

# Why the CRTC should endorse FairPlay's website-blocking plan: a reply to Michael Geist – Barry Sookman

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The Hill Times published my op-ed on the FairPlay Canada website blocking proposal, [Why the CRTC should endorse FairPlay's piracy site-blocking plan](#). The full unedited version, complete with endnote references is below.

Last week [Fairplay Canada](#) filed an application with the Canadian Radio-television and Telecommunications Commission (CRTC), asking for a new tool to help Canadian creators to combat online theft of their content by illegal piracy websites. It proposed that the Canada's telecom regulator create an independent agency to identify websites and services that are "blatantly, overwhelmingly, or structurally engaged in piracy". Following a fair procedural process, the agency could recommend that a site be blocked by ISPs. Then, if the CRTC agreed, that quasi-judicial administrative agency could use its lawful authority to order ISPs to block the site.

The coalition's 25 representatives from all walks of Canada's cultural community appropriately described the proposal as "a much needed solution to a large and growing problem that threatens the massive employment, economic, and cultural contributions of Canada's film, television, and music industries."

As expected, the proposal immediately came under fire by anti-copyright activist Michael Geist.<sup>1</sup> In criticizing the proposal he deployed the playbook that he uses to systematically oppose

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<sup>1</sup> Michael Geist, "Bell Leads on Radical Proposal for CRTC-Backed Mandatory Website Blocking System", Dec. 4, 2017, <http://www.michaelgeist.ca/2017/12/bell-leads-radical-proposal-crtc-backed-mandatory-website-blocking-system/>; Michael Geist, "Why the CRTC should reject FairPlay's dangerous website-blocking plan", Feb. 1, 2018, <https://www.theglobeandmail.com/report-on-business/rob-commentary/why-the-crtc-should-reject-fairplays-dangerous-website-blocking-plan/article37818403/>; Michael Geist, "No Panic: Canadian TV and Film Production Posts Biggest Year Ever Raising Doubts About the Need for Site Blocking and Netflix Regulation", Feb. 6, 2018, <http://www.michaelgeist.ca/2018/02/no-panic-canadian-tv-film-production-posts-biggest-year-ever-raising-doubts-need-site-blocking-netflix-regulation/>; CBC As it Happens, Transcript of Interview with Michael Geist, Feb 2, 2018, <http://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.4516793/february-02-2018-episode-transcript-1.4520972>; Jordon Pearson, "Does Canada Even Have a Huge Piracy Problem?", Motherboard, Feb 2, 2018, [https://motherboard.vice.com/en\\_us/article/9kz5ba/does-canada-even-have-a-huge-piracy-problem-fairplay-website-blocking?source=techstories.org](https://motherboard.vice.com/en_us/article/9kz5ba/does-canada-even-have-a-huge-piracy-problem-fairplay-website-blocking?source=techstories.org) (e-mail commentary from Michael Geist).

initiatives to protect creators of cultural materials;<sup>2</sup> namely, to deny there is any problem to be addressed, contend that even if there is problem the laws don't need changing, and to engage in scaremongering<sup>3</sup>, in this case, by claiming the proposal is "radical" and "dangerous", will violate net neutrality principles, rights of freedom of expression, privacy rights, and is like the unpopular proposed U.S. anti-piracy law called SOPA.

The proposal to establish website blocking can hardly be considered "radical" or "dangerous". Website blocking is a legitimate tool used by many free and democratic countries that support an open Internet including England, France, Portugal, and Italy to block a variety of websites that disseminate illegal content such as child pornography, malware, investment fraud, terrorism, personal information, counterfeiting, and copyright infringement.<sup>4</sup>

The jurisdiction to make such orders has been available throughout the EU since 2001 and has been used to block a variety of targets ranging from the Pirate Bay to servers that illegally stream soccer matches.<sup>5</sup> Australia recently established an express regime to permit orders to be made against ISPs to block pirate websites. In France, the anti-piracy agency Hadopi recently released a report calling for faster blocking of pirate sites and adoption of measures to counter illegal streaming platforms and their access through fully loaded Kodi boxes and other illicit streaming devices (ISDs).<sup>6</sup>

Each of Geist's claims about the proposal are examined below.

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<sup>2</sup> Barry Sookman, "Michael Geist: A question of values", March 12, 2012, <http://www.barrysookman.com/2012/03/12/a-question-of-values/#comments>.

<sup>3</sup> Scaremongering" means "a person who spreads stories that cause public fear". Cambridge Dictionaries Online.

<sup>4</sup> Nigel Cory, "How Website Blocking Is Curbing Digital Piracy Without "Breaking the Internet", ITIF, August 2016, <http://www2.itif.org/2016-website-blocking.pdf>.

<sup>5</sup> See, Barry Sookman, "Blocking orders against ISPs legal in the EU: UPC Telekabel Wien", Mar. 30, 2014, <http://www.barrysookman.com/2014/03/30/blocking-orders-against-isps-legal-in-the-eu-upc-telekabel-wien/>; Barry Sookman, "Keeping The Pirate Bays at Bay: using blocking orders to curtail infringements", Feb. 22, 2012, <http://www.barrysookman.com/2012/02/22/keeping-the-pirate-bays-at-bay/>; *The Football Association Premier League Ltd v British Telecommunications Plc & Ors*, [2017] EWHC 480 (Ch) (13 March 2017).

