CONSULTATION PAPER ON THE APPLICATION OF THE COPYRIGHT ACT'S COMPULSORY RETRANSMISSION LICENCE TO THE INTERNET

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TABLE OF CONTENTS

1. INTRODUCTION

Section 31 of the *Copyright Act* provides a compulsory copyright licence, which permits the retransmission of the copyrighted works associated with over-the-air television and radio signals without the consent of affected rights holders, so long as specified conditions are met, including the payment of any applicable royalties contained in a tariff certified by the Copyright Board. Recent online developments have made it evident that the Internet can be used as a medium for the retransmission of over-the-air television signals, and have brought into question whether or not Internet-based retransmitters should have the benefit of the compulsory retransmission licence. The Departments of Canadian Heritage and Industry (the departments) are of the view that Internet-based retransmission raises significant issues of public policy, and are therefore seeking public input on the issues set out in this paper. This paper provides background to these issues, including an overview of arguments raised both for and against the compulsory copyright licensing of Internet-based retransmission. The paper also sets out certain preliminary views of the departments, along with a non-exhaustive set of options for a possible government response.

In this document, "Internet" is used in the commonly understood sense of the global network of computer networks which supports a number of applications including the World Wide Web, and the phrase "Internet-based retransmission" means retransmission which is delivered and accessed over the Internet.

2. CONTEXT

2.1 Copyright in Over-the-Air Television and Radio Signals

Over-the-air television and radio signals are broadcast by television and radio stations in unencrypted form for free off-air reception by the general public, e.g. CKVU-TV Vancouver; CBF-FM Montréal. This contrasts with pay and specialty programming services, e.g. Super Écran, Newsworld, Galaxie, which are only intended to be received by subscribers to cable, direct-to-home (DTH) satellite and multipoint wireless distribution undertakings, e.g. Vidéotron, Star Choice and Look TV.

Copyright subsists solely as provided by the *Copyright Act* (the Act), and includes the right to communicate original literary, dramatic, musical or artistic works to the public by telecommunication, and to authorize the same (the "communication right"). Copyright subsists in the programming contained in over-the-air television and radio signals. In addition, the television broadcast day has been recognized as a compilation work in which broadcasters have a copyright.

The retransmission of over-the-air television and radio signals involves the reception (often via a satellite distribution intermediary) and further transmission to the public of those signals. This is the means by

which cable, DTH satellite and multipoint wireless systems provide their subscribers with access to over-the-air television signals. This further transmission involves an exercise of the communication right, which if undertaken without the consent of affected rights holders, or an appropriate statutory exception, would amount to copyright infringement. In the case of retransmission by cable, DTH satellite, multipoint wireless and perhaps other systems, the *Copyright Act* includes such an exception in the form of the compulsory retransmission licence found in section 31 of the Act.

2.2 The Compulsory Retransmission Licence

In a 1954 decision, the Exchequer Court of Canada held that non-consensual cable-based retransmission infringed neither the then-existing public performance right, nor the then-existing communication right. In particular, the latter right was then drafted in technology-specific terms, and applied only to communication by Hertzian waves, which the Court distinguished from communication conducted by means of coaxial cables.[1] As a consequence, cable systems were not subject to copyright liability for the retransmission of over-the-air signals.

In the years that followed, several reports and studies addressed the need for the introduction of retransmission liability.[2] Ultimately, in 1989 a technology-neutral communication right (and hence retransmission liability) along with a compulsory licensing regime (the "Licence") were introduced. These amendments to the *Copyright Act* were made pursuant to the *Canada-United States Free Trade Agreement Implementation Act*.[3] They also facilitated Canadian ratification of the *Berne Convention (Paris, 1971)* in 1998.

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1 *Cdn. Admiral Corp. Ltd. v. Rediffusion, Inc*., [1954] Ex. C.R. 382.

2 Economic Council of Canada, *Report on Intellectual and Industrial Property*, (Ottawa: Information Canada, 1971) at 175-177; A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, (Ottawa: Consumer and Corporate Affairs, 1977) at 130-144; Government of Canada, *From Gutenburg to Telidon: A White Paper on Copyright*, (Ottawa: Consumer and Corporate Affairs, 1984) Appendix 1; Canada, House of Commons, Standing Committee on Communications and Culture, *A Charter of Rights for Creators, Report of the Sub-Committee on the Revision of Copyright* (Ottawa: Supply and Services Canada, 1985) at 77-83.

3 A similar situation had prevailed in the United States, also in virtue of court decisions (*Fortnightly* and *Teleprompter*), until retransmission liability and an associated cable compulsory licence were introduced by the US *Copyright Act of 1976*. A separate satellite licence was introduced in 1988.

