

June 9, 2006

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
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. These comments are filed on behalf of the Canadian Wireless Telecommunications Association (the "CWTA") in accordance with the procedure outlined in the above-noted Public Notice ("the Notice") as modified by Broadcasting Public Notice CRTC 2006-48-1.
2. CWTA is the authority on wireless issues, developments and trends in Canada. It represents cellular, PCS, messaging, mobile radio, fixed wireless and mobile satellite carriers as well as companies that develop and produce products and services for the industry.
3. The Association supports the Commission's decision to exempt from regulation undertakings that provide broadcasting services that are delivered and accessed through mobile devices. However, CWTA has serious concerns about the terms of the proposed exemption order as set out in the Notice. These concerns are addressed in the following comments.
4. Specifically, CWTA opposes including in the new exemption order the proposed obligation for an exempt mobile broadcasting undertaking to obtain the prior consent of a broadcaster for the retransmission of its signal. This proposed obligation is based on mistaken interpretations of what was said in the proceeding leading up to the Notice, is unnecessary in order to ensure that rights holders are properly protected, and would amount to the Commission acting beyond its jurisdiction to re-write existing copyright laws and establish a new copyright right not provided for in the *Copyright Act*.
5. CWTA also submits that the new proposed exemption order should apply to all broadcasting services that are delivered and accessed through mobile devices, not just such TV services.

Retransmission Consent

Introduction

6. In Broadcasting Public Notice CRTC 2006-47 (“Regulatory framework for mobile television broadcasting services”), the Commission noted at paragraph 49 that some parties “expressed concern about potential use by mobile broadcasters of broadcast signals without permission” and, in this respect, specifically referred to CMPDA’s submission. We do not believe that this correctly summarizes the CMPDA submission. Contrary to the statement in paragraph 49 of BPN 2006-47, parties had not “expressed concern about potential use by mobile broadcasters of broadcast signals without permission”, nor did CMPDA submit that “mobile TV providers should be required to obtain the consent of a terrestrial broadcaster for the retransmission of its signal.”
7. In that same BPN, there is similar inaccuracy at paragraph 50, where it is stated that “the wireless carriers appear to be negotiating with broadcasters for the rights to retransmit their signals and have committed to do so”.
8. The Commission then relies on these statements as grounds for the second criterion of its proposed exemption order, namely:

“The undertaking has obtained the prior consent of a broadcaster for the retransmission of its signal.”
9. CWTA opposes inclusion of this proposed criterion because, as described below, it is based on misinterpretations, it is unnecessary, and we believe it would amount to the Commission acting beyond its jurisdiction to re-write existing copyright laws and establish a new copyright right not provided for in the *Copyright Act*.

Programming vs. Signal

10. While the Commission proposes in the exemption order to respond to CMPDA’s apparent concerns by granting broadcasters the right to consent to the retransmission of their signals by mobile TV broadcasting undertakings (signal retransmission consent), what CMPDA actually sought was for the Commission to grant a right to the owners of the *programming* in the signal to consent to the retransmission of such programming (program retransmission consent).
11. There is a clear distinction both in fact and law between the retransmission of a broadcaster’s signal and the retransmission of the programming in the signal. Section 31 of the *Copyright Act* establishes a regime of rights and obligations with respect to the retransmission of the programming in a broadcaster’s signal; however, no similar rights or obligations exist with respect to the signal itself.

12. Under the provisions of s. 31 of the *Copyright Act*, retransmitters of over-the-air (OTA) broadcasting signals may retransmit the programming in local signals without incurring liability, but must pay royalties under a Copyright Board-approved tariff for the right to retransmit the programming in signals imported from distant markets.
13. A “retransmitter” is broadly defined in s. 31(1) to mean “a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter”. A “new media retransmitter” is a retransmitter operating pursuant to the Commission’s New Media Exemption Order¹. Traditional wireline broadcasting distribution undertakings (BDUs) are thus “retransmitters”, as are DTH providers as well as MDS providers, including LOOK Communications. Similarly, mobile television broadcasting undertakings operating pursuant to the proposed exemption order rather than pursuant to the New Media Exemption Order will, to the extent they retransmit OTA signals, qualify as “retransmitters” for the purposes of the *Copyright Act’s* retransmission regime.
14. Given that the mobile television broadcasting services described in BPN 2006-47 and operated by Bell Mobility Inc., TELUS Mobility and Rogers Wireless Inc. are, pursuant to that BPN, subject to the New Media Exemption Order, they are excluded from the *Copyright Act’s* retransmission regime and thus must obtain the consent of program suppliers to retransmit their programs when contained in OTA signals. This fact, however, does not in any way justify the Commission creating a similar exclusion for undertakings *not* subject to the New Media Exemption Order simply because they also offer mobile broadcasting services. The legal distinction is between retransmitters that operate pursuant to the New Media Exemption Order and those that do not. The mobile broadcasting undertakings contemplated in the Notice, which will operate pursuant to the new proposed exemption order rather than pursuant to the New Media Exemption Order, will be subject to the *Copyright Act’s* retransmission regime and rights holders will have their retransmission rights protected accordingly.
15. The Commission does not have the power or jurisdiction to re-write Canadian copyright law, which is what it would be doing if it were to incorporate in the proposed mobile broadcasting exemption order the program retransmission consent obligation that CMPDA actually sought.