<sup>6</sup> Haute Autorité Pour La Diffusion Des Oeuvres et la Protection Des Droits Sur Internet (HADOPI), *Hadopi Activity Report 2016-2017*, <https://www.hadopi.fr/sites/default/rapportannuel/HADOPI-Rapport-d-activite-2016-2017.pdf>.

## Piracy is a problem

Geist claims that piracy isn't a problem in Canada. He made this type of argument before to oppose changes in copyright that would provide rights holders tools to go after enterprises engaged in the business of piracy. For example, he argued that peer-to-peer (P2P) file sharing of music actually benefitted the music industry in an attempt to thwart legislative intervention to reform the *Copyright Act*. He continued to rely on a biased and flawed study during the copyright reform process leading up to Bill C-11 until it was authoritatively debunked with a showing that, unsurprisingly, P2P downloads reduced demand for the legal sales of CDs.<sup>7</sup>

Geist also opposed amending Canada's laws to curtail counterfeiting, telling a Parliamentary Committee "there is likely to be limited economic impact in Canada from counterfeiting". He was the only witness to take this view and his evidence was rejected by the Committee finding that "there is no doubt that counterfeiting and piracy cause economic harm to intellectual property owners, private companies and Canadian governments."<sup>8</sup> Parliament eventually enacted the, which brought Canadian border measures to, or closer to, international standards.

Geist now opposes the Fairplay proposal asserting that piracy is not a concern because Canada is "well below global averages when it comes to things like downloading music from unauthorized sites, stream ripping so-called from sites like YouTube." Specifically, he says, because only 33% of Canadians engaged in digital music piracy in 2017 (which is up from 27% in 2016, and is a staggering 53% among 16-24 year olds) and because only 27% of music is stream ripped from sites like YouTube. But, why does he believe that this is an acceptable level of theft? Even if this represented the only losses due to illegal access in the music industry, what reasonable person would countenance a one-third market share loss due to theft?

For film and TV content, Geist seems to contend there is no piracy problem at all. He argues that declining revenues in traditional television packages are not "lost revenues" due to illegal streaming but rather that "the money is actually going" to paid Internet streaming services such as Netflix. He even favourably quotes from a report that film and TV piracy has been "made

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<sup>7</sup> Barry Sookman, "The Andersen P2P file sharing study on the purchase of music CDs in Canada", August 20<sup>th</sup>, 2012, <http://www.barrysookman.com/2012/08/20/the-andersen-p2p-file-sharing-study-on-the-purchase-of-music-cds-in-canada/>.

<sup>8</sup> See, Barry Sookman, "OECD counterfeiting report misinterpreted to support myth of Canada as a low piracy country", Nov. 24, 2009, <http://www.barrysookman.com/2009/11/24/oecd-counterfeiting-report-misinterpreted-to-support-myth-of-canada-as-a-low-piracy-country/>; House of Commons Report, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session, May 2007, <http://www.ourcommons.ca/DocumentViewer/en/39-1/SECU/report-10/page-ToC>.

pointless” given unlimited viewing on Netflix. These claims do not stand up to even cursory scrutiny.

Netflix itself regards video piracy (which is predicted to cost over the top streaming services more than USD\$50B between 2016 and 2022) as one of its biggest competitors.<sup>9</sup> Netflix’s concerns about copyright piracy are backed by studies on video streaming that show that programs are accessed more frequently from illegal rather than from paid legal sources. For example, the 7<sup>th</sup> season of Game of Thrones had 1.03 billion illegal views, with more people watching the blockbuster series illegally rather than legally through HBO.<sup>10</sup>

Geist’s claims also ignore the studies that show the extent of piracy in Canada and the economic harm caused to the creative industries by it.

He disregards, for example, the report from anti-piracy analyst firm MUSO filed with the CRTC that “Canada is one of the highest consumers of global web streaming piracy”, making 1.6 billion trips to web streaming sites in 2016. Contrary to his claim, Canada is also well above the global average, being in 8<sup>th</sup> place globally in piracy visits, totaling 1.88 billion visits to all piracy sites in 2016.<sup>11</sup> This is significant because of the link between levels of piracy and loss of legitimate sales of copyright content.

A recent study by Sandvine estimated that approximately 6% of all households in North America currently have a fully loaded illicit streaming device called Kodi configured to access unlicensed content.<sup>12</sup> Another study, found that 6.5% of North American households are accessing illegal

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<sup>9</sup> Stewart Clarke, “Piracy Set to Cost Streaming Players More Than \$50 Billion, Study Says”, Variety, Oct. 30, 2017, <http://variety.com/2017/tv/news/piracy-cost-streaming-players-over-50-billion-1202602184/>; Netflix, “Netflix’s View: internet entertainment is replacing linear TV”, Jan. 22, 2018, <https://ir.netflix.com/netflixs-view-internet-tv-replacing-linear-tv>.

<sup>10</sup> Travis Andrews, “‘Game of Thrones’ was pirated more than a billion times – far more than it was watched legally”, Chicago Tribune, Sep. 8, 2017, <http://www.chicagotribune.com/entertainment/tv/ct-game-of-thrones-piracy-20170908-story.html>.

