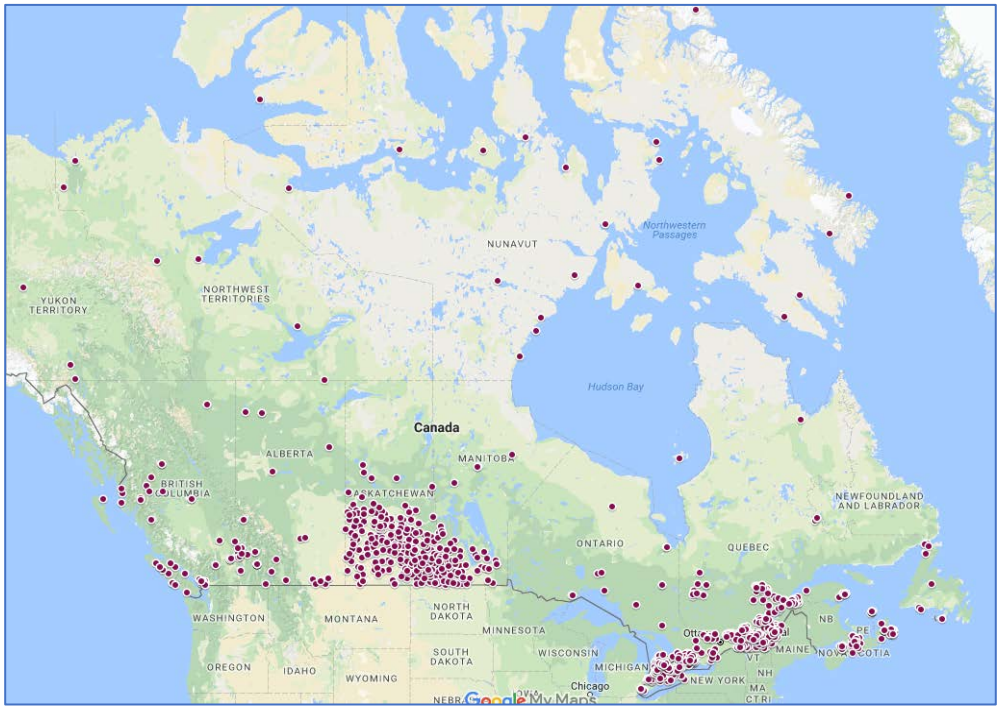
Regulatory

CANADIAN COMMUNICATION SYSTEMS ALLIANCE INC.

Submission for Consideration
in the
Standing Committee on Industry, Science and Technology
Statutory Review Of The Copyright Act



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September 6, 2018

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Introduction

1. As a representative of more than 115 independent companies who distribute broadcasting and other communications services to Canadians in more than 1,200 communities from sea to sea to sea, CCSA wishes to comment on recent proposals by the US National Association of Broadcasters ("NAB") and Bell Canada to introduce the US "retransmission consent" model into Canada and Bell Canada's related recommendation to repeal s. 31 of the *Copyright Act*.

2. In the United States, the retransmission consent regime was implemented by passage of the *1992 Cable Act*.

3. Ever since, the American retransmission consent regime has been nothing short of a disaster for both smaller distributors of video programming and their customers. The regime has resulted in dramatic price increases to consumers and black-outs of broadcasting services that also hold television viewers hostage.

4. A key element of CCSA's submission is a 2017 release of the American Cable Association ("ACA"), which represents some 750 small and medium–sized distributors throughout America. The ACA's release is set out in full at **Attachment A** to this brief. ACA's release describes and quantifies the punishing effect of this regime on video programming distributors and American consumers.

5. Replication of that regime in Canada would have dire consequences for Canada's regulated broadcasting system, for the Broadcasting Distribution Undertakings ("BDUs") who deliver television programming to Canadians and, not least, to Canadian consumers.

The Early History in Canada

6. In the 1950s, the cable television distribution system began to grow in both Canada and the US. In Canada, the sector's growth was an organic, entrepreneurial response to the problem that, while US broadcast stations could be received off-air, the signals were often weak and the channels were "snowy".

7. With most of Canada's population living within 100 kilometers of the US border, local entrepreneurs set up receiving dishes on towers and delivered much improved signals to their customers through coaxial cable.

