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Music Canada CEO says CRTC regulatory update shouldn't put 'artificial dome' over Canadian content

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As the CRTC begins three weeks of public hearings, endangered Canadian content creators need urgent regulations to stave off predatory foreign streamers, says CAB president Kevin Desjarlais.

With the clock already ticking down on the long-awaited public hearings to determine how much online streaming services will be required to contribute to Canadian and Indigenous content as part of the government's effort to update industry regulations for the digital age, the heads of Canada's major broadcasting and music recording associations hope the process will proceed urgently to meet the needs of the sector while there's still one to save.

However, law expert Michael Geist says that the government's decision to leave the Canadian Radio-television and Telecommunications Commission (CRTC) with most of the regulatory heavy-lifting is to blame for much of the delays, and, despite an "authoritative suggestion," he said the feds have not assuaged concerns over the potential regulation of user-generated content.

The CRTC began its first set of public hearings related to the government's Online Streaming Act on Nov. 20, and over the course of the next three weeks will hear from more than 120 industry stakeholders to discuss how the proposed contribution framework will apply; to whom it will apply; and how much applicable online streaming services like Netflix, Spotify, and YouTube will be required to pay to support Canadian and Indigenous content.

During the first week, the commission is scheduled to hear from more than 45 stakeholders from Canada's music, television, and film industries, including Québecor Média, the Canadian Media Producers' Association, the Motion Picture Association-Canada, Google, and Music Canada.

On Sept. 29, the CRTC released its first two decisions on which online streaming services will be asked to provide information on their activities and the conditions for them to operate in Canada. Online streaming services are now required to provide the CRTC with information related to content and subscribers, and prohibit those services

Heritage Minister Pascale St-Onge says 'time is of the essence' to complete the process of updating the regulations governing online streaming giants and the contributions they will need to make to Canadian producers as part of the Liberals' Online Streaming Act. The Hill Times photograph by Andrew Meade

from being tied to a specific mobile or internet service. Additionally, streaming services earning \$10-million or more in annual revenue must register with the CRTC by Nov. 28. The commission also clarified that while social media and platforms that distribute podcasts will be required to register as well, users will not be required to register, nor will video game or audiobook services.

On Nov. 14, the federal government released a policy direction instructing the CRTC to consider both "established and emerging means of discoverability" to promote Canadian content and minimize the need for changes to algorithms or presentation of programming in making regulations or imposing discoverability requirements. The federal direction also instructed the commission not to impose regulatory requirements on social media creators, individual pod-

casters, and video game services.

The definition of what counts as Canadian or Indigenous content is something the CRTC will define through the current hearings, with further sessions on how to best support Canadian music and audio-visual content, local market access and competition, as well as protecting Canadian consumers expected to run into early 2024. The Canadian Association of Broadcasters (CAB) is hoping the questions of “who pays, how much, and where those funds go” will be answered with more urgency.

CAB president Kevin Desjarlais told *The Hill Times* that this first set of public hearings—at which Desjarlais will appear on Dec. 7—will need to ensure Canadian media companies, and especially Canadian broadcasters, aren’t left with the entirety of the regulatory burden to help support Canadian content creation in Canada.

“We want to make sure that there is built in, on the front end, some equitable treatment of Canadian players versus foreign players,” Desjarlais explained. He said CAB members are currently required to compete for viewers and advertisers in a media ecosystem with foreign streaming giants that have completely disrupted it to their own benefit.

“They’ve blown away all of the pre-existing business models, but they haven’t replaced it with a new one that makes sense,” Desjarlais said, adding that he was encouraged to see the government’s policy direction address the inequities created by those foreign streaming giants’ unfettered access to the Canadian market.

Despite giving credit to Heritage Minister Pascale St-Onge (Brome-Mis-

sisquoi, Que.) for her efforts to shepherd the regulatory process forward expeditiously, with almost 130 intervenors scheduled over 15 days of public hearings, Desjarlais said he is concerned that determining the answer to “who pays and how much” may stretch on too long to meet the urgent needs of Canada’s struggling entertainment sector.

In a recent interview with *The Globe and Mail*, St-Onge echoed Desjarlais’ concerns, as she said “time is of the essence” to ensure “we still have creators and a system to save” at the conclusion of the regulatory process. St-Onge also blamed “the games and the obstruction Conservatives played in the House” for delaying the legislation’s passage into law. First introduced in the House on Feb. 2, 2022, Bill C-11 did not complete third reading in the Senate until exactly a year later.

Desjarlais told *The Hill Times* that it is important there aren’t any further delays, and that the commission approaches its work with urgency. He said he also appreciates that the policy directions from both the CRTC and the government have indicated that user-generated content would not be regulated.

“Most of the discussion around user-generated content was a canard,” Desjarlais said, adding that he views that issue as having been dealt with in the legislation, and believes those who suggested otherwise were simply looking for reasons to further delay the bill.

“I feel a level of empathy for creators and producers on those platforms because I feel as though they were spooked and misled as a tactic to help disrupt the legislative process,” Desjarlais explained, “but I don’t think that

there’s any intent to ever include that sort of content.”

However, Geist, a law professor and Canada Research Chair in Internet and E-commerce Law at the University of Ottawa and one of the legislation’s loudest critics, views the government’s policy direction as confirmation of the concerns raised by himself and other content creators, and said he doesn’t believe the door is completely shut on the subject.

