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December 10, 2018

Members of the Standing Committee on Industry, Science and Technology

Dear Sir/Madam,

Re: Canadian Retransmission Collective's Submission to the Standing Committee on Industry, Science and Technology for Statutory Review of the *Copyright Act*

Introduction

The Canadian Retransmission Collective (CRC) is grateful for this opportunity to participate in the section 92 review of the *Copyright Act* (the Act). CRC acts as a copyright collective in the "retransmission" setting, in which the Copyright Board values the capturing of free, over-the-air broadcast signals for use on cable TV, satellite TV, or similar systems known as "BDUs".

CRC represents thousands of program rights holders, including independent Canadian program producers, the National Film Board of Canada, all producers of programs shown on Public Broadcasting Service (PBS) and Réseau France Outremer (RFO), educational TV producers in Canada (except Télé-Québec), all rights holders outside North America, and others. CRC's mission is to ensure that retransmission royalties reflect an equitable market value and to flow such royalties through to rights holders in a timely and efficient manner. Without equitable royalties or timely payment, all the laudable aims of the Act—protecting creators' rights, fostering the fair dissemination of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment—would be nullified.[1]

Generally speaking, program owners have the exclusive right to authorize communication to the public of their works by telecommunication. But section 31 of the Act creates an exception to this exclusive right in two ways:

- It provides a **full exception** to retransmission of programs contained in "local" signals. Simply put, the BDUs exploit the considerable economic value of programs without paying **any** royalty to rights holders for this use.

- It creates a **compulsory licence** for retransmission of programs contained in "distant" signals, to be valued by the Copyright Board in tariff proceedings. Program owners cannot block retransmissions, but they get a fair and equitable royalty for their use.

[1] See the recent discussion of the copyright balance in *Voltage Pictures, LLC v. John Doe,* 2017 FCA 97 at ¶21-27.

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CRC is supportive of measures that encourage broader distribution of programs. However, the regime should not permit third parties such as BDUs to capture all of the economic value of that expanded distribution.

The Act is not, and should not be, a general instrument of economic or industrial policy. Its purpose is not to provide sector-specific incentives or subsidies for particular forms of commercial exploitation of creative works. It should provide fair and consistent rules that encourage the creation and voluntary dissemination of creative works, to the benefit of the public, and allow creators to reap the rewards of their effort.

Retransmission creates value for broadcasters, BDUs, and viewers. Retransmission benefits Canadian society as a whole and CRC has no interest in limiting or restricting its scope. However, the value that is created through retransmission depends on the underlying programming. Nobody would watch a retransmission of a blank screen. This arrangement is only equitable if producers receive a fair share in the value that is created through exploitation of their work.

The existing retransmission royalty regime attempts to balance viewer, BDU, broadcaster, and owner interests; however, the balance should be updated to reflect changing technology and viewing habits. Fortunately, relatively simple technical fixes are available that will not require disruptive changes or present barriers to innovation.

CRC recommends two specific changes: the retransmission regime should be made explicitly technologically neutral, and the distinction between local and distant signals should be eliminated.

The retransmission regime should be technologically neutral

The Supreme Court of Canada has explained that the principle of technological neutrality means that the Act should avoid distinguishing between situations that are functionally equivalent to an end user, merely because different technologies are employed.[2] The policy benefit of this is clear: it allows the Act to apply consistent principles to a technological landscape that evolves on time scales too short for the legislative process to cope with.

The retransmission regime should be updated to resolve any doubt as to its continued application to newer and future broadcast technologies.

Our first recommendation involves explicitly "future proofing" the present definition of "signal" in s. 31(1) of the Act:

> ***signal*** means a **signal** that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

[2] *Rogers v. SOCAN,* 2012 SCC 35 at ¶39; *Robertson v. Thomson Corp.,* 2006 SCC 43 at ¶49.

There are at least two issues with this definition. The first and most obvious flaw is that the definition is circular ("signal means a signal"). The second is that it introduces terms ("a terrestrial radio or terrestrial television station") that are not themselves defined in the Act and have not received judicial treatment. Accordingly there may be doubt in future as to whether future delivery models will be recognizable (legally or practically) as "signals" related to "terrestrial television" or "terrestrial radio", even if they are functionally indistinguishable from present-day retransmissions.

This language creates a risk that the regime may be disrupted by changes in how broadcasters deliver programming to audiences. The regime should be reformulated to be technologically neutral now, before it becomes moribund. CRC proposes that the definition be amended to clarify that a "signal" is a fully neutral term:

> ***signal*** includes any means by which a literary, dramatic, musical or artistic work is transmitted by telecommunication for free reception by the public.

To be clear, CRC is not seeking to expand the scope of the regime beyond its current scope of retransmission of freely-available linear programming. On-demand and subscription services operate on different business models and should be treated differently. This status quo is preserved by retaining the condition in s. 31(2)(c) that a signal must be "retransmitted **simultaneously and without alteration**" to qualify for the retransmission regime. The proposed amendment "future proofs" the retransmission regime without impacting rights in other delivery models.