The Licence provides as follows:

> 31.(1) In this section,
>
> "retransmitter" does not include a person who uses Hertzian waves to retransmit a signal but does not perform a function comparable to that of a cable retransmission system;
>
> "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) It is not an infringement of copyright 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 in its entirety, except as otherwise required or permitted by or under the laws of Canada; and
> (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.
>
> (3) The Governor in Council may make regulations defining "local signal" and "distant signal" for the purposes of this section.

The definition of *Local Signal and Distant Signal Regulations*, SOR /89-254 have been made by the Governor in Council under subsection 31(3) and are available in electronic form at http://laws.justice.gc.ca /en/C-42/index.html.

Royalties are contained in tariffs which have been certified by the Copyright Board. The Copyright Board is required by law to fix royalties which are fair and equitable, and in doing so must have regard to the criteria prescribed in the *Retransmission Royalties Criteria Regulations*, SOR/91-690, which are available in electronic format at http://www.cb-cda.gc.ca/regulations/91690-e.html.

2.3 Policy Rationale for Compulsory Licensing in the Conventional Broadcasting Distribution Context

A compulsory copyright licence is an exception to an otherwise exclusive right. In specific circumstances, it permits third parties to exercise that right without the consent of affected right holders so long as conditions regarding the payment of equitable remuneration are satisfied. Although the use of such licences is contemplated by copyright treaties and is not uncommon, the circumstances which

justify their use can be a matter of dispute.

In its 1985 report A Charter of Rights for Creators, the Sub-Committee on Copyright Revision of the Standing Committee of Communications and Culture concluded that "Although the Sub-Committee does not in general favour compulsory licensing, it sees no other possibility in this case".[4] The Sub-committee was driven to this conclusion by its belief that the introduction of a new, broader communication right must not impair the vital role which the retransmission of over-the-air signals played in the Canadian broadcasting system. This vital role continues today with over 75% of Canadian households relying upon cable and DTH satellite broadcasting distribution undertakings (BDUs) for access to a wide range of over-the-air signals. This is of especially great importance in rural and remote areas of the country where many Canadians would otherwise have extremely limited, if any, access to over-the-air signals. The importance of retransmission is also reflected in the long-standing "must carry" obligations imposed on conventional BDUs which require these undertakings to retransmit both specified local and, in some cases, distant television signals.[5] But for the Licence, conventional BDUs would be obliged to first negotiate the consent of the many rights holders affected by retransmission. This would be not only a process of questionable efficiency and even possibility but, among other things, could permit a single holdout to force a conventional BDU to choose between compliance with its broadcasting regulatory obligations and copyright infringement.

In short, the Licence provides an efficient, certain means by which conventional BDUs can clear the rights necessary to continue to fulfill their vital role in the Canadian broadcasting system and comply with applicable regulatory obligations, while ensuring that affected rights holders are provided fair and equitable remuneration. The departments believe that conventional retransmission continues to serve vital interests of Canadian public policy while treating rights holders in a fair and equitable manner. However, as discussed in the balance of this paper, Internet-based retransmission differs in a number of significant respects from retransmission conducted by conventional BDUs which raises the question whether, and under what conditions, if any, Internet-based retransmitters should also be entitled to rely on the Licence.

2.4 iCraveTV and JumpTV

On November 30, 1999 an Internet service with the address www.iCraveTV.com ("iCraveTV") commenced operations. It provided Internet users with access to nine Canadian and eight US over-the-air television signals which were received off-air at a location in the Toronto area, converted to

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4 *A Charter of Rights for Creators,* at 80.

5 In this document, "conventional BDUs" refers to cable, DTH satellite and multipoint wireless broadcasting distribution undertakings.

Internet compatible format and streamed over the Internet. Users who visited the service's web site, and had appropriate software which was available for free on-line, could select a signal from a menu screen, which would then be displayed in a small box on the user's computer monitor. The service was provided free of charge, but advertising was contained throughout the web site, including in the frame surrounding the box in which the signal was displayed on a user's monitor. Although the service was stated to be provided solely for persons in Canada, it was available to Internet users world-wide who were either willing to click through screens which the service deemed to be an assertion that they were located in Canada, or were otherwise able to directly access the signals without first clicking through the relevant terms of use.