8. At the same time, the Canadian "over the air" television networks were getting their start. Those networks were concerned with rights and advertising competition from the US broadcasting networks. They were also interested in getting the benefit of the increased viewership and improved signal quality that cable distributors could deliver.

9. After an intensive campaign, those Canadian networks succeeded in having the CRTC (or the Board of Broadcast Governors, as it then was) make distribution of their free, "over the air" channels mandatory for all licensed BDUs.

10. That result is apparent in s. 17 of today's *Broadcasting Distribution Regulations* (the "Access Rules") which requires all licensed BDUs to distribute local and regional television stations on their basic service; that is, the entry level of service that all customers must buy before being able to access other "optional" services like national sports channels and video-on-demand.

11. Mandatory distribution of such local and regional "over-the-air" television stations increased their reach, quality of service and advertising revenues. On the other hand, such distribution imposed significant costs on the BDUs to build the network capacity needed to deliver those stations.

12. Canadian cable, satellite and Internet Protocol (IPTV) BDUs have invested billions of dollars in their facilities, including a transition to digital technology. These BDUs have never charged the broadcasters for access to – and distribution on – their systems. By way of contrast, in a number of European countries, television broadcasters pay the cable and satellite operators for system access and signal delivery.

Recent History – "Fee For Carriage"

13. In more recent years, some of the Canadian broadcast networks have attempted to secure a right of consent and a related ability to negotiate wholesale fees for distribution of their TV stations by BDUs. Despite their early demands for distribution on the BDUs' systems, these broadcasters now accuse the BDUs of "stealing" their signals.

14. Two times, the CRTC denied the broadcast networks' applications for a right to charge "Fee for Carriage"; that is, to implement what would effectively be a Canadian "retransmission consent" regime. The CRTC concluded that there was no evidence to justify such a regime. Following a third attempt, the CRTC decided to implement a right of consent to BDU distribution of those channels and the right to charge BDUs a fee for distribution of their television stations. However, uncertain of its authority to implement such a regime, the CRTC referred the question of its jurisdiction to do so to the Courts.

15. In the result, the Supreme Court of Canada decided that the scheme was *ultra vires* the CRTC's jurisdiction and that, more importantly, such a scheme would contradict a comprehensive and balanced regime already set out by the *Copyright Act.* That scheme provided for compensation to rightsholders, including the broadcasters, for retransmission, by BDUs, of the "works" that the "over the air" television signals contain.

16. Under that comprehensive copyright regime, BDUs pay royalties to those persons – including the broadcasters – who hold a copyright in the works contained in broadcast signals retransmitted from distant markets.

17. In making its decision, the Supreme Court carefully considered the legislative history of the relevant provisions of *the Copyright Act*. In so doing, the Court observed that:

> . . . Parliament specifically addressed the question of whether the simultaneous retransmission of works carried in local and distant television signals should require the consent of the copyright owner: it adopted the compulsory licence and exception regime by way of ss. 31 and 71-76 of the *Copyright Act* (Canada-United States Free Trade Agreement Implementation Act, s. 62).[1]

18. The Court continued:

> Studies on the same question had preceded this enactment; there, too, a major concern was that copyright owners "should not be permitted to stop retransmission because this activity is too important to Canada's communications system" (Standing Committee on Communications and Culture. A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright (1985), at p. 80 (A.R., vol. III, at p. 118) . . . .[2]

[1] 2012 SCC 68 at para. 75.
[2] *Ibid.*

19. Finally, the Court noted that ". . . the history confirms Parliament's deliberate policy choice in enacting the compulsory licence and exception, or user's rights, regime under s. 31(2)."[3]

20. Notably, the references considered by the Court in those passages dealt directly with the question of compensation for retransmission of signals and works in the context of the negotiation of the initial bilateral Canada US Free Trade Agreement ("CUSFTA"), which, later, was incorporated by reference into NAFTA.

21. To introduce a retransmission consent regime at this time would require Parliament to completely reverse the deliberate policy choices it made in the context of the original CUSFTA negotiation.

