



CFTPA
*Representing television, film
and interactive production in Canada*

ACPFT
*Porte-parole de l'industrie de la production
cinématographique, télévisuelle et interactive au Canada*

8 June 2006

Ms Diane Rhéaume
Secretary General,
Canadian Radio-television and
Telecommunications Commission,
1 Promenade du Portage
Ottawa, Ontario K1A 0N2

Dear Ms Rhéaume:

Re: Broadcasting Public Notice CRTC 2006-48, Call for comments on a proposed exemption order for mobile television broadcasting undertakings

1. The Canadian Film and Television Production Association (CFTPA) provides the following **comment** in response to the Commission's proposed exemption order for mobile television broadcasting undertakings. This proceeding follows the Commission's ruling in Public Notice CRTC 2006-47 that mobile television broadcasting services offered to wireless handsets by Canadian wireless carriers should be exempted from regulation.
2. CFTPA represents the interests of more than 400 companies engaged in the production and distribution of English-language television programs, feature films and interactive media products in all regions of Canada. Our member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.
3. Last August, in Broadcasting Public Notice CRTC 2005-82, the Commission had asked for public comment as to whether it would be appropriate to regulate mobile broadcasting services by way of an exemption order, in particular the applicability of the Exemption Order for New Media Broadcasting Undertakings, set out in Appendix A to Public Notice CRTC 1999-197.

4. In the current proceeding, the Commission has asked interested parties for their views on the proposed criteria that would permit mobile television broadcasting undertakings to be exempt from regulation. The Notice set out two defining characteristics:
 - (1) the undertaking provides television broadcasting services that are delivered and accessed through mobile devices, including cellular telephones and personal digital assistants, and
 - (2) the undertaking has obtained the prior consent of a broadcaster for the retransmission of its signal.
5. CFTPA submits that it is crucial to ensure that program content on mobile devices is properly authorized by copyright owners or rightsholders. For this reason, we **support** the CRTC's proposal to include an exemption condition relating to prior authorization provided the Commission strengthens the wording of that condition to ensure that mobile phone companies do not gain access to content on a compulsory licence basis under the *Copyright Act*.
6. Accordingly, we **recommend** the following wording:

“The undertaking has obtained the prior authorization of a broadcaster for the retransmission of its signal **and the prior authorization of the program rightsholder.**”
7. CFTPA has proposed two wording changes. The first is to use the word “authorization” instead of “consent”. Although the words have similar meanings, the word “authorization” is consistent with other government legislation, particularly the *Copyright Act*. Specifically, section 3 of the *Copyright Act* states that the copyright owner of a program has the sole right “to communicate the [program] to the public by telecommunications” and “to authorize any such acts.” That wording is the basis for the orderly marketplace in broadcast rights and, we submit, is the appropriate word to be used in the exemption order.
8. The second change is intended to clarify that the authorization applies not only to the signal but also to the programs carried on the signal. This is necessary to ensure that program rightsholders (producers) will be able to control the mobile rights for their programs.
9. Broadcasters who wish to have their signals retransmitted on mobile devices can bargain for those rights. But if a broadcaster were to authorize the retransmission of its signal by a mobile phone company without obtaining the necessary rights for mobile broadcasting from the program rightsholder, the rightsholder would be entitled to seek legal redress. The revised wording proposed by the CFTPA would prevent such an occurrence and ensures a level playing field where the rights of both broadcasters and rightsholders will be fully protected.

10. Without such a requirement, there would be nothing to stop a mobile phone company from retransmitting the programming of any over-the-air TV signal. Instead of seeking and obtaining permission from the rightsholder, it would rely on the compulsory licence provisions of the *Copyright Act* and pay a flat royalty amount that is but a small fraction of the commercial value of the broadcast licences typically paid to producers. As such, a compulsory licence would neither provide sufficient compensation to the producer nor redress the harm done to the Canadian broadcasting system and to rightsholders by such retransmission.
11. The same issue came up in 1999 when iCraveTv, and later JumpTV, sought to put free-to-air TV signals on the Internet without the permission of rightsholders. In response to concerns expressed by CFTPA and other rightsholders, the government amended section 31 of the *Copyright Act* to provide that distribution undertakings operating in Canada through the Internet under the provisions of the New Media Exemption Order would not qualify for the compulsory licence otherwise available to BDUs under the *Copyright Act*. (See S.C. 2002, c.26.s.2.)
12. The government then asked the CRTC to review the issues raised by Internet Retransmission. The CRTC reported back to the Commission in Broadcasting Public Notice CRTC 2003-2, dated 17 January 2003. In its report, the Commission concluded that Internet retransmitters should not have the benefit of the compulsory licence, and that it saw no reason to issue CRTC broadcasting licences to such retransmitters so as to allow them to avail themselves of that right under the *Copyright Act*. Excerpts from that report are set forth in Appendix A to this submission.
13. The implications of this for program rightsholders concerned with the use of mobile devices to retransmit their programs can be simply stated.
14. To the extent a mobile phone company relies on the New Media Exemption Order to avoid the need for a broadcasting licence for its activities, the *Copyright Act* explicitly disentitles such a company to the benefit of a compulsory licence under that Act. Therefore, all program content used by the mobile phone company must be authorized by the appropriate copyright owner or rightsholder. This ensures that the Canadian rights marketplace is maintained.
15. However, to the extent a mobile phone company does not use the Internet to obtain its program content, but takes it directly off-the-air from TV broadcasters, it would no longer rely on the New Media Exemption Order. Rather, it would rely on the mobile television broadcast undertaking exemption order proposed to be issued by the CRTC for such delivery systems. In those circumstances, the mobile phone company might be able to benefit from the compulsory licence under s. 31 of the *Copyright Act* unless the CRTC stated otherwise as a condition of its exemption order, consistent with Public Notice CRTC 2003-2.