Although iCraveTV had not received the consent of affected rights holders, it claimed it did not infringe copyright. It argued that, like cable systems, it too was a retransmitter for the purposes of the Licence and satisfied the conditions thereof, including the requirement that the retransmission "must be lawful under the *Broadcasting Act*". Under that Act it is an offence to carry on a broadcasting undertaking, in whole or in part in Canada, without either a broadcasting licence or the benefit of an appropriate exemption from licensing. Although unlicensed by the Canadian Radio-television and Telecommunications Commission ("CRTC"), iCraveTV claimed to have the benefit of the *Exemption for new media broadcasting undertakings,* which unconditionally exempts undertakings which "provide broadcasting services delivered and accessed over the Internet" from the requirements to hold a broadcasting licence and conform with regulations made under Part II of the *Broadcasting Act*.[6]

As for the other conditions of the Licence, iCraveTV claimed to retransmit the signals simultaneously and in their entirety. In December 1999, the service's solicitors wrote to the Copyright Board indicating the service's willingness to pay copyright royalties and requesting an interim Internet retransmission tariff for the years 1999 and 2000, with a final tariff to be determined in due course.

Affected Canadian and US broadcasters and producers initiated copyright infringement proceedings in both Canada and the United States, with the U.S. litigation resulting in the issuance of a preliminary injunction in that country in February 2000. The parties subsequently reached a settlement of the litigation in both Canada and the United States, with iCraveTV agreeing to cease operation and withdraw its request to the Copyright Board to certify Internet retransmission tariffs.

In August 2000, the solicitors for a prospective Internet-based retransmitter ("JumpTV") filed an objection with the Copyright Board to proposed retransmission royalty tariffs for the years 2001-2003 on the grounds that the proposed tariffs do not take proper account of Internet-based retransmitters. JumpTV apparently intends to rely on revenue generated by banner advertisements which will be viewed by Internet users at the same time as the retransmitted signal. It also apparently intends to put in

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6 *Public Notice CRTC 1999-197, Appendix A.*

place technological measures intended to ensure that the signals it retransmits are received only at locations in Canada. JumpTV's request for the certification of an Internet specific retransmission tariff is currently pending before the Copyright Board, with a public hearing scheduled to commence in December 2001, and could result in a determination by that body as to whether Internet-based retransmitters have the benefit of the Licence.

2.5 Over-the-Air Radio Signals

Unlike television signals, many complete over-the-air radio signals are currently streamed over the Internet. In many cases they appear to be placed there by the over-the-air broadcasters, in which circumstances the broadcaster is apparently not engaged in "retransmission" for the purposes of the licence.[7] However, the placement by third parties of over-the-air radio signals on the Internet may raise similar questions regarding the application of the Licence to Internet-based activities as are raised in the television context. Although this document in many respects focuses on the Internet-based retransmission of television signals, ***comment*** is also sought on the retransmission of over-the-air radio signals. Where appropriate, comments on the issues raised below should indicate any considerations particular to the retransmission of over-the-air radio signals.

2.6 Informal Consultations

From the time of the launch of iCraveTV, the departments have been engaged in informal consultations with concerned stakeholders. This has included iCraveTV and JumpTV, as well as, a coalition of rights holders whose members include the Canadian Association of Broadcasters, the Canadian Film and Television Production Association and the Canadian Motion Picture Distributors Association. The departments have also heard from the Canadian Cable Television Association, the Canadian Association of Internet Providers, DTH satellite systems, and organizations representing actors, composers, directors and screen writers. The important input which the departments have received reflects a sharp divergence of opinion between rights holders (who seek the exclusion of the Internet from the benefit of the Licence), and existing and prospective retransmitters (who generally object to the introduction of technology-specific exclusions).

2.7 Views in Support of the Compulsory Licensing of Internet-based Retransmission

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[7] See, *Tariff 22 - Transmission of Musical Works to Subscribers Via a Telecommunications Service Not Covered Under Tariffs Nos. 16 or 17, Phase 1: Legal Issues*, October 27, 1999, at 53 (currently the subject of judicial review proceedings). Issues related to the "transmission"of over-the-air television and radio signals on the Internet are outside the scope of this consultation.

Proponents of the compulsory copyright licensing of Internet-based retransmission have argued that it is simply a new technical means of providing essentially the same type of service as is provided by conventional BDUs, with the public policy reasons which support the compulsory licensing of the latter, also supporting the compulsory licensing of the former. It has been argued that an Internet exclusion would favour older technologies at the expense of innovative services which are ready and willing to comply with the same conditions to the Licence as do conventional BDUs, including the payment of any royalties contained in a tariff certified by the Copyright Board. It has also been argued that an Internet exclusion could inappropriately limit the ability of conventional BDUs to themselves adopt the most effective technologies available in a time of rapid technological change. In fact, it has been argued that the Internet will eventually replace cable, DTH satellite and multipoint wireless distribution systems as the sole means of distribution of television and radio content.