<sup>11</sup> MUSO, *Global TV Piracy Insight Report 2017: Canada Country Level Report*, <https://static1.squarespace.com/static/5a6cf478edaed87d3b78d1c6/t/5a6f607a4192024166d52106/1517248641536/FairPlay+Canada+2018-01-29+Exhibit+1.pdf>

<sup>12</sup> Sandvine, “Global Internet Phenomena Spotlight: The ‘Fully-Loaded’ Kodi Ecosystem”, May 4, 2017, <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-kodi.pdf>.

TV piracy subscription services. It estimated that this piracy costs Canadian and US broadcasters and other communication service providers up to five billion dollars a year.<sup>13</sup>

Studies on site blocking have not only shown that they reduce traffic to blocked web sites, they also show that piracy hurts sales of legitimate content and services by showing that website blocking increases access to content through legitimate services. For example, a study conducted by Carnegie Mellon University's Brett Danaher of the blocking of only 53 piracy websites in the UK showed it caused a 6% increase in visits to paid legal streaming sites like Netflix and a 10% increase in videos viewed on legal ad supported streaming sites like BBC.<sup>14</sup>

Geist says that the piracy issue is "fundamentally" a "business model" issue. He stated in an interview with the CBC, "fundamentally, it's about business models that will solve these issues". Yet, he acknowledges that Canadians have a wide variety of choices to access content legally including a plethora of legal streaming services such as Netflix.

The problem is not a lack of business models. Canadian businesses have and are innovating to bring exciting copyright content to Canadians. The fundamental question is why the cultural industries should have to compete with business models built on content theft. We do not expect car part makers, for example, to have to compete with chop shop criminals who steal cars and sell spare parts. Nor do we consider it appropriate to require legitimate makers of any products to drop their prices or to otherwise change their business models to compete with sellers of counterfeit or stolen goods. In both cases, we expect fair marketplace rules that outlaw theft. One may therefore ask, what moral compass underpins Geist's premise that the legal framework for copyright should be structured to force creators alone to compete with content thieves?

Geist's argument that the issue is one of business models also flies in the face of basic economics. When piracy sites steal content and offer unlicensed streaming services, their costs of production will always be significantly less than for legal services that make investments in creating and distributing content – and in compensating the people employed in and that make investments in creating and distributing the content. Pirate operators do not. Accordingly, the

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<sup>13</sup> Sandvine, "2017 Global Internet Phenomena: Spotlight: Subscription Television Piracy", October 27, 2017, <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf>

<sup>14</sup> Brett Danaher, "Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior", April 19, 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2766795](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795).

price for pirate content will invariably be less than for legal products and services. Moreover, as the supply of legal services cannot be provided at the price of pirated services, the production and supply of legitimate content will also invariably over time not be able to meet the demand at that price. The solution is not to require legitimate copyright industries to suffer losses or to go out of business. Business model changes alone will not solve the piracy problem. Only business models supported by effective anti-piracy laws which guard against unfair competition will.

In a blog post devoted to the issue, Geist also argues based on a report by the Canadian Media Production Association (CMPA) that “the Canadian industry is achieving record growth” and that the website blocking proposal is a “solution in search of a problem”.<sup>15</sup> However, this “sky is rising” argument, which he frequently uses in his anti-copyright advocacy, completely ignores the counterfactual, namely, what would the sectors supported by copyright look like in the absence of piracy and with effective anti-piracy laws such as site blocking.<sup>16</sup> Research in the film and tv sector on this question in Australia showed that a legal framework that did not adequately protect copyrights harmed the Australian community by causing slower growth in the copyright industries, fewer jobs, and a decrease in film and video production.<sup>17</sup>

Geist’s “the sky is rising” and “piracy isn’t a problem” arguments shows a basic lack of respect for the thousands of Canadians who have lined up to support the FairPlay proposal. What defies common sense is that Geist, an academic, is telling all of the actors, producers, artists, studios, cinema owners, ISPs, media companies, and broadcasters of this country including the unions, guilds and associations representing Canadians that work in the film, television, and music industries, independent production and media companies – the people who actually know from industry experience what the effects of online piracy are – and who support the FairPlay proposal, that they don’t know what they are talking about and that they are wasting their time and resources pursuing a solution to a non-existent problem.

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<sup>15</sup> He says “The latest report tells a remarkable success story. Far from the doom and gloom, the Canadian industry is achieving record growth, suggesting that website blocking and new Internet regulations are ill-advised solutions in search a problem.”

<sup>16</sup> Counterfactual reasoning is a method for evaluating claims of causation by exploring what might have happened had the causal event not occurred. Such reasoning is a common test of the validity of claims in the social sciences and in historical studies. Oxford University press, <http://www.highbeam.com/doc/1O104-counterfactualreasoning.html> (SC - This link is no longer active.)

<sup>17</sup> George Barker, “Diminished Creative Industry Growth in Australia in the Digital Age”, Feb. 10, 2017, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2915246](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2915246).

Geist's "sky is rising" argument, distilled to its essence, is that it is bad public policy to prevent unfair competition from harming industries if they are growing. It is tantamount to a claim that the banking industry is not affected by cyber-crime if the overall banking industry revenues increase or do not steadily decline. By his logic, we shouldn't have laws protecting profitable businesses from online scams, fraud, phishing, and ransomware by cyber thieves or laws that prevent theft from banks, or at least laws that prevent theft short of bankrupting them. This would be a dangerous and radical reformulation of public policy principles.