While the government may have argued that it wasn’t regulating user content, the need to direct the CRTC not to regulate it confirms that the current legislation as written could potentially include that, argued Geist, adding that the policy direction does not carry the same weight as amending the legislation as he and members of the Senate had suggested.

Though the CRTC will no doubt consider the Liberals’ policy direction, Geist said the commission isn’t bound to those instructions as it would be if that language were included in the actual legislation.

“It’s an authoritative suggestion, but it’s pretty clear that the CRTC will do what it thinks is appropriate,” Geist explained. “The CRTC is an independent body and makes decisions based on the evidence before them, but anyone who has spent any time reading telecom policy directions ... it feels like the commission takes it seriously, and at times, it feels more like lip service. So, I’m hoping that they take this one seriously.”

In a statement to *The Hill Times*, St-Onge’s office pushed back on the possibility that the CRTC may disregard the government’s final policy direction.

“We were clear since the beginning that this direction would ensure the CRTC cannot regulate the content of social media creators,” the minister’s office said. “The direction is binding under the Act. The Broadcasting Act, as the name suggests, only applies for broadcasters and online streaming platforms, not users or creators.” Geist said when he appears at the hearings on Dec. 5, his comments will focus primarily on the implications of the CRTC deciding to go ahead with regulating user content and podcasts like the one he produces, as well as the consequences of regulating algorithms and discoverability. He also said he expects to offer a counterbalance to some of the stakeholders he is sure will still be pushing for greater carveouts for regulation of that content despite the policy direction.

With regard to the minister’s “admonition to move quickly,” Geist cautioned against hoping the process will move too fast, and pushed back on St-Onge’s suggestion that the opposition is to blame for delaying it.

“The government could have had this thing passed years ago, but it opened up this Pandora’s box of regulating [user-generated] content,” Geist explained. “This process is going to be a pretty lengthy one, and part of that is driven by the government’s decision to leave much of the heavy lifting to the CRTC.”

‘Once-in-a-generation’ process, says Music Canada head In an interview with The Hill Times, Music Canada’s CEO Patrick Rogers said that as the trade association representing Canada’s largest music labels—including Sony Music Entertainment Canada Inc., Universal Music Canada Inc., and Warner Music Canada Co.—they have been taking the

government’s approach to regulate the CRTC’s regulatory framework very seriously ever since its first attempt with Bill C-10.

“This is a once-in-a-generation regulatory process; it’s a huge deal,” Rogers said, adding that while Music Canada itself would not be subjected to that regulation, the music labels it represents and the artists they represent will.

“It’s not a big jump between being regulated and having our content being regulated,” Rogers explained, adding that his industry is especially sensitive to minor changes to the market, especially where the internet is concerned.

“We’re the music industry; our stuff used to be expensive, then it was illegally free, and now people pay money for it again,” Rogers said, explaining that the industry is only just now beginning to recover from the rise of illegal pirating of music spurred by the growth of the internet in the late 1990s and early 2000s.

“We know what it is like for small changes to almost wipe out the industry,” Rogers said. “We’re coming forward because we’re really worried about this; this is not hypothetical [to us], so I think we’re an industry worth listening to.”

Rogers said that after more than 10 years of “free music” following the advent of internet piracy, the industry pivoted to embrace new technology to deliver music digitally, and invest in new infrastructure and talent. Almost a decade after that, online streaming revenue accounted for nearly 80 per cent of Canada’s \$834.23-million total music revenue in 2022, a 10.1 per cent increase from the year before.

As the majority of online streaming’s \$521.79-billion market value is due to paid subscriptions (79 per cent), with ad-supported audio (12 per cent) and video streaming (nine per cent) each only providing a small fraction of revenue, Rogers said he appreciates that the CRTC has indicated the new framework will respect the user experience that makes those subscriptions worth paying for.

While Rogers said his concern has never been that users could find more Canadian content in their suggested playlists on streaming services like Spotify, his real concern is the possibility of users getting content they don’t want.

“I would be skeptical of anything that was artificially inserted without the best [entertainment] value,” Rogers explained, noting that the success of those streaming platforms stems from the perceived value users find in the ability to discover new music they enjoy, Canadian or otherwise.

While Rogers said his concerns that the CRTC may harm those streaming services’ “secret sauce” has diminished, the question of who pays and for what is still a significant determining factor to continue producing the kind of content users are willing to pay for.

“We want to make sure that there is a role for our companies to work with Canadians to make the best Canadian content for the Canadian market and the world,” Rogers said, adding that the definition of what counts as Canadian content will need to reflect “how modern music is made.”

“Record companies aren’t entirely in contracts anymore; they’re very much à la carte services,” Rogers explained,

adding that Canada should be encouraging its talent to work with the best possible people, regardless of geographic location, so that they can continue to succeed at home and abroad.

“I think we should be making sure that we’re not putting too many limitations on who they can work with and under what circumstances,” Rogers continued, noting that the “artificial dome” the CRTC created during the age of radio and television is untenable in the digital age.

“Radio and streaming aren’t just different, they’re opposites,” Rogers explained. “One is finite and linear, and the other is infinite and non-linear, and we need to make sure our regulators understand that; there’s no walling up that garden again.”

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Figure:

Kevin Desjarlais, president of the Canadian Association of Broadcasters, says he believes the concerns over the regulation of user-generated content have always been a ‘canard’ to further delay Bill C-11. Photograph courtesy of Kevin Desjarlais

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