22. Finally, Bell Canada has recommended, in the Committee's current proceeding, that s. 31 of the *Copyright Act* be repealed.

23. CCSA wishes to make it clear that such an action, by itself, would make the previously legal retransmission of "over the air" channels by BDUs an infringement of copyright and therefore illegal.

24. The only way BDUs would be able to transmit those channels legally would be to secure the broadcast networks' and all other rightsholders' consent to retransmission of the free "over the air" signals and the works they contain. To secure such consent, they would have to pay fees to all of the rightsholders.

25. In other words, repeal of s. 31 of the *Copyright Act* would amount to a *de facto* implementation of a new "retransmission consent" regime in Canada.

26. Bell's proposal would actually make retransmission of any signals virtually impossible. To comply with a *Copyright Act* that did not include s. 31, a BDU would need to acquire a licence from the television station and, also, from every person who owns rights in any of the programming broadcast on the station.

27. The only way that could work is if the television station acquired the retransmission rights to all of the programming it broadcasts. There is no evidence that the broadcasters could acquire those rights.

[3] 2012 SCC 68 at para. 78.

28. The result would deprive Canadians, especially those in small and remote communities not served by local "over the air" stations, with access to important Canadian broadcast services.

29. It is important to keep in mind that the *United States Copyright Act* also has the equivalent of our section 31. So the US cable companies pay royalties to program owners just like Canadian BDUs but, also, have to negotiate consent with the broadcaster to retransmit the signal.

Conclusion

30. The "over the air" broadcast networks, both Canadian and American, in demanding retransmission consent, are completely ignoring a history that began with them demanding access to the highly valuable network "real estate" of the BDUs.

31. Those broadcasters continue to enjoy substantial "in kind" value in the form of extended, high quality distribution of their television programming services by BDUs. That distribution enhances the broadcast networks' ability to generate advertising revenues.

32. The BDUs' physical distribution networks are continually challenged for capacity as the universe of available video expands exponentially. The BDUs must make substantial and continuing capital investment to maintain and expand those networks.

33. It should not be forgotten, then, that the "over the air" channels consume extremely valuable capacity on the BDUs' networks.

34. The broadcast networks – both Canadian and US – are fully compensated for the retransmission of their programs through royalties properly paid under the *Distant Television Signals Retransmission Tariff* certified by the Copyright Board of Canada under the authority of the *Copyright Act*.

35. By virtue of those royalty payments, rightsholders are properly compensated and the BDUs have a legal right to distribute the "over the air" signals and the works they contain to their customers.

36. Finally, as a practical matter, the American experience with "retransmission consent" has dramatically increased the cost of television services to consumers with no actual addition of value to the services they receive.

37. The American regime also has left viewers exposed to increasing levels of blackouts of broadcast channels imposed by the broadcast networks when American video distributors attempt to resist massive increases they must pay for consent to distribute those channels.

38. The American regime has also created an environment that permits broadcast networks that also operate Specialty channels to tie availability of their Specialty channels to the BDU's consent to pay retransmission consent fees.

39. With the large, vertically integrated Canadian broadcaster networks also owning the vast majority of Canadian specialty channels, such a scheme would be devastating for the Canadian broadcasting system and for Canadian consumers.

40. At a time when the regulated Canadian broadcasting system is under threat from well-funded disrupters and when Canadian viewers appear to be willing to get content wherever they can, regardless of the legality of the sources, introduction of a new scheme that adds cost but does not increase value to consumers is the worst thing that could be done to Canada's system.

41. Accordingly, the government should reject proposals by NAB and Bell Canada for the repeal of s. 31 of the *Copyright Act* and introduction of a "retransmission consent" regime into Canada.

APPENDIX A – AMERICAN CABLE ASSOCIATION PRESS RELEASE ON RETRANSMISSION CONSENT

ACA Launches "TV Ransom" To Highlight Broadcasters' Abusive Behavior With Retransmission Consent Resulting In Consumer Harm[4]

OCTOBER 4, 2017IN PRESS RELEASES

Campaign Launch Timed To 25th Anniversary Of Retrans' Birth

PITTSBURGH, October 4, 2017 – The American Cable Association today launched TV Ransom, a national campaign to set the record straight that corporate broadcasters are to blame for out-of-control retransmission consent fees and TV station blackouts that blindside consumers with the needless loss of their favorite news, weather reports, and national sporting and entertainment events.