Copyright is said to have two fundamental goals, one of which is to obtain a "just reward for the creator".<sup>18</sup> A moral basis for this goal of copyright was suggested long ago by the Privy Council as resting on the 8th commandment "Thou shalt not steal".<sup>19</sup> Based on Geist's arguments that as long as piracy is "below global averages" or doesn't affect what appear to be otherwise financially successful persons, I suppose the 8<sup>th</sup> commandment according to Geist should be reformulated to say:

8<sup>th</sup> Commandment according to Geist: "Thou shall not steal, unless your theft is below global averages or is from a person who has enough to steal from".

#### Web blocking must be part of Canada's anti-piracy tools

Geist says that site blocking isn't needed because Canada has "some of the world's toughest anti-piracy laws". He used the same argument to oppose a law to help the cultural industries take down the notorious file sharing site isoHunt. Before any amendment had been proposed, he argued that Canada's laws were too weak to shut down the site. Then, when during the copyright reform process the Government planned to amend the Act to add an enablement cause of action to permit rights holders to go after sites like isoHunt that were enabling mass

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<sup>18</sup> *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283, Copyright is said to have two goals, to "promote the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator".

<sup>19</sup> *MacMillan & Co. Ltd. v. Cooper* (1923), 40 T.L.R. 186, "The moral basis of copyright rests on the 8th commandment 'Thou shalt not steal'". See also, *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 "Copyright 'protects property. It is no more interference with trade than is the law against larceny. Free trade does not require that one man should be allowed to appropriate without payment the fruits of another's labour'. See also, Barry Sookman, "Margaret Atwood at the Parliamentary Committee on Bill C-32", Mar. 18, 2011, <http://www.barrysookman.com/2011/03/18/margaret-atwood-at-the-parliamentary-committee-on-bill-c-32/>. Copyright infringement is not "theft" under the Criminal Code and the term is used here in the sense conveyed by Margaret Atwood, as supported by usage by a long lineage of law Lords.

piracy, he changed his view arguing an amendment wasn't needed because Canada already had robust anti-piracy laws that would be effective.<sup>20</sup>

He also says that Canada is one of the only countries in the world to have anti-piracy laws that allow companies to go after piracy websites.<sup>21</sup> That is simply untrue.

However, whatever one might think about the efficacy of our laws against Canadian based pirate site operators, site blocking is needed to protect our domestic market against foreign piracy sites. As anyone with even the slightest experience in dealing with online piracy knows, domestic anti-piracy laws without an effective blocking regime provide scant to no relief against foreign pirate operators. Court orders are whac-a-mole instruments, unenforceable against them.<sup>22</sup>

Geist himself supported website blocking of foreign based websites that provided access to child pornography based on a block list to be created by Cybertip.ca because of the hundreds of websites that were beyond the reach of domestic law enforcement.<sup>23</sup> That is also why many other liberal democratic countries like the UK, France, and Australia rely on site blocking to protect their domestic cultural industries.

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<sup>20</sup> Barry Sookman, "Are Canada's copyright laws friendly or unfriendly towards wealth destroyers according to Prof. Geist?", March 9<sup>th</sup>, 2011, <http://www.barrysookman.com/2011/03/09/are-canadas-laws-friendly-to-wealth-destroyers/>

<sup>21</sup> In the *As it Happens* interview, he stated "First, we ought to recognize that we have some of the toughest anti-piracy laws in the world. We established some of those rules just a few years ago, which were unique around the globe, that allow those same companies to go after piracy websites. We're one of the only countries in the world to have that."

<sup>22</sup> Hugh Stephens, "Why the Time has come to Block Offshore Pirate websites in Canada", Inside Policy, Jan. 10, 2018, <https://www.macdonaldlaurier.ca/time-come-block-offshore-pirate-websites-canada-hugh-stephens-inside-policy/>, "The *Globe and Mail* weighed in its editorial page, conflating "site blocking" with "net neutrality," and urging that copyright infringement be handled by "Canada's robust laws against intellectual property theft." But that is precisely the problem. These sites are not set up just down the street within reach of Canadian courts. They have deliberately established themselves in legal "no go" zones, somewhere in cyberspace in jurisdictions with no interest or capability in enforcing intellectual property laws. It is pointless to bring legal proceedings against them in Canada because they don't operate in Canada. Also, Hugh Stephens, "Canada and New Zealand: Both Wrestling with Offshore Piracy and Both Seeking an Effective Solution", Feb. 4, 2018, <https://hughstephensblog.net/2018/02/04/canada-and-new-zealand-both-wrestling-with-offshore-piracy-and-both-seeking-an-effective-solution/>.

<sup>23</sup> Michael Geist, "Child Pornography Blocking Plan a Risk Worth Taking", December 4, 2006, <http://www.michaelgeist.ca/2006/12/project-cleanfeed-column/>.



### The FairPlay proposal has due process and judicial oversight

Geist says the proposal is “sorely lacking in due process” and judicial oversight. But, it’s hard to imagine a process that is more procedurally fair. The Internet Piracy Review Agency (IPRA) would consider claims using criteria established by the CRTC, give notice to alleged content thieves, review evidence, and permit a hearing if desired. The CRTC would review recommendations and decide whether an order should be made.