¹ The exclusion from the *Copyright Act’s* retransmission regime of retransmitters operating pursuant to the Commission’s New Media Exemption Order is a relatively recent development. Representatives of rights holders had lobbied hard for this exclusion based on the substantial differences they perceived at the time between services delivered and accessed over the Internet and those that were not. The narrow exclusion was established after lengthy government-sponsored public consultations, a number of parliamentary committee hearings, and examination and approval by the House of Commons and Senate.

16. If the Commission's concern is that rights holders may not be compensated for the retransmission of their programs by mobile broadcasting undertakings operating pursuant to the new proposed exemption order, the solution is to clarify that such undertakings are not subject to the New Media Exemption Order, and thus are included in the s. 31 retransmission regime. The solution is *not* for the Commission to try to establish a new rights regime by imposing on mobile broadcasting undertakings a unique program retransmission consent obligation which is not borne by any other retransmitter whose services are not delivered and accessed over the Internet.

Broadcasters Have no Retransmission Right in their Signals

17. As described in the preceding section, by including in the proposed exemption order a requirement that mobile broadcasting undertakings obtain the prior consent of an OTA broadcaster for the retransmission of its *signal*, the Commission is proposing a different obligation than what CMPDA and most others who commented on this issue in fact sought in this proceeding.
18. More importantly, and of more concern, the Commission's proposed signal retransmission consent requirement would amount to the creation of an entirely new and very controversial copyright right for OTA broadcasters - a right that Canada has specifically rejected with respect to Canadian OTA signals, and which, with respect to foreign OTA signals, is currently the subject of intense examination and heated debate at the international level. Accordingly, the Commission should adopt neither the CMPDA program retransmission consent proposal nor the signal retransmission consent criterion it actually included in the proposed exemption order.
19. CWTA notes that the carriers' prior submissions with respect to negotiations with broadcasters have been mischaracterized at paragraph 50 of BPN 2006-49. The wireless carriers had not been "negotiating with broadcasters for the rights to retransmit their signals", nor have they "committed to do so", for the following reasons:
- a. As CWTA stated in its Reply comments of September 27, 2005, the carriers at that point had been focusing their attention on transmitting programming carried by specialty services, for which the carriers could and must negotiate and secure the *transmission* rights. No negotiations with OTA broadcasters to *retransmit* their signals had taken place nor had they been contemplated;
 - b. The OTA broadcasters cannot negotiate signal retransmission rights with the mobile carriers - or with any other retransmitters for that matter - because they have no such rights to negotiate: no such rights exist.