16. To be clear, the primary source of revenue for independent producers comes from the exploitation of their rights in the content they create, consisting primarily of licence fees paid by broadcasters for the use of the program for a defined period of time in a defined geographic marketplace. Further, just because actual or contemplated mobile television broadcasting undertakings are deemed to be “broadcasting” services, a broadcast programming undertaking which has licensed copyrighted program content is not in a position to grant a further use of that content without the specific authorization of the content creator and payment of appropriate compensation. The “right” to exploit this separate platform rests with the producer.
17. This is why it is so important that the CRTC include a condition in its new exemption order which addresses this point. Without such a provision, the same problems identified by rightsholders and the CRTC in regard to the application of the compulsory licence to Internet retransmission would occur.
18. In particular, foreign rightsholders might be reluctant to license their programs to Canadian over-the-air broadcasters, since to do so would result in a significant loss of control over the geographical reach of programs. Mobile retransmission under the compulsory licensing provisions of the *Copyright Act* could also undermine the potential for Canadian broadcasters to obtain additional revenues by licensing programs they have created to foreign markets. Such retransmission could also undermine the potential for Canadian broadcasters and other rightsholders to license separately the rights for broadcast over mobile devices.
19. It should also be noted that if mobile retransmission under the compulsory licensing provisions of the *Copyright Act* were permitted, Canadian producers would increasingly be reluctant to sell their productions to over-the-air broadcasters, preferring instead to sell them to specialty and pay services, which are not covered by the compulsory licensing regime. As a result, fewer Canadians would have access to a full range of Canadian programming, since specialty and pay services are not as widely distributed or received as over-the-air signals.
20. In addition, such retransmission would erode the revenue potential of independent producers at a time when the CRTC and the production community are seeking to bolster the capacity of the Canadian broadcasting system to invest in more high cost Canadian drama, documentary, children’s and performance programming.
21. For all these reasons, CFTPA urges the Commission to address this matter in its exemption order.
22. With regard to the first definitional characteristic, CFTPA is concerned that the term “mobile devices” is too vague and that the word “including” does not provide sufficient definitional precision to alleviate the concern we had expressed in our 12 September 2005 submission that the cell phone (or some other mobile device) could become a portal for delivery of broadcast programming to the home. As such, we ask the

Commission to make every effort to clarify its definition such that the exemption order would only be applicable to portable hand-held devices such as cell phones and personal digital assistants.

23. In recent weeks, American broadcasters ABC, NBC and FOX have announced that they will make programs available for purchase on the iTunes online service provided by Apple Computer Inc., while Microsoft (at E3 in Los Angeles in early May) promised to provide live links for video game console players, PC users and cell phone players. As we stated in our 12 September 2005 intervention comment to Public Notice CRTC 2005-82, "Today's receipt of news headlines or sports scores and highlights could tomorrow be a means of completely bypassing licensed Canadian broadcast distribution undertakings".
24. We are concerned that without precise definitional parameters, the Commission's intention to exempt from regulation the mobile television broadcasting applications presently in existence could potentially undermine a substantial portion of the Canadian broadcasting system.
25. One further matter is of concern to us. We concur with the recommendation made by The Society of Composers, Authors and Music Publishers of Canada (SOCAN) that the proposed mobile television broadcasting exemption order should be subject to review in two years and that the 1999 New Media Exemption Order should be reviewed immediately. Given the significant changes that have occurred in terms of content delivery over the Internet, particularly in the last couple of years, CFTPA recommends that the CRTC's anticipated television policy review this fall is the appropriate occasion to reconsider the New Media Exemption Order.
26. CFTPA appreciates the opportunity to comment on this matter.