It has also been argued that the "spill-over" of signals into other jurisdictions is not a matter which should be addressed by Canadian law. Rather, it is argued that Internet-based retransmitters can be expected to adopt new territory-limiting technologies which will be able to limit such retransmissions within Canada, with rights holder able to address any inappropriate "spill-over" into other jurisdictions under the laws applicable in those places. In this respect, the U.S. litigation concerning iCraveTV has been referenced as a case where a Canadian-based Internet retransmitter was successfully sued under foreign law.[8]

2.8 Concerns Raised by the Compulsory Licensing of Internet-based Retransmisssion

This section provides an overview of some of the concerns which have been raised by the potential compulsory licensing of Internet-based retransmission.

2.8.1 Global Reach of the Internet

Unless specific measures are taken, signals retransmitted over the Internet can be received anywhere in the world where there is Internet access. This is in sharp contrast with cable systems whose service is limited to points within Canada. A stronger analogy might be drawn with DTH satellite systems since their "footprint" is nearly continental in scope. However, DTH systems operate on a subscription basis, and employ encryption technology to prevent unauthorized viewing both within and outside Canada. A number of technologies have been developed to permit geographic restrictions to be imposed on access to material available on the Internet, but the efficacy of these and any future measures which might be

[8] As earlier noted, the U.S. litigation did result in the issuance of a preliminary injunction. However, the U.S. court made no final determination of the issues raised under U.S. law given the subsequent settlement of the litigation.

used in the retransmission context remains unclear. Moreover, it is not necessarily the case that all future Internet-based retransmitters would avail themselves of such measures if not otherwise required by law.

Unrestricted non-consensual foreign reception of retransmitted television signals raises issues of significant concern to rights holders since rights in the content of over-the-air television signals are currently licensed on a territory-by-territory basis. The importation into a foreign territory of content included in a signal retransmitted from Canada can undermine the value of the foreign rights for that content. For example, the value of the exclusive right to broadcast programming within a defined market for the first time can be negatively affected by the prior or simultaneous importation into that market of programming broadcast over-the-air in a distant market. Moreover, films which are licensed for over-the-air broadcast have generally already run through a prior sequence of "release windows" in the television viewer's local market (e.g., theatrical, pay-per-view television, video rental). This sequence of release through different media is intended to maximize rights holders' revenues. However, given territorially staggered release schedules, a film broadcast over-the-air in Canada or the United States may be at an earlier stage of release in other jurisdictions. The result is the value derived in that other market from e.g., both video release and subsequent licensing of over-the-air broadcast is potentially negatively affected by the availability of the same film on a signal retransmitted over the Internet.

Some rights holders have argued that no matter what security measures may be relied upon, Internet services could never be properly restricted solely for reception within Canada. It is further argued that no tariff set by the Copyright Board could ever adequately compensate rights holders for the harm which would likely result, with rights holders being potentially led to refuse to license broadcast rights to Canadian broadcasters. Finally, it has been argued that the application of the Licence to the Internet could render Canada in violation of its international obligations since, although Article 11(bis) of the Berne Convention contemplates the compulsory licensing of the retransmission of the over-the-air signals, paragraph 2 thereof provides that such licences "shall apply only in the countries where they have been prescribed".

The departments note that, assuming that all statutory conditions are satisfied, the Licence simply removes from rights holders the right to authorize retransmission in Canada. However, if this right were not so limited it could be used by rights holders to ensure by the imposition of appropriate conditions that a retransmission otherwise authorized in Canada is not received outside Canada. As discussed in section 3.2, there may be some doubt as to whether it is necessary for this aspect of the communication right to be unconditionally subject to compulsory licensing in order to achieve the public policy objectives which underlie the Licence.

2.8.2 Possible Undue "Extension" of a Limited Exception into a New Market

Some rights holders have argued that the Licence should be understood as a very limited exception to otherwise exclusive rights essential to support the creation of vital cultural content, and should not be permitted to extend in scope beyond its original focus on cable and what might be viewed as clearly cable-like undertakings (e.g. DTH satellite and multipoint wireless distribution systems). Particular concern has been raised that third parties should not be provided a mandatory right to exploit the works of others in such an important new market. Rather the technological and social benefits which may be related to the on-line use of broadcast programming should be permitted to evolve through the "normal" requirement for users to negotiate access from rights holders, who are best placed to judge whether they should assume the piracy risks which may be associated with on-line distribution. In addition, broadcasters view competition from third parties able to retransmit their entire signals over the Internet as unfair and damaging to their ability to maintain and build their brands in a converging broadcast environment. They note that they hold only very limited Internet rights in the content of their signals and claim that compulsory licensing would permit third parties to do that which they cannot. They are especially concerned with banner advertising which is perceivable by Internet users at the same time as they view a retransmitted signal.