Across the country hundreds of local cable operators are beginning to negotiate with a handful of corporate media conglomerates that own many of the local TV station affiliates for ABC, CBS, FOX and NBC. This process, called retransmission consent, pits ACA's 750 small and mid-sized cable operator members, who predominantly serve rural Americans and provide competition to large operators in urban markets, against huge corporations with no stake or ties to these local communities. The outcome is predictable: Broadcasters leverage their market power to charge these smaller providers the highest rates in the market, raising the cable bills of more than 7 million cable customers across the country.

"Retransmission consent should be a straight-forward business negotiation, but, unfortunately, these corporate broadcasters abuse their market power to extract outrageous fees from cable customers," said Matthew M. Polka, President and CEO of the American Cable Association.

Smaller pay-TV providers are not alone regarding concerns about runaway retransmission consent fees. A senior executive of Comcast, which owns the NBC network and 28 NBC and Telemundo local television stations, recently described retransmission consent fees as the "No. 1 driver of increases in cable prices for consumers these days."

Since passage of the 1992 Cable Act, which marks its 25th anniversary on October 5, cable operators and broadcasters have been negotiating "retrans." And for 25 years, the fees that cable operators and their customers are forced to pay have been growing at exponential rates even though viewership is down: Retrans fees rose about 30 times over the last decade while network primetime audiences fell by more than half, according to SNL Kagan and Nielsen.

[4] Accessed at http://www.americancable.org/aca-launches-tv-ransom-to-highlight-broadcasters-abusive-behavior-with-retransmission-consent-resulting-in-consumer-harm/ on October 6, 2017.

Furthermore, broadcasters generally extract the highest fees from the smallest cable operators and their customers, and their demands keep escalating. SNL Kagan projects that these fees will cost U.S. consumers and satellite and cable operators $11.6 billion by 2022, up from $8.6 billion in 2017, a stunning 35 percent increase in just five years.

Unfortunately, broadcaster overreach doesn't stop with aggressive tactics designed to line their bank accounts. These broadcasters think nothing of disrupting local programming – even in an emergency – in an effort to gain leverage in negotiations. A few examples:

• As Hurricane Irma targeted the Gulf Coast, Hearst Television took down its signal for two markets in the path of the storm – Orlando and New Orleans – even as broadcasters touted on Capitol Hill their commitment to the public during extreme weather events.

• For a month in early 2017, Northwest Broadcasting simultaneously blacked out ABC, CBS, NBC and FOX signals in two Mississippi communities served by Cable ONE.

• Shortly after acquiring an NBC affiliate station in Toledo, Ohio, Sinclair Broadcast Group demanded that Buckeye Broadband pay significantly higher fees to access the station's signal. That demand led to Sinclair taking the station off the air for 212 days before an agreement could be reached.

"Every day, smaller cable operators work hard to ensure our neighbors have access to the video, broadband, and phone services they want and need," continued Polka. "Meanwhile, the corporate broadcasters are going unchecked as our members and their customers suffer through blackouts and get hit in the wallet, repeatedly."

The TV Ransom campaign is designed to: 1) illustrate how corporate broadcasters use their market power to take advantage of retransmission consent negotiations to extract escalating fees from cable customers; 2) expose corporate broadcasters' weak business models, which lead to their aggressive negotiation tactics designed to make money off the backs of consumers; and 3) demonstrate how consolidation of broadcast and media companies is taking local TV station ownership corporate, so that local news is no longer local, and "free TV" is no longer free.

About the American Cable Association: Based in Pittsburgh, the American Cable Association is a trade organization representing about 750 smaller and medium-sized, independent cable companies who provide broadband services for nearly 7 million cable subscribers primarily located in rural and smaller suburban markets across America. Through active participation in the regulatory and legislative process in Washington, D.C., ACA's members work together to advance the interests of their customers and ensure the future competitiveness and viability of their business. For more information, visit http://www.americancable.org/

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ABOUT US

For more than 20 years, the American Cable Association has proudly represented independent cable operators throughout America.
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