The distinction between local and distant signals should be eliminated

Viewers expect services to be mobile. Regulatory definitions tied to fixed locations are obsolete in a world where transmission and delivery are not location-dependent.

The current retransmission regime relies on a difficult-to-understand technical definition distinguishing local signals from distant signals.[3] The technological fragility of these definitions was demonstrated by the fact that they had to be changed to accommodate the transition from analog to digital television. However, the definitions still rely on a fundamental assumption that broadcast signals will be sent from or received in a fixed location.

In the mobile world, this is no longer true. Mobile viewers tune into "local" stations whether they are at home or on the road. Thus, viewers categorized as "local" under the old rules can and do consume content from "distant" locations, and vice-versa. The mobile world renders distance and location irrelevant.

[3] *Local Signal and Distant Signal Regulations,* SOR/89-254, s. 1(a) (referring to "Grade B contours" plus "noise-limited bounding contours" of "terrestrial television stations").

Rather than trying to concoct a "fix" for mobility, the better solution is to simply eliminate the distinction between local and distant signals, which has been not justified for many years and which will be increasingly difficult to justify or apply in future.

There is a longstanding debate in Canada and around the world about how to best support local broadcasters, producers and artists. CRC believes that such support is integral to our national and local identities. However, ensuring remuneration to program producers for retransmission of local signals is also fundamentally a question of fairness. Through the existing regime, BDUs have been obtaining a sector-specific subsidy through a full exception for retransmissions of local signals, with no compensation to broadcasters, producers and artists for use of their works.

Any royalties provided for local signals would be set by the Copyright Board, which must ensure that royalties are fair and equitable. The goal of these changes is to ensure that producers of programming are not shut out from receiving **any compensation at all** when others exploit the economic value of such programs. Per the Supreme Court's recent discussion in the *SODRAC* appeal, the respective contributions of program creators and users of copyrights should be valued in a manner that promotes the goals of the copyright balance.[4]

Retransmissions of local signals likely creates more value for BDUs than distant signals: local signals are more likely to be relevant to local audiences. It is illogical and inequitable that producers should be excluded from receiving any of the economic value reaped from the use of their programming in this way.

In the "value for signal" case,[5] the Supreme Court determined that legislative change would be needed to eliminate the statutory distinction between local and distant signals. The time to make this change has come. All retransmissions of linear programming should be subject to a fair and equitable royalty. If distinctions are to be drawn about how to value particular forms or modes of retransmission, they can be addressed by the Copyright Board in line with Supreme Court guidance on valuation and with the benefit of a proper evidentiary record.

This change can be accomplished via the amendments set out in Appendix A.

[4] *CBC v. SODRAC,* 2015 SCC 57 at ¶75.

[5] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168,* 2012 SCC 68.

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Conclusion

The two changes to the Act recommended by CRC are narrow, principled, non-disruptive and, most importantly, fair. They are fair to producers, who will continue to enjoy reasonable compensation for the exploitation of their programming. They are fair to broadcasters because they encourage innovations in broadcasting – giving them freedom to experiment with technologies offering new ways to connect with audiences. They are fair to viewers, who will benefit from the widest possible range of distribution models for programming, with the Copyright Board taking their interests into account as part of any tariff proceeding. Finally, they are fair to BDUs, who will continue to benefit from a compulsory license permitting them to commercially exploit programming, to their own profit, without any need to seek the consent of program owners. All that program owners ask in return is to receive fair compensation for the use of their works, in the form of a reasonable and sustainable royalty permitting them to reinvest in creating content for Canada and the world to enjoy.

We thank the Standing Committee for this opportunity to provide our written submissions on the review of the Copyright Act, and would be pleased to answer any questions you may have.

Yours truly,

Canadian Retransmission Collective

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Appendix A – Cumulative Changes to the Act and Regulations

Amendments to the Act

31 (1) In this section,

new media retransmitter means a person whose retransmission is lawful under the Broadcasting Act only by reason of the Exemption Order for New Media Broadcasting Undertakings issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time; (retransmetteur de nouveaux médias)

retransmitter means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter; (retransmetteur)

signal includes any means by which ~~means a signal that carries~~ a literary, dramatic, musical or artistic work ~~and~~ is transmitted by telecommunication for free reception by the public ~~by a terrestrial radio or terrestrial television station~~. (signal)

Retransmission of local and distant signals

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a ~~local or distant~~ signal;

(b) the retransmission is lawful under the Broadcasting Act;

(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(d) ~~in the case of the retransmission of a distant signal,~~ the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

Regulations

(3) The Governor in Council may make regulations

~~(a) defining "local signal" and "distant signal" for the purposes of subsection (2); and~~

(b) prescribing conditions for the purposes of paragraph (2)(e), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

Repeal or Amendment of Regulations:

- *Local Signal and Distant Signal Regulations,* SOR/89-254 (**Repeal**)
- *Retransmission Royalties Criteria Regulations,* SOR/91-690 (**Remove "distant" from ss. 2(a)-(b)**)

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