Further, any decision to issue a blocking order would be made by the CRTC, a quasi-judicial administrative tribunal that already makes orders under the Do Not Call and anti-spam (CASL) regimes, both regimes that Geist staunchly supports, as well as for the broadcast and telecom industries more generally. The CRTC also enforces Canada’s net neutrality laws, all with the same court oversight as the proposed regime.

### The proposal is consistent with net neutrality principles

Geist claims the proposal is a setback for net neutrality and “is inconsistent with the current communications law framework”. However, blocking illegal materials on the Internet has nothing to do with this important principle that all members of the FairPlay coalition endorse.

The term “net neutrality” has no precise universally accepted meaning or scope. However, there is a consensus on the general concepts that the term reflects. For example, in the U.S., it is described at a high level as prohibiting “blocking”, “throttling”, and “paid prioritization” by ISPs.<sup>24</sup> In the European Union, it is understood to be “rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights”.<sup>25</sup>

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<sup>24</sup> See also, Federal Communications Commission, *FCC Consumer Guide: Open Internet*, June 14, 2016, <https://transition.fcc.gov/cgb/consumerfacts/openinternet.pdf>, How do FCC rules protect the open internet? The FCC’s open internet rules protect and maintain open, uninhibited access to lawful online content. The rules specifically prohibit:

- Blocking: Broadband providers may not block access to lawful content, applications, services or non-harmful devices.
- Throttling: Broadband providers may not deliberately target some lawful internet traffic to be delivered to users more slowly than other traffic.
- Paid prioritization: Broadband providers may not favor some internet traffic in exchange for consideration of any kind. ISPs are also banned from prioritizing content and services of their affiliates.

<sup>25</sup> [EU Regulation 2015/2120](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R2120&from=en), Nov. 25, 2015, Recital 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R2120&from=en>

In Canada, the CRTC considers it as a policy requiring that “all traffic on the Internet should be given equal treatment by Internet providers with little to no manipulation, interference, prioritization, discrimination or preference given.”<sup>26</sup>

Net neutrality is not however, as Geist simply asserts without reference to any sources on net neutrality, an absolute principle and the high level statements about it don’t encompass the whole principle. Importantly, it co-exists, like most laws including those related to freedom of expression, with other legal frameworks. Net neutrality may prevent ISPs from unilaterally interfering with legal online content, but does not restrict the CRTC from making orders to prevent the dissemination of unlawful content.

For example, in the U.S., the FCC limited the “no blocking” rule to only “lawful” content, applications and services. To make it clear that open Internet protections can and must coexist with these other legal frameworks, it adopted the express rule that the prohibitions did not prohibit “reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity”.<sup>27</sup> The net neutrality principles in the European

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<sup>26</sup> CRTC, “Strengthening net neutrality in Canada”, Jan. 26, 2018, <https://crtc.gc.ca/eng/internet/diff.htm>

<sup>27</sup> FCC, *Final Rule: Preserving The Open Internet*, Dec. 21, 2010, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-201A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf) Open Internet Principles “To provide greater clarity and certainty regarding the continued freedom and openness of the Internet, we adopt three basic rules that are grounded in broadly accepted Internet norms, as well as our own prior decisions” ...ii. No blocking. Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services”. “...open Internet rules protect only lawful content, and are not intended to inhibit efforts by broadband providers to address unlawful transfers of content.” “To make clear that open Internet protections can and must coexist with these other legal frameworks, we adopt the following... Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity”. See also, FCC, *Policy Statement: FCC-05-151A1*, Sept. 23, 2005, <https://www.scribd.com/document/29639687/FCC-05-151A1> “As a result, the Commission has jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner. Moreover, to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers, the Commission adopts the following principles:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.

Union are also expressly “without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services”.<sup>28</sup>

In Canada, there is no all-encompassing Commission decision or regulatory framework on the broad concept of net neutrality. Net neutrality has been described by the Commission as a “general concept” “that all traffic on the Internet should be given equal treatment by ISPs. In other words, there should be no manipulation, preference, or discrimination, either through technical or economic means.”<sup>29</sup>

Net neutrality, as ISED Minister Bains correctly stated in commenting on the proposal requires that “all legal content must be treated equally by internet service providers”.<sup>30</sup> This view is confirmed by decisions of the CRTC that illegal and other forms of offensive content can be blocked by ISPs and carriers. The CRTC’s position, however, is that its approval is required before an ISP can engage in content blocking by virtue of Section 36 of the *Telecommunications Act*.<sup>31</sup>

In the decision Geist referred to in a blog post involving blocking unlicensed online gambling sites, the CRTC confirmed it had the authority to permit site blocking by ISPs with no suggestion that this would violate any “net neutrality” rule. It did not, as Geist asserted incorrectly, state

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• To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet consumers are entitled to competition among network providers, application and service providers, and content providers. (emphasis added)

<sup>28</sup> EU Regulation 2015/2120, Nov. 25, 2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R2120&from=en> re open Internet access “Article 3 “Safeguarding of open internet access”: Para. 1 “This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.” “Providers of internet access services shall not engage in traffic management measures except as necessary... in order to: comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers”.

