



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

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

13 September 2002

Diane Rheume, Acting Secretary General,
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

By Facsimile – (819) 994-0218

Dear Ms Rheume:

**Re: Calls for comments concerning Internet Retransmission
(Order in Council P.C. 2002-1043)**

Introduction

1. The Canadian Film and Television Production Association (CFTPA) is pleased to provide this comment in response to the Commission's call for comments on the retransmission via the internet of the signals of over-the-air television and radio broadcasting undertakings by third parties.
2. The Association represents the interests of almost 400 companies engaged in the production and distribution of English-language television programs, feature films and interactive media productions in all regions of Canada. Our member companies are significant engagers of Canadian creative talent and bring together the writers, directors, production designers, directors of photography, performers, music composers, editors, production crew and post-production lab crafts people that contribute their arts and skills to our productions.
3. CFTPA has noted the parameters of this call, as set out in Broadcasting Public Notice CRTC 2002-38. To facilitate the present inquiry, made at the request of Parliament, the CRTC has posed a series of sixteen questions. The CFTPA will address the following issues: the impact of internet retransmission on the Canadian independent production sector, the appropriateness of an exemption order governing internet retransmission, and the protection of program rights.

Impact on Canadian independent production

4. CFTPA notes that comments filed in response to the Commission's *Fact finding inquiry on interactivity* (Public Notice CRTC 2001-113), form part of the record of this proceeding. Our submission last February outlined our membership's views on the characteristics of interactivity and on the economic value and rights associated with different types of interactive content. We described the role of producers and new media content creators as follows:

Independent producers and new media content creators work in a broad range of formats and genres to give expression to Canadian stories, interests and concerns. Producers are responsible for financing the production, for budgeting and for contracting the services of creative and craft talent in accordance with negotiated guild and union contracts. They exercise financial and creative control over all aspects of the program, from beginning to end, and bear full responsibility for ensuring that the production is realized. In return, they hold copyright in the production and control over how the production is exploited, particularly through the negotiation of broadcast distribution rights. It is vital to our members that the broadcast industry recognize that interactive rights are distinct and separate from broadcast program rights and, as such, must be licensed separately at fair market value.

5. The CFTPA made a clear distinction between the online streaming of a program via the Internet with no alteration to the production, and the creation of new and original interactive content that is delivered via the internet or wireless communications devices. Broadcasters and producers object to the first application unless it is undertaken with their consent. For producers, it is a consent under copyright; for broadcasters, it is a consent to a potential infringement of the broadcast window they have negotiated.
6. The term Internet retransmission is generally used to mean non-consensual transmission simultaneous with the original over-the-air transmission. Such activity has direct consequences for the independent production sector. With the exception of programs produced in-house, Canadian private conventional broadcasters, pay television services and most specialty services depend upon us to meet their Canadian content obligations. Significantly, we create the high-cost drama, documentary and performance programming that broadcasters need to fulfill key components of their prime time priority Canadian exhibition requirements.
7. Broadcasters pay us a licence fee to exhibit our creations. Essentially this is a negotiated contract giving broadcasters the right to air a program in a defined "broadcast window" (a specified number of viewings over a certain period of time). Broadcasters expect and pay for exclusivity, as it is this factor that drives viewership and thus advertising (or subscription) revenues. Without exclusivity, broadcasters will pay less for a program.

8. Unlicensed internet retransmission of over-the-air broadcast signals would effectively eliminate the first broadcast window in every territory of the world. This would result in lower broadcast fees outside Canada and a reduction (or the elimination) of the program distributor's advance on sales in foreign markets. As a consequence, we would have less money with which to produce our programs and a reduced ability to tell our stories to Canadians and to the world.
9. While the Internet and new media activities offer vast potential for innovation, Canada must ensure that we not confuse progress with piracy. An entity that takes someone else's content without authority or permission and retransmits it over the World Wide Web is not innovating or otherwise contributing to the broadcasting system. One way that the CRTC could deal with this type of activity is by an outright ban on non-consensual internet retransmission. CFTPA would not oppose such an approach in the short term. We recognize, however, that such an approach could preclude the ability of licensed Canadian cable and satellite broadcast distribution undertakings from using the Internet as a beneficial adjunct to their activities.
10. Alternatively, the CRTC could require Internet retransmitters to be licensed. CFTPA believes that, if internet retransmitters are licensed, they should be subject to essentially the same requirements and obligations as are imposed on cable and satellite broadcast distribution undertakings – tiering and linkage, access, simultaneous substitution, contribution of a percentage of revenues to the Canadian Television Fund, etc. Without such obligations, the very structure of the broadcasting system is put in peril.
11. Licensed Canadian cable and satellite operators must also adhere to two other essential regulatory requirements. They must ensure that reception of the broadcast signals they distribute is only available to authorized recipients within Canada, and they are precluded from inserting commercial messages within or around the broadcast content they are authorized to distribute.
12. The CRTC is familiar with the concerns of Canadian producers, television, pay and specialty operators and broadcast distribution undertakings regarding the harm caused by grey and black market services operating outside our borders. Canada must make every effort to ensure that we not exacerbate the problems this creates for legitimate program rightsholders by permitting similar activities to occur in this country.
13. Competitive advertising has the potential to reduce significantly broadcaster revenue, with downstream consequences for Canadian programming and persons such as ourselves who create that programming.
14. It is essential that internet retransmitters also be subject to these requirements.