Sincerely,



Guy Mayson
President and CEO

Appendix A

Excerpts from Broadcasting Public Notice CRTC 2003-2, January 17, 2003

69. The Commission notes that conventional BDUs are entitled to avail themselves of the compulsory licensing regime set out in section 31 of the *Copyright Act*. Section 31 of the *Copyright Act* permits such BDUs to distribute local and distant radio and television signals without having to negotiate with broadcasters or other copyright holders as to appropriate terms and conditions, provided that certain conditions set out in section 31 are met. Several parties to this proceeding commented on the negative effects that would result if Internet retransmitters were permitted to avail themselves of this compulsory licence, without having to meet the regulatory obligations imposed on conventional BDUs, or to satisfy other conditions that would address, among other things, the issue of the territorial control of signals.
70. The Commission acknowledges the concern expressed by some interveners that, if Internet retransmitters were to have access to the compulsory licensing provisions of the *Copyright Act*, foreign rights holders might be reluctant to license their programs to Canadian over-the-air broadcasters, since to do so would result in a significant loss of control over the geographical reach of programs. The Commission considers this concern to be justified, and notes the opposition by broadcasters and producers in the United States to operations such as iCraveTV and JumpTV. The Commission further notes that, at present, most English-language Canadian broadcasters rely on the revenues generated by popular foreign programs to support their business model and to contribute to the production of Canadian programming. The same is true to a lesser extent of French-language Canadian broadcasters. The loss of these revenues could result in a decrease in the production and broadcast of Canadian programming, contrary to the objectives of the *Broadcasting Act*.
71. The Commission also considers that, for reasons discussed in paragraph 68 related to loss of control over the geographic reach of signals, Internet retransmission under the compulsory licensing provisions of the *Copyright Act* could undermine the potential for Canadian broadcasters to obtain additional revenues by licensing programs they have created to foreign markets. In addition, it could undermine the potential for Canadian broadcasters and other rights holders to license separately the rights for broadcast over the Internet.
72. As indicated above, parties also raised issues related to the addition of advertising to retransmitted signals. Parties noted, among other things, that Internet retransmitters pursuing an advertising-based business model would likely combine their own banner or other advertising with the retransmitted signal. The Commission agrees with parties that this would likely lower the potential value of advertising time offered by over-the-air broadcasters, thus lowering broadcasters' revenues and thereby making it more difficult for them to produce Canadian programming.
73. Finally, the Commission agrees with parties who indicated that, if Internet retransmission under the compulsory licensing provisions of the *Copyright Act* were permitted, Canadian producers may become reluctant to sell their productions to over-the-air broadcasters, preferring instead to sell them to specialty and pay services because such services are not covered by the compulsory licensing regime. As a result, fewer Canadians would have access to a full range of Canadian programming, since specialty and pay services are not as widely distributed or received as over-the-air signals. In addition, producers would have fewer attractive outlets for their programs, possibly resulting in reduced licence fees for their program rights.
74. If Internet retransmitters were to be granted access to the compulsory licensing provisions of the *Copyright Act*, the Commission considers it possible that at least some of the negative consequences described above would manifest themselves relatively quickly. Further, the Commission considers that these disadvantages would likely outweigh any positive benefits that Internet retransmission might bring to the Canadian broadcasting system.

75. The Commission considers that Internet retransmission of radio signals by third parties would raise concerns similar to those raised by such retransmission of television signals. For example, Internet retransmission of radio signals would raise concerns related to advertising if an Internet retransmitter added its own banner or pop-up advertising that might compete with the advertising on the originating station. The Commission therefore sees no reason, in terms of broadcasting policy, to distinguish between the Internet retransmission of radio programs and the Internet retransmission of television programs.

The appropriate regulatory framework

76. In respect of regulatory measures that might be appropriate at this time to ensure that Internet retransmission contributes to the attainment of the policy objectives of the *Broadcasting Act* a number of parties proposed conditions that, in their view, should be imposed on Internet retransmitters, either through the terms of a new or amended exemption order or through condition of licence. While focussing generally on regulatory measures that might enhance signal integrity or limit the geographic reach of Internet signals, they covered a wide range of possibilities.
77. In the Commission's view, this diversity of opinion reflects the relative immaturity of Internet retransmission, the absence of clear answers to many technical questions at this time, and the lack of reasonably developed business models. Without a reasonably clear indication as to how the industry will develop, the Commission considers that the development of conditions of exemption or a licensing framework at this point would entail considerable speculation.
78. The Commission further notes, as discussed in Appendix B, that recent amendments to the *Copyright Act* exclude Internet retransmitters from the compulsory licensing regime embodied in section 31 thereof. Accordingly, Internet retransmitters will be obliged to negotiate with copyright holders and obtain their consent in order to retransmit the programming of over-the air broadcasters. The Commission considers that the negotiation of Internet retransmission rights will allow broadcasters and producers to address the potential negative effects discussed above on a case-by-case basis, while leaving open the possibility that business models will evolve that will permit the realization of the potential benefits of Internet retransmission. The Commission further considers this requirement for negotiation sufficient at this time to ensure that Internet retransmission contributes to the attainment of the objectives of the *Broadcasting Act*.
79. In light of the above, the Commission does not consider it necessary or appropriate to require the licensing of Internet retransmitters. Rather, Internet retransmission undertakings should remain exempt from these and from other requirements under Part II of the *Broadcasting Act*. In addition, since the recent amendments to the *Copyright Act* address the main concern identified in this proceeding, the Commission sees no need to amend the *New Media Exemption Order* at this time.

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