20. While s. 21 of the *Copyright Act* grants broadcasters very limited rights in their signals, s. 21(1)(c) was purposely drafted so as to clarify that such rights do not apply to retransmission, including wireless retransmission. Specifically, while s. 21(1)(c) grants a broadcaster the right to authorize another broadcaster to retransmit its signal, the definition of “broadcaster” in s. 2 of the Act intentionally excludes retransmitters. Thus the limited right in s. 21(1)(c) applies only with respect to the retransmission of an OTA broadcaster’s signal by another OTA broadcaster, not by a wireline or wireless retransmitter. Accordingly, Canada’s copyright law does not grant Canadian OTA broadcasters the right to authorize the retransmission of their broadcast signals by mobile TV undertakings or any other licensed or exempt retransmitter.
21. Similarly, no such right is granted to foreign (e.g. US) OTA broadcasters, which would also appear to be covered by the Commission’s proposed signal retransmission consent criterion.
22. The question of whether a brand new retransmission right should be established for foreign broadcasters’ signals is the subject of lengthy and on-going deliberations at the World Intellectual Property Organization (WIPO). WIPO is currently considering a proposed Treaty on the Protection of Broadcasting Organizations which, as presently drafted, would contain such a right. Support for the proposed treaty amongst WIPO members, however, is much divided. Most importantly, the Canadian Government is opposed to such a right applying within Canada and, for this reason, reiterated at the recent WIPO meetings in Geneva its official position that parties to the proposed treaty, should it ultimately be adopted, should be given the option of opting out of the retransmission right provisions.
23. Accordingly, should the Commission maintain the proposed signal retransmission consent requirement in the mobile broadcasting exemption, it would be acting against the Canadian Government’s official position on the matter with respect to foreign broadcasters’ signals.
24. With respect to Canadian OTA signals, adoption of the Commission’s proposed signal retransmission consent criterion would amount to the creation of a new copyright right for broadcasters which the Canadian Government has specifically chosen not to establish under Canadian copyright law.
25. For these reasons, CWTA submits that Commission must delete the second criterion in its proposed mobile broadcasting exemption order.

TV Policy Review

26. Even if the Commission is not satisfied with the above copyright-based arguments against its retransmission consent proposal, CWTA submits that it is premature to introduce such a new and controversial obligation into the Canadian broadcasting system.

27. Rather, CWTA submits that the matter should be considered in the context of a larger public process where all the associated issues and implications could be given a thorough examination by all interested and affected parties.
28. In this respect, CWTA notes that one broadcaster, CanWest Global, has publicly indicated that it wishes to have its particular interest in a broadcasters' fee for carriage examined as part of the upcoming TV Policy Review referenced in the CRTC's recently released 3-Year Action Plan. As the notion of retransmission consent may be closely aligned with the notion of fee for carriage, CWTA submits that, if the CRTC wishes to consider either issue, it should do so as part of that upcoming proceeding and not in the narrow context of this proposed exemption order proceeding.

Scope of the Proposed Exemption Order

29. In BPN 2006-47, the Commission announced its determination that the mobile television broadcasting services described therein and operated by Bell Mobility Inc., TELUS Mobility and Rogers Wireless Inc., in conjunction with MobiTV Inc., fall within the Commission's existing New Media Exemption Order because they are "delivered and accessed over the Internet."
30. In that same BPN, the Commission determined that mobile broadcasting services that do not fall under the New Media Exemption Order, because they are not delivered and accessed over the Internet, should nevertheless be treated the same as services subject to that Exemption Order.
31. Consistent with this approach and given the fact the New Media Exemption Order applies to *all* broadcasting services delivered and accessed over the Internet, CWTA submits that the new proposed exemption order should similarly apply to all broadcasting services that are delivered and accessed through mobile devices.
32. In BPN 2006-47, the Commission determined that mobile broadcasting services are unlikely to compete significantly with traditional broadcasting services due, for example, to the limitations of the wireless technology employed, the battery life and audio quality of the services, and that the market for mobile broadcasting services will likely differ from the market for conventional broadcasting services. For these reasons, the Commission concluded that, "given the current technical challenges associated with the wireless technology noted above, the mobile television broadcasting services are unlikely in the near future to become substitutes for conventional broadcasting services or impede the ability of traditional broadcasters to fulfill their obligations under the Act."
33. CWTA submits that these above observations and conclusions apply equally to all mobile broadcasting services, not just to television services, and thus there are no reasons why, unlike the New Media

Exemption Order, the proposed exemption order should be limited in its scope and application to only mobile *television* services.

34. In addition, CWTA is concerned that the proposed exemption order's reference to specific forms of mobile technology may unintentionally limit its application in a dynamic and changing technological environment.
35. Specifically, CWTA is concerned that the phrase in the first proposed criterion, "including cellular telephones and personal digital assistants", might be interpreted as an all-inclusive list, as opposed to examples of mobile devices. In this respect, "cellular", for example, refers to a particular part of the spectrum used by mobile companies as distinct from PCS telephone services.
36. Accordingly, CWTA submits that the first - and only – criterion for the new proposed exemption order should be:

“The undertaking provides broadcasting services that are delivered and accessed through mobile devices, including but not limited to cellular telephones, PCS telephones, and personal digital assistants.”

Conclusion

37. CWTA appreciates the opportunity to provide these comments.

Sincerely,

Electronic filing

J. David Farnes
Vice President
Industry and Regulatory Affairs

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