<sup>29</sup> [Telecom Regulatory Policy CRTC 2017-104](https://crtc.gc.ca/eng/archive/2017/2017-104.htm), April 20, 2017, <https://crtc.gc.ca/eng/archive/2017/2017-104.htm>.

<sup>30</sup> Sameer Chhabra, “ISED minister responds to anti-piracy group, defends net neutrality”, MobileSyrup, Jan. 29, 2018, <https://mobilesyrup.com/2018/01/29/ised-minister-responds-anti-piracy-group-defends-net-neutrality/> “Our government supports an open internet where Canadians have the ability to access the content of their choice in accordance to Canadian laws,” said Bains, in an emailed statement to MobileSyrup. “In other words, our Government believes that all legal content must be treated equally by internet service providers (ISPs). That’s why our government has a strong net neutrality framework in place through the Canadian Radio-television and Telecommunications Commission (CRTC).” (emphasis added)

<sup>31</sup> [Telecom Decision CRTC 2016-479](https://crtc.gc.ca/eng/archive/2016/2016-479.htm), Dec. 9, 2016, <https://crtc.gc.ca/eng/archive/2016/2016-479.htm>

that it would only permit such site blocking in “exceptional circumstances”.<sup>32</sup> The CRTC said in a different decision that it would only permit blocking of legal content for traffic management purposes in exceptional circumstances. The CRTC also stated that traffic management policies to protect users from network threats such as the distribution of illicit materials were unlikely to trigger complaints or concerns under the Act and are a necessary part of an ISP’s network operations.<sup>33</sup>

In another decision addressing whether carriers are precluded from offering universal call blocking or opt-in filtering services, the Commission went out of its way to emphasize that carriers could do so when implemented in a manner consistent with the Commission’s determinations. The Commission went even further, stating that it intended to approve universal blocking for the purposes of preventing nuisance calls that contain blatantly illegitimate caller ID from reaching Canadians.<sup>34</sup>

This view of net neutrality was aptly summarized by technology lawyer Mark Hayes in a recent article commenting on this issue:

In general terms, net neutrality is a laudable concept since it ensures that ISPs are unable to discriminate among (and charge differing amounts for) packets of specific content on their networks. However, broad statements about net neutrality often gloss over the nuanced approach that is required when approaching the regulation of ISPs and Internet content, and it has to be recognized that there are situations in which ISPs need to manage or control content on their networks and that such situations are not as nefarious as some commentators may suggest.

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<sup>32</sup> *Telecom Decision CRTC 2016-479*, Dec. 9, 2016, <https://crtc.gc.ca/eng/archive/2016/2016-479.htm> “The Commission expressed the preliminary view that the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet without prior Commission approval, whether or not such blocking was the result of an Internet traffic management practice. Such blocking would only be approved where it would further the telecommunications policy objectives set out in section 7 of the Act. Accordingly, compliance with other legal or juridical requirements—whether municipal, provincial, or foreign—would not, in and of itself, justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act.”

<sup>33</sup> *Telecom Regulatory Policy CRTC 2009-657*, Oct. 21, 2009, <https://crtc.gc.ca/eng/archive/2009/2009-657.htm>, Review of the Internet traffic management practices of Internet service providers ““Blocking as part of ITMP requires CRTC approval under s.36. “Canadian ISPs have used certain ITMPs for the purposes of network security and integrity...these ITMPs have been employed to protect users from network threats such as malicious software, spam, and distribution of illicit materials... such activities are unlikely to trigger complaints or concerns under the Act and are a necessary part of an ISP’s network operations.” (emphasis added) The CRTC expressly stated that blocking for the purpose of network security or network integrity was not covered by the policy.

<sup>34</sup> *Telecom Regulatory Policy CRTC 2016-4427: Empowering Canadians to protect themselves from unwanted unsolicited and illegitimate telecommunications*, Nov. 7, 2016, <https://crtc.gc.ca/eng/archive/2016/2016-442.htm>

The first category of permissible content discrimination involves the technical operation of Internet networks by ISPs....

Secondly, ISPs may be required to control content on their network for legal reasons. For example, ISPs will be required to abide by court orders, which may require ISPs to block access to certain websites. A simplistic mantra of protecting net neutrality should not be permitted to allow the dissemination of websites which infringe intellectual property rights or other rights.<sup>35</sup>

### The proposal is privacy enhancing

Geist claims the proposal represents “a set-back for privacy”. However, his only reference to privacy is the mention of the prior Conservative government’s electronic surveillance legislation which was withdrawn after opposition to it. Nothing about the proposal involves electronic surveillance of individuals or is remotely similar to the former government’s plans for combatting child pornography. However, Geist claims that the FairPlay proposal “could have similarly harmful effects on the Internet”. This suggestion is untrue and misleading as Hugh Stephens aptly pointed out in the recent blog post, [The New Canadian Content Coalition: Hang Together or Hang Separately](#):

As Michael Geist notes, the Toews initiative was rightly criticized as government overreach and an invasion of privacy and was quickly withdrawn, but what the connection is between that episode and today’s proposal is, frankly, a mystery to me. No-one is suggesting any government snooping or knowledge over what individual consumers are doing in cyberspace. If the Coalition proposal is accepted, all that would happen is that a request by a consumer for access to a designated infringing website would be denied by the user’s ISP using an automatic process to disable the link. It is disingenuous and misleading to argue that there would be any surveillance or invasion of privacy or that there is any link between the FairPlay Canada proposal and the past misguided initiative of the Harper government.