The departments note that if the Licence did apply to the Internet, an appropriate territorial restriction, if feasible, could limit any effects upon Internet rights to Canada. Within Canada rights holders would continue to enjoy exclusive Internet rights with the sole exception of being effectively obliged to share Internet "simulcast" rights, for which they would be due fair and equitable compensation. Concerns raised by banner advertising are addressed further in section 5.3.

2.8.3 Lack of Comparable Broadcasting Regulatory Obligations and Restrictions

As noted in section 2.4, Internet-based retransmitters are currently unconditionally exempt from regulation under the *Broadcasting Act*. This is in contrast with conventional BDUs which, among other things, are subject to both must-carry obligations and restrictions on the signals which they may retransmit. Larger undertakings are also required, among other things, to both contribute a percentage of their gross revenues to the creation of Canadian programming, and comply with program protection measures intended to preserve the value of over-the-air broadcasters' local program rights. Program protection measures include the simultaneous substitution obligation imposed on larger cable systems which requires them, upon request by an affected broadcaster, to substitute the signal of a local Canadian television station for that of an out-of-market station when the same program is broadcast simultaneously on the local station and the out-of-market station. This helps ensure that the local audience for a particular program is not split among a number of stations, and hence helps preserve local Canadian broadcasters' advertising revenue base, which may also ultimately benefit underlying rights holders from whom broadcasters acquire local rights.

This significant difference in regulatory status may argue against Internet-based retransmitters being

afforded the benefit of the Licence. On the other hand, the unregulated status of a BDU does not necessarily imply that its operations would not further at least some of the same objectives of Canadian broadcasting policy as are furthered by conventional BDUs. In particular, it might be argued that, like conventional BDUs, Internet-based retransmitters would extend to Canadians in all parts of the country access to a range of signals which are not uniformly available for over-the-air reception. Moreover, the CRTC retains the jurisdiction to impose program protection measures, signal carriage restrictions and other regulatory obligations on Internet-based retransmitters should the same prove necessary in order to implement the objectives of Canadian broadcasting policy.

2.8.4 Lack of Comparable Investment

Some rights holders have suggested that the Licence might be viewed as intended to support and encourage the significant, socially beneficial investment which conventional cable and DTH satellite systems have made in their systems. It is claimed that Internet retransmitters do not make a similar contribution since they rely upon an existing distribution medium, and given their lack of a "value-added" contribution, should not be entitled to the benefit of compulsory licensing.

The departments note that the lease of the broadband Internet capacity necessary to operate an Internet-based retransmission undertaking over a shared network has similarities to the lease by a DTH satellite undertaking of transponder capacity on a shared satellite. Both activities can stimulate investment in vital communication infrastructure. Although any investment related to Internet-based retransmission might be initially undertaken on a modest scale, it may well increase to significant levels if the services offered ultimately prove commercially viable.

There may, however, be some question as to whether compulsory licensing is necessary in order to stimulate such investment in Canada. Arguably, similar investment would be made in Canada by rights holders themselves or their licensees as movement is made to the more active exploitation of Internet rights. However, if the Licence does not apply to the Internet there appears to be good reason to doubt whether a retransmitter would be able to clear all the rights necessary to retransmit entire signals over the Internet. This would eliminate an entire class of potential competitors to conventional BDUs. Moreover, as discussed further in section 4 below, the introduction of a technology-specific restriction may also risk inappropriately limiting the ability of the Canadian broadcasting distribution system to ensure through significant ongoing investment that it continues to employ the most effective technologies available in a time of rapid technological change.

3. PRINCIPLES AND OPTIONS

3.1 Principles

In the view of the departments, the issues raised by the potential application of the Licence to Internet-based retransmission should be approached with the following principles in mind:

° **Shared Access by Canadians to a Vibrant Broadcasting System**

The Licence should continue to support the achievement of the objectives of the broadcasting policy for Canada set out in the *Broadcasting Act*, including by helping to ensure that all Canadians, no matter where they live, continue to have appropriate, shared access to diverse cultural content provided by Canada's broadcasting system.