The Exemption Order as a Regulatory Instrument

15. The CRTC is asking whether internet retransmission could “reasonably be expected to become complementary or substitutable for existing over-the-air broadcasting undertakings and/or distribution undertakings” and whether an exemption order concerning internet retransmission is the appropriate means of regulating this activity.
16. Section 9(4) of the *Broadcasting Act* provides that the CRTC may regulate by way of an exemption order, “where it is satisfied that compliance with those requirements will not contribute in a material manner” to the implementation of Canadian broadcasting policy. As our arguments in this and previous filings have made clear, the CFTPA believes that the CRTC must maintain full authority over the distribution function of the broadcasting system, no matter the mode of delivery.
17. This is because the business model of the independent production sector hinges on the ability of the producer to negotiate separate licensing agreements for each broadcast window, with the licence fee determined by the value of each exhibition window. The same holds true of Internet or wireless delivery. While new technologies offer new media for exploiting creative works, there is still an inherent obligation on the producer to negotiate new rights from the underlying rightsholders before any such exploitation can happen. It is incumbent on the CRTC to ensure that its broadcast policies support and sustain this continuum.
18. In our filings related to the 1999 New Media proceeding, CFTPA urged the CRTC not to retreat from regulation. We emphasized the need to protect intellectual property rights and that Canada needs appropriate mechanisms to support the development of a Canadian presence in new media. While we concurred that an exemption order was an appropriate mechanism to deal with activities that do not affect in a material manner the implementation of Canadian broadcasting policy, nevertheless we proposed that at least a light-handed regulatory approach was appropriate and required for activities which would impact the Canadian broadcasting system.
19. In the short term, we would certainly support the CRTC continuing its New Media Exemption Order unchanged, i.e., internet transmitters would be covered by the Order and, by virtue of Bill C-48, would fall outside the compulsory licence regime. In the longer term, if the CRTC chooses to regulate broadcasting via the internet, if internet retransmission is licensed, it must be subject to the same regulatory obligations as other broadcast distribution undertakings.

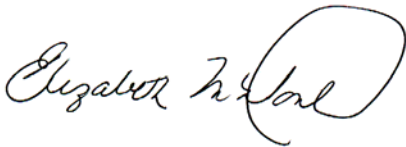
The protection of program rights

20. The Copyright Board has established a retransmission tariff, which is paid by those who retransmit distant television signals – the operators of cable, DTH, MDS and MATV distribution systems – to copyright collectives, on behalf of copyright holders. (One of these, the Canadian Retransmission Collective was launched by the CFTPA.)
21. Implementation of the retransmission royalty regime was part of Canada's commitment in entering into the Free Trade Agreement with the United States. It was put forward as a means of dealing with the unauthorized distribution of broadcast signals into distant markets. In our responses to Public Notices CRTC 2001-103 and 112, the CFTPA has put forward its views on the limitations of this mechanism. The Association's interest arises from the fact that the broadcaster accorded such wide carriage is not obligated to purchase program rights for the extended territory.
22. Several parties to this proceeding (Canadian Association of Broadcasters, Directors Guild of Canada, the Canadian Motion Picture Distributors Association, and the Canadian Retransmission Collective) have provided details about the compulsory licensing provisions of the *Copyright Act*. We concur with the views of others that broadcasting policy is not appropriately served if internet retransmitters are permitted to circumvent regulatory licensing provisions or to take advantage of licensing provisions which are less stringent than those required of other distribution undertakings.
23. Recent amendments to Canada's copyright legislation, which would be implemented once Bill C-48 is promulgated, would effectively prohibit internet-based retransmission services from taking advantage of the compulsory licensing regime as a means of circumventing the need to obtain consent from the rightsholders.
24. In May 2002, the CFTPA appeared before the Standing Committee on Canadian Heritage to discuss the proposed changes to Section 31 of the Copyright Act. Our position was clear. We are not adverse to new legitimate forms of distribution. In fact, additional distribution of our products is important to our growth.
25. However, content can only be fostered within a regime that allows for negotiated use and fair exploitation of rights. It is our view that, in future, if internet retransmitters are to be licensed, they must be required to implement and maintain effective technological means of limiting their output to authorized Canadian users and prohibited from inserting advertising messages into or around any broadcast content they distribute. They must also meet the additional obligations imposed on licensed Canadian broadcast distribution undertakings.

Conclusion

26. As we stated in our submission last February, the digital environment in which we now find ourselves promises to offer truly interactive experiences to the Canadian public. The Internet is rapidly becoming a delivery medium for digital cultural products as well as for transactional e-commerce. Broadcasters and distributors are positioning themselves to participate in this potential new revenue stream.
27. iCraveTV and JumpTV have pitted the interests of producers and broadcast programming undertakings against those of internet retransmitters. In essence, the issue is one of respect for copyright. It is our view that permitting third parties to distribute programming services via the Internet without them having obtained the right to that content is a breach of copyright law. The compulsory licensing provisions are neither an appropriate nor an acceptable means of circumventing this obligation. Parliament's intention, as evidenced in the proposed amendments to the Copyright Act, would expressly prohibit this practice. The CRTC should respect this intention.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth McDonald", with a large, stylized flourish at the end.

Elizabeth McDonald
President and CEO

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