In fact, the proposal is a pro-privacy one. The proposal does not involve any collection of personal information of individuals engaged in illegal file sharing. In fact, it would protect

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<sup>35</sup> Mark Hayes et al, “Net neutrality: Ensuring free flow of information while protecting ISP networks” The Lawyer’s Daily, Jan. 10, 2018, <https://www.thelawyersdaily.ca/articles/5634/net-neutrality-ensuring-free-flow-of-information-while-protecting-isp-networks>. See, also, Mark Goldberg “Blatantly, overwhelmingly, or structurally engaged in piracy”, *Telecom Trends*, Jan. 29, 2018, <http://mhgoldberg.com/blog/?p=11875>, When a draft of the FairPlay Canada application leaked in December, some erroneously described the plan as an attack on net neutrality, perhaps hoping to capitalize on the publicity associated with the FCC’s Restoring Internet Freedom declaratory ruling.” “So it is pretty clear: the FairPlay Canada proposal has nothing to do with net neutrality. There is nothing in the proposal that will “kill the internet.” There is no slippery slope. There is no attack on charter rights of expression.” Hugh Stephens, “The New Canadian Content Coalition: Hang Together or Hang Separately”, Feb. 12, 2018, <https://hughstephensblog.net/2018/02/12/the-new-canadian-content-coalition-hang-together-or-hang-separately/>, “In short, net neutrality is a total red herring in this debate, designed to confuse the public.”

privacy. Online pirates often collect IP addresses and other personal information about users which they use for nefarious purposes. The proposal would reduce how often this happens to Canadians.

Further, Canadian ISPs are being bombarded with court motions for disclosures of subscriber information (Norwich orders) by a cottage industry of third tier copyright trolls. Blocking orders would reduce piracy and thereby help to stop these proceedings targeting users, something Geist also advocated for.

### The proposal is consistent with freedom of expression values

Geist asserts that the proposal would violate *Charter* rights to freedom of expression. He says the proposal is “anathema” to “the sorts of values that Canadians have when it comes to freedom of expression”. Yet, this law professor fails to identify anything to support this claim.

Canadian courts have repeatedly held that copyright infringers do not engage in freedom of speech when they distribute pirate materials.<sup>36</sup> The Supreme Court of Canada recently confirmed this in the *Google v Equustek* case, which Geist conveniently ignores, stating that “We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods.”<sup>37</sup>

EU courts, which Geist also ignores, have found blocking orders to be effective without over blocking and to be consistent with freedom of speech rights.<sup>38</sup>

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<sup>36</sup> See, *Compagnie Générale des Établissements Michelin–Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C. 306 (T.D.) “The Charter does not confer the right to use private property – the Plaintiff’s copyright – in the service of freedom of expression.”; *Canada v. James Lorimer & Co*, [1984] 1 F.C. 1065 (C.A.) “So little of its own thought, belief, opinion and expression is contained in the respondent’s infringing work that it is properly to be regarded as entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work.”

<sup>37</sup> *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 24.

<sup>38</sup> *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) (17 October 2014) “As for the freedom of internet users to receive information, this plainly does not extend to a right to engage in trade mark infringement, particularly where it involves counterfeit goods. Since the Target Websites appear to be exclusively engaged in infringing commercial activity, with no lawful component to their businesses, the operators have no right which requires protection. Thus the key consideration so far as this freedom is concerned is the impact of the orders on users of other, lawful websites. If the orders are properly targeted, and have sufficient safeguards built into them, then that should mean that such users are not affected.” Also, Barry Sookman, “[Website blocking effective without over blocking: EUFA v British Telecommunications](http://www.barrysookman.com/2017/12/31/website-blocking-effective-without-over-blocking-eufa-v-)”, Dec. 31, 2017, <http://www.barrysookman.com/2017/12/31/website-blocking-effective-without-over-blocking-eufa-v->

Further, as Neil Turkewitz, stated in responding to the assertion by the Internet activist organization OpenMedia that the FairPlay proposal is a form of censorship

“Truth is, site blocking of pirate sites undertaken in a careful and deliberative manner doesn’t undermine freedom, it expands it. Unless one champions a version of “freedom” that includes freedom to steal.”<sup>39</sup>

Geist argues that the proposal is a slippery slope because of “the likelihood that it will quickly expand beyond sites that “blatantly, overwhelmingly or structurally” engage in infringing or enabling or facilitating the infringement of copyright”. This strawman argument can be used against any good law that targets illegal activities. Geist made the same spurious argument against amending Canada’s copyright law to enable rights holders to take down the notorious isoHunt piracy site claiming it could also be used to take down YouTube. This fantastical claim was rejected by Parliament which enacted the law.<sup>40</sup>

However, the slippery slope – and “domestic laws are adequate to stop foreign sites from making illegal content available to Canadians without site blocking”, “freedom of speech”, “net neutrality”, “site blocking is inconsistent with the current communications law framework”, “privacy”, and “judicial oversight” – canards levelled against the FairPlay proposal did not stop Geist from supporting website blocking of foreign child pornography sites without court or administrative tribunal orders.<sup>41</sup>

#### FairPlay is a reasonable proposal that should be supported

Geist compares the FairPlay proposal to the U.S. “controversial legislation known as the [Stop Online Piracy Act](#) (SOPA)” and says the CRTC and the federal government “would be well advised to swiftly dismiss the ill-advised and dangerous Canadian site blocking proposal.”

