The Senate should stick to its guns on Bill C-11

The government rejected a Senate amendment designed to address concerns about the regulation of user-generated content

Michael Geist

Michaël Geist holds the Canada Research Chair in Internet and E-commerce Law at the University of Ottawa, Faculty of Law.

The long legislative road of Bill C-11, the government’s controversial Internet streaming bill, may be nearing its final destination. Late last month, the House of Commons approved an amended version and sent it back to the Senate for final approval. Yet that approval remains in doubt since the government rejected the marquee amendment that was designed to address lingering concerns that the bill opens the door to regulating user content. While the Senate is typically reluctant to push back on the same bill twice, it should do so with Bill C-11.

The bill, which was first introduced in 2020 and re-tabled in 2022, was promoted as a means to bring global streaming platforms such as Netflix and Disney+ into the Canadian broadcast system and to mandate support for Canadian-created content. However, the surprising inclusion of user generated content found on sites like YouTube and TikTok within the ambit of potential regulation sparked freedom of expression concerns.

The Bill C-11 debate has been marked by overheated rhetoric on both sides: some argue that the bill does not affect user content when it clearly does, while others insist that it will censor what Canadians can say online, when it will not. The reality is that the bill has important freedom of expression implications not because it will limit people’s ability to speak, but because government regulation may affect their ability to be heard. This is because Bill C-11’s regulatory powers could lead to the demonetization of some user content on subscriber feeds, making those voices harder to find. Given those implications - and the government’s inability to cite a credible justification for rejecting an amendment to address the problem by excluding user content from potential regulation - the Senate should send the bill back to the House once more by restoring the amendment.

There is good reason to respect the democratic principle that the elected house ultimately prevails. However, no democratic principle is more important than freedom of expression, and Bill C-11 fails in this regard. The legislation speaks for itself, scoping in TikTok videos with music, thousands of YouTube videos, and a myriad of podcasts. The government may have simply intended to cover certain sound recordings, but its poorly drafted provision goes much further. Indeed, any bill that requires a government policy direction to provide guidance on regulating user expression has left too much uncertainty on the most fundamental of freedoms.

With user content within scope, the CRTC is empowered to establish regulations over that content. While most of the discussion around this provision focuses on the “discoverability of Canadian programs,” which may require algorithmic changes in response to CRTC demands to promote poorly defined Canadian content, the provision is actually far broader. It allows the CRTC to establish rules on “the presentation of programs and programming services” of which discoverability is but one example. The presentation of programs - which includes all audiovisual content - could include warning labels or other regulatory measures.

This approach understandably left the Senate concerned, particularly after the
scope of regulatory powers was repeatedly confirmed by the then-chair of the CRTC Ian Scott and Canadian creators identified potential harms from the approach. The result was an amendment crafted by two Trudeau-appointed independent Senators, Julie Miville-Duchêne and Paula Simons.

Their amendment narrowed the CRTC’s regulatory power to sound recordings uploaded to user content platforms and scoped out other forms of user content, consistent with the government’s oft-repeated use case that a song that appears on both YouTube and Spotify should be treated in the same manner. Further, Ms. Simons pre-empted claims that the amendment created loopholes by convincingly demonstrating its "surgical" approach. The full Senate agreed and overwhelmingly passed the amended bill.

Yet once the amended bill returned to the House for approval, Canadian Heritage Minister Pablo Rodriguez offered a flat rejection of the amendment narrowly tailored to meet his stated objectives. The rationale behind the rejection removed any pretense of the government’s true Bill C-11 intent: It wants the power to direct the CRTC on user content today and the power to exert further regulation tomorrow.

So now Bill C-11 is back at the Senate. The bill as currently drafted raises freedom of expression concerns. The Senate knows this and had tried to fix it. Ms. Simons has suggested that the Senate could not approve a plainly unconstitutional bill. It should similarly decline to pass a bill that may abridge expression rights by potentially limiting the ability for some Canadians to have their voices heard online. The right approach is to send the bill back and require the House to reconsider its amendment by either passing it or offering a credible, constitutionally sound explanation for declining to do so.

Follow this link to view this story on globeandmail.com: The Senate should stick to its guns on Bill C-11

This article appeared in The Globe and Mail (web site)