° **Equitable Balance Among Stakeholders**

The Licence authorizes third parties to make non-consensual use of rights holders' copyrighted works, and that authorization should be limited to the extent necessary to achieve the public policy objectives which underlie the Licence, while ensuring that rights holders are treated in a fair and equitable manner.

° **Technological Neutrality and Innovation**

The principle that wherever possible legislation should be drafted in technologically-neutral terms contributes to long-term legislative stability by reducing the need for ongoing amendments arising from unforeseen technological change. Respect for this principle can support technological innovation by helping ensure that new technologies are not inappropriately disadvantaged as compared with the old. Although the departments acknowledge that technological neutrality may not be appropriate in all circumstances, they are of the view that it forms an important principle which should be adhered to when possible.

° **Certainty**

The proper scope of the Licence should be readily apparent to both rights holders and retransmitters so that neither unlawful activities may be sheltered behind, nor lawful uses be inhibited by unnecessary ambiguity.

3.2 Options for a Government Response

A broad range of possible responses has been suggested to the departments, from maintaining the status quo to repealing the Licence. As for the latter, as noted in section 2.3, the departments are of the view that retransmission conducted by cable, DTH satellite and multipoint wireless BDUs pursuant to the Licence continues to serve vital interests of Canadian public policy while treating rights holders in a fair and equitable manner. As for the former, considerations of certainty and the need for the equitable

treatment of rights holders argues in favour of a legislative response. In particular, in the view of the departments non-consensual retransmission to locations outside Canada of the protected works contained in retransmitted television signals does not further Canadian public policy interests. To the contrary, it risks harm to the legitimate interests of rights holders who could be obliged to bring proceedings in multiple jurisdictions in the hope of preserving the integrity of their territory-specific licensing arrangements. Although it has been argued that recourse to foreign law ought to be the solution for rights holders concerned with the preservation of their territory-specific "business models", the departments believe this could be an inequitable consequence of a compulsory licensing regime. Among other things, this could undermine the ability of the holders of rights in Canadian film and television programming to extract full advantage from foreign markets. Given the foregoing, the departments are of the view that if Internet-based retransmission were to have the benefit of the Licence it likely must, at a minimum, be subject to an appropriate territorial restriction.

To date, there has been no authoritative legal determination as to whether Internet-based retransmitters are entitled to the benefit of the Licence so long as they comply with the conditions specified thereunder, and whether any given technical and business configuration of such an undertaking would be consistent with those conditions.[9] This has led some interested parties to suggest that, pending a final determination of these legal issues, intervention by the Government would be premature. However, this would leave unanswered the important questions of public policy associated with the proper scope of the Licence. Moreover, in the view of some commentators, it is quite possible that at least some forms of Internet-based retransmission could be found to fall within the scope of the Licence, even though existing Licence conditions do not expressly require retransmission services to be limited to Canada. The possibility of such a result following a period of potentially extended legal uncertainty argues in favour of the Government promptly bringing appropriate clarity to the proper scope of the Licence.

Considerations of the need for certainty and for the equitable treatment of rights holders support some form of government response to the possible application of the Licence to Internet-based retransmission. However, significant questions have been raised as to whether an express Internet exclusion might be an inappropriately "technology-specific" response. In this respect, it may be that any response necessary to deal with the concerns raised by Internet-based retransmission can be given effect in a more targeted, technology-neutral manner.

Given all of the foregoing, while with this paper the departments are seeking ***comment*** on all aspects of Internet-based retransmission, including any options whatsoever for a government response which

[9] The departments note that it is also unclear whether under some or perhaps all currently feasible technical configurations Internet retransmission might engage other copyrights which may not be subject to the Licence e.g., the reproduction right.

respondents may support, specific, detailed ***comment*** is sought on whether the *Copyright Act* ought to be amended to either (1) expressly exclude Internet-based retransmitters from the benefit of the Licence, or (2) expressly provide for the technologically-neutral application of the Licence, but subject to an appropriate territorial restriction and other possible conditions, restrictions or remedies which may be necessary to take proper account of any other legitimate concerns raised by non-consensual Internet-based retransmission within Canada. Each of these options is discussed below.