This is not the first time Geist has tried to use SOPA and demagoguery to try and sabotage a proposal to provide the creative community with rights they need to combat 21st century piracy.

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[british-telecommunications/](#); Barry Sookman, “Keeping The Pirate Bays at Bay: using blocking orders to curtail infringements”, Feb. 22, 2012, <http://www.barrysookman.com/2012/02/22/keeping-the-pirate-bays-at-bay/>.

<sup>39</sup> Neil Turkewitz, “OpenMedia: Flying Blind in Pursuit of an Open Society”, Feb. 7, 2018, [https://medium.com/@nturkewitz\\_56674/openmedia-flying-blind-in-pursuit-of-an-open-society-a641005ea8a9](https://medium.com/@nturkewitz_56674/openmedia-flying-blind-in-pursuit-of-an-open-society-a641005ea8a9).

<sup>40</sup> Barry Sookman, “Reining in the rhetoric on copyright reform”, Feb. 8, 2012, <http://www.barrysookman.com/2012/02/08/reining-in-the-rhetoric-on-copyright-reform/>

<sup>41</sup> Michael Geist, “Child Pornography Blocking Plan a Risk Worth Taking”, Dec. 4, 2006, <http://www.michaelgeist.ca/2006/12/project-cleanfeed-column/>

He made the same argument to try and demonize the *Copyright Modernization Act* calling it the “Canadian version of SOPA” in an opportunist effort to leverage anti-SOPA public opinion, something Parliament also rejected.<sup>42</sup>

However, as Geist surely knows, SOPA is totally different from the FairPlay proposal both procedurally and substantively<sup>43</sup> and its demise had more to do with inaccurate information spread through social media than its substance.<sup>44</sup> SOPA had no precedent globally, while the proposal is similar to well-established regimes adopted by Canada’s peers.

We should not be surprised that Geist opposes the FairPlay proposal. He does not believe in copyright and will find any excuse to oppose it and use his activist playbook to undermine meaningful reforms to solve challenges faced by the cultural industries based on copyright. In a speech given in June 2010 about Bill C-32 (later enacted as Bill C-11) Heritage Minister James Moore, referring to Geist, warned against being fooled by opponents of copyright reform who “don’t believe in copyright”, who “pretend” to be experts in copyright, but are misleading the public about it.<sup>45</sup> The Minister’s insights are fully applicable to assessing Geist’s arguments opposing the proposal:

“...There’s people out there who don’t believe in copyright at all. They just say well Bill C-61, the old copyright legislation, we disagree with these specific revisions. Well, Bill C-32 we have these specific amendments. Don’t fool yourself. These voices that are out there, there’s people out there who pretend to experts that the media cites all the time, they don’t believe in any copyright reform whatsoever. They will find any excuse to oppose this bill to drum up fear to mislead to misdirect and to push people in the wrong direction and to undermine what has been a meaningful comprehensive year-long effort to get something right...

We need to amend our legislation and those people out there who try to pretend that they’re copyright experts and they want to amend copyright in a meaningful way. Don’t be fooled by some of these people. They don’t believe in any copyright. They don’t believe in individuals’ rights to protect their own creations and when they speak, they

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<sup>42</sup> Barry Sookman, “Reining in the rhetoric on copyright reform”, Feb. 8, 2012, <http://www.barrysookman.com/2012/02/08/reining-in-the-rhetoric-on-copyright-reform/>

<sup>43</sup> For an overview of SOPA’s provisions, see, *H.R.3261 – Stop Online Piracy Act*, 112th Congress (2011-12), Summary: All Information, <https://www.congress.gov/bill/112th-congress/house-bill/3261>; Terry Hart, “Hey, what happened to Wikipedia? (An intro to SOPA)”, Jan. 18, 2012, <http://www.copyhype.com/2012/01/hey-what-happened-to-wikipedia-an-intro-to-sopa/>; Terry Hart, “New remedies for existing liability”, Nov. 14, 2011, <http://www.copyhype.com/2011/11/sopa-new-remedies-for-existing-liability/>

<sup>44</sup> See the references in Barry Sookman, “Reining in the rhetoric on copyright reform”, Feb. 8, 2012, <http://www.barrysookman.com/2012/02/08/reining-in-the-rhetoric-on-copyright-reform/>

<sup>45</sup> Barry Sookman, “Minister Moore’s Speech on C-32”, March 12, 2012, <http://www.barrysookman.com/2012/03/12/a-question-of-values/>



need to be confronted. If it's on Facebook, if it's on Twitter or if it's on a talk show, if it's in a newspaper, confront them and tell them they are wrong... We need to protect those investments, protect those jobs and make sure that those voices who try to find technical nonsensical fear-mongering reasons to oppose copyright reform, are confronted every step of the way and they are defeated. And when we do that, this bill will pass and Canada will be better for it."

FairPlay has made a moderate, responsible proposal to address a pressing problem. It should be given due consideration based on the facts and not contrived arguments designed to oppose it.

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