulating social media in Bill C-11. ACTRA urges the Government to abandon its proposed approach; it is messy, confusing and would undoubtedly put the CRTC in a near impossible situation when trying to determine what content is amateur, professional or user-generated. **Bill C-11 should not seek to regulate certain programs; it should seek to regulate certain activity**. Specifically, in the realm of online programming activity, Bill C-11 should be focused on commercial activity conducted by a corporation, partnership, or other similar entity.

To provide absolute clarity in this approach, **ACTRA supports a comprehensive exclusion of individual Canadians who create audiovisual works and upload them to their social media accounts**. These individuals would be free to derive revenue from such activity, safe with the knowledge they would never be made subject to broadcasting regulation. Such an approach would assuage concerns of legislative overreach and ensure individuals innovating and creating content online would not find themselves subject to regulation by the CRTC. Of course, these individuals would continue to be subject to obligations under the *Copyright Act*, the *Income Tax Act*, the *Criminal Code*, and other laws and regulations.

While ACTRA wishes to protect and preserve the absolute right of individual Canadians to upload programs to the Internet, this approach must be balanced against a need to regulate online streamers appropriately. That is, after all, the fundamental purpose of Bill C-11.

Taking all of this into account, ACTRA submits the language below not only achieves these objectives, but does so in a manner that is clear, concise, and fair.

ACTRA Proposed Changes 3

(2.1) A **person acting in an individual capacity** who uses a social media service to upload programs for transmission over the Internet and reception by other users of the service does not, by the fact of that use, carry on a broadcasting undertaking for the purposes of this Act. This exemption shall not apply to any person who is the provider of the service, or an affiliate, agent or mandatary of the provider, or is doing so on behalf of a broadcasting undertaking.

(2.3) A person does not carry on an online undertaking for the purposes of this Act in respect of a transmission of programs over the Internet
~~(a) that is ancillary to a business not primarily engaged in the transmission of programs to the public and that is intended to provide clients with information or services directly related to that business;~~ (renumber remaining)

Programs on social media service
4.1 (NEW) Except as provided in 2.1 and 2.3, this Act applies in respect of a program that is uploaded to an online undertaking that provides a social media service by a user of the service for transmission over the Internet and reception by other users of the service.

4.2 For the purposes of paragraph 4.1, the Commission may make regulations respecting such programs taking into account the following matters:
(a) the extent to which such a program directly or indirectly generates revenues;
(b) the fact that such a program has been broadcast, in whole or in part, by a broadcasting undertaking that
(i) is required to be carried on under a licence, or
(ii) is required to be registered with the Commission but does not provide a social media service; and
(c) the fact that such a program has been assigned a unique identifier under an international **registration** system.

This approach avoids the confusing 'exceptions to an exception' approach presently contained in Bill C-11 and, instead, lays out clear exemptions to the application of the *Online Streaming Act* to social media platforms for individuals and others. For those (other than individuals) engaged in commercial ventures on social media platforms, the possibility of regulation remains at the discretion of the CRTC depending on the nature of the broadcasting activity in question. In this respect, ACTRA also strongly supports a minimum revenue threshold that must be met prior to CRTC regulation. With respect to minimum revenue thresholds, ACTRA has not proposed specific language as the CRTC could create such a threshold using the powers provided in Bill C-11.

ENSURING CANADIAN OWNERSHIP

Canadian ownership of our broadcasting system remains as essential today as it was in the 1930s when radio first came to Canada. Canadian ownership is fundamental because:

a) Canadians are more likely to create Canadian programs, music, and other content; and
b) It is far easier to establish standards and impose regulations on Canadian services than foreign ones. This is especially the case as bi- and multi-lateral trade and investment agreements entered into by Canada over the past 40 years have given extensive rights to foreign investors.

Section 3(1)(a) of the 1991 *Broadcasting Act* was clear: "the Canadian broadcasting system shall be effectively owned and controlled by Canadians." This was seen by some as preventing the CRTC from regulating foreign online streamers, since only Canadian-owned services could be licensed. Bill C-11 attempts to resolve this uncertainty with the language: "the Canadian broadcasting system shall, with the exception of foreign broadcasting undertakings providing programming to Canadians, be effectively owned and controlled by Canadians."

Foreign ownership in broadcasting continues to be restricted by Investment Canada rules and a Cabinet Directive to the CRTC. These rules, however, could be changed relatively easily by any government and there is no assurance of robust public debate and discussion before a decision is made.

This proposed language would allow, in theory, *any* foreign broadcasting undertaking "providing programming" to enter the Canadian market – including Comcast, Charter Communications, AT&T and the Dish Network. Given there is no definition of "providing programming," it is conceivable that American-based cable and satellite operators could leverage the ambiguous new language to enter the Canadian market by arguing their distribution networks 'provide programming' to Canadians. This would cause chaos in the Canadian distribution market and likely challenge the business models of small independent broadcasting distribution undertakings (BDUs), and Canadian satellite operators. Furthermore, an unintended consequence of this new language is that it may encourage Canadian media companies or BDUs to sell to American companies looking for entry to the Canadian market. In effect, the ambiguity of this objective could encourage the entry of non-Canadian companies into the Canadian broadcasting distribution system.

Thus, ACTRA proposes new language below which we believe would strengthen the Canadian-ownership principle in the *Act*.

ACTRA is adamant that Canadian ownership and control of Canada's broadcasting system must be maintained. This was essential in the 1930s, is essential today and will remain essential in the coming decades. We are aware many other groups share these concerns and some will propose amendments. ACTRA will support whatever amendment will be the best to ensure i) continuing Canadian ownership and control; ii) appropriate regulation of foreign services that provide programming to Canadians through the Internet; iii) other foreign media companies are not permitted to establish in Canada; and iv) foreign enterprises cannot acquire Canadian media companies.

ACTRA Proposed Changes 4

3(1)(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(NEW) (b) where a foreign broadcasting undertaking provides programming to Canadians, the Commission may establish such rules and regulations, and issue such orders, as necessary to ensure it contributes appropriately to the achievement of the objectives of this Act;

CONCLUSION

ACTRA appreciates the opportunity to share our concerns about some of the proposed changes in Bill C-11 and the impact they will have on our industry and on Canadian performers. We hope Members of the Standing Committee on Canadian Heritage will take our amendments under serious consideration. We must stress the importance of amending the proposed Bill so it can be effective and implemented as soon as possible. We would be pleased to answer any questions members may have about this submission.

Sincerely,

Marie Kelly
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ACTRA