4. AN INTERNET EXCLUSION

In the view of the departments, an Internet exclusion would be justified if the compulsory licensing of Internet-based retransmission within Canada were not appropriate under any terms or conditions. However, as has been noted, it has also been argued that a wholesale Internet exclusion could inappropriately limit the ability of existing participants and new entrants to the Canadian broadcasting distribution sector to adopt the most effective technologies available in a time of rapid technological change. In this respect, the departments note that although the Government has been asked to exclude the "Internet" from the scope of the Licence, no definition of that term has been provided. Assuming that an Internet exclusion were appropriate, the delineation of an appropriate definition is complicated by the fact that, although the Internet can be referred to as a "technology", it is better understood as a functional arrangement of separate networks forming a global network of networks. In particular, although certain software and hardware technologies are currently characteristic of the Internet, e.g. Internet Protocol and packet switching, these technologies can also be employed in networks which link closed user groups and are distinct from the "Internet". For example, the CRTC recently issued a BDU licence for a cable system which will rely upon a closed Internet Protocol-based network.[10]

In the view of the departments, the use of Internet Protocol technology by a retransmitter employing a network appropriately distinct from what might be thought of as the "public Internet" should not for that reason alone disqualify the retransmitter from reliance upon the Licence. However, if an Internet exclusion were adopted without express delineation of its scope, it may risk inadvertently excluding just such forms of retransmission. Conversely, an undefined reference to the Internet could prove insufficient to adequately protect rights holders' legitimate interests if such an exclusion were subsequently held not to cover some successor to the Internet which provides shared global access to information but does so by the use of currently unforeseen technology.

The departments also note that in a time of rapid convergence between broadcasting, telecommunications and computer networks and services, the means by which broadcasting distribution might be most effectively undertaken in the future cannot necessarily be foreseen. In fact, it is possible

[10] *Decision CRTC 2000-754*.

that in the future the preferred means for broadcasting distribution will be over secure, virtual paths on shared networks rather than over dedicated paths on proprietary networks.

Importantly, the promotion of technological innovation in the media which connect Canadians to one another is an important element of Canadian public policy. In the words of The Government of Canada's Response to "A Sense of Place, A Sense of Being", The Ninth Report of the Standing Committee on Canadian Heritage:

> To ensure that Canadians have Canadian choices will require creativity in content, and innovation in the media we use to make that content available.[11]

This is also reflected in the broadcasting policy for Canada set out in the *Broadcasting Act* which states that BDUs should "provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost."[12]

In light of the issues canvassed in this and preceding sections, and any other relevant considerations the departments seek ***comment*** on whether Internet-based retransmitters should be simply excluded from the benefit of the Licence. If so, ***comment*** is sought on how this might be given effect so as to avoid improperly limiting the appropriate technological development of the Canadian broadcasting distribution sector.

5. A TECHNOLOGY-NEUTRAL LICENCE SUBJECT TO TERRITORIAL AND OTHER POSSIBLE RESTRICTIONS

As earlier noted, it might be possible to amend the Licence to expressly provide for its technologically-neutral application, but make it subject to an appropriate territorial restriction and any other conditions, restrictions or remedies which may be necessary to take proper account of any other legitimate concerns raised by non-consensual Internet-based retransmission within Canada. This might help ensure that the Canadian BDU sector can continue to make innovative use of the most appropriate new technologies while addressing the specific concerns raised by Internet-based retransmission.

5.1 Scope of the Licence

The departments seek ***comment*** on whether, having reference to the restrictions elsewhere discussed in this section, the Licence ought to be amended to expressly provide that any person who retransmits a

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[11] *Connecting to the Canadian Experience: Diversity, Creativity and Choice*, at 7.

[12] *Broadcasting Act*, subparagraph 3(1)(t)(ii).

signal by *any* technical means will have the benefit of the Licence, so long as all other conditions to the Licence are satisfied.

Having regard to the existing statutory definition of "retransmitter" (set out in section 2.2 of this paper), the departments also seek ***comment*** on whether over-the-air broadcasters which "rebroadcast" a signal ought to be expressly excluded from the benefit of the Licence and, if so, how any such stipulation can be clearly delineated without inadvertently excluding retransmitters which distribute signals over-the-air in unencrypted form, in rural and remote areas of Canada, e.g. by means of Low and Very Low Power Television Stations licensed by the CRTC.[13]

5.2 A Territorial Restriction

The departments note that even if it were the case that Internet-based retransmitters could not now appropriately restrict their service to Canada, it does not appear possible to predict with any sufficient degree of certainty whether or not they would be able to do so in the future. Rather than prejudge technological developments, it may be preferable to impose an appropriate restriction such that Internet-based retransmission would be permitted only if the retransmitter can meet the specified requirements.

An absolute or a qualified restriction

The departments view an absolute restriction (i.e., one which does not permit any unintentional foreign reception) as, in effect, an Internet exclusion since absolute technical effectiveness is, and likely will remain, an impossible standard. In fact, it appears that Canadian DTH satellite services are sometimes illicitly received outside Canada despite the ongoing use of electronic countermeasures intended to ensure that only authorized users have access to the same. The departments are of the view that instances of limited, unintentional intelligible foreign reception of retransmitted signals, despite the use of reasonable measures intended to restrict access to authorized users in Canada, should not result in the violation of any express territorial restriction which may be adopted.

Entities subject to a qualified territorial restriction

The departments note that if a qualified territorial restriction were imposed on all retransmitters, it may risk introducing a level of uncertainty in the operations of DTH satellite systems, and multipoint wireless systems located in border areas even though, to date, foreign reception of signals retransmitted by these systems has not given rise to the same concerns as have been raised by Internet-based retransmission.

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[13] Existing "rebroadcasters" are either owned or have a contractual relationship with the originating broadcaster, unlike what may be termed "over-the-air retransmitters".

However, the departments are concerned that limiting any such restriction to only some classes of retransmitter appears to be inconsistent with the principle of technological neutrality, and could raise not only definitional concerns but also concerns of fairness as between persons using different means of retransmission. It may also give rise to unwarranted implications concerning potential retransmission to locations outside Canada by retransmitters not subject to the restriction. However, the departments note that in the case of some classes of retransmitter, e.g. cable systems, concerns with "spill-over" do not appear to have any application, and the imposition of a territorial restriction may well be simply unnecessary.

Given the foregoing, the departments seek ***comment*** on whether a territorial restriction should be imposed on all or only some classes of retransmitters, and if only some, how appropriate classes could be specified.

Elements of a qualified territorial restriction

The departments are of the preliminary view that if a qualified territorial restriction were imposed retransmitters subject thereto should be required to: (1) put in place and monitor the operation of measures forming a reasonable territorial restriction, and (2) as appropriate, take effective corrective action to address the circumvention of those measures. The departments therefore seek ***comment*** on the following proposed restriction:

1. Maintenance of Reasonable Technological Measures

The subject retransmitter would be obliged to, in good faith, establish and maintain reasonable technological measures intended to restrict the intelligible reception of the signals they retransmit to locations in Canada. "Reasonable technological measures" could mean measures which persons without specialist knowledge could not reasonably be expected to circumvent except with outside assistance.

2. Monitoring

The subject retransmitter would be obliged to engage in reasonable monitoring of the efficacy of the referenced measures. Among other things, this might include an obligation to log all instances of confirmed foreign reception.

Retransmission collectives authorized to receive a share of tariffed retransmission royalties could have a right to audit the results of the monitoring process (and perhaps even the process itself) subject to appropriate confidentiality provisions. Specific ***comment*** is sought on whether retransmission collectives should be able to exercise such right only through a neutral third party, and on how disputes

concerning the selection of such monitors could be fairly resolved in an efficient manner.

3. Effective Corrective Action (Particular and Systemic)

Particular

There would be an obligation to take prompt effective corrective action whenever the retransmitter is aware of a particular instance of foreign reception, but only if the retransmitter has or, given the technical nature of its operations, could be reasonably expected to have the technical means of addressing violations on an individual basis.

Systemic

There would be an obligation to take effective corrective action as promptly as is reasonable in all the circumstances whenever the retransmitter has reasonable grounds to believe that the means to circumvent such measures are being used in excess of a specified threshold.

The departments note that a quantitative threshold appears especially difficult to determine not only in the first instance but also for purposes of enforcement since illicit reception is largely hidden reception, which is only partially addressed by monitoring obligations and audit privileges.[14] On the other hand, a non-quantitative standard may carry with it the risk of undue uncertainty. The departments seek ***comment*** on whether any threshold which is adopted ought to be set by regulation.

The departments seek ***comment*** on how an appropriate threshold might be set. Without limiting the generality of this request, the departments seek specific ***comment*** on a threshold triggered by the retransmitter having reasonable grounds to believe that foreign reception is occurring on a commercial scale. "Commercial scale" might not be defined, but factors to be considered by a court in making this determination might be specified. The departments seek further specific ***comment*** on what factors might be prescribed for this purpose.

Remedies

The departments seek ***comment*** on the remedies which should be available for non-compliance with a territorial restriction. Without limiting the generality of this request, specific ***comment*** is sought on the

[14] In 1996 the European Commission's best estimate was that unauthorized broadcast decoders formed "about 5 to 20% of the total number of devices in circulation". *Legal Protection for Encrypted Services in the Internal Market, Consultation on the Need for Community Action* COM (96)76.

view that non-compliance with a territorial restriction should not render the entire retransmission an infringement of copyright, subject to the full range of existing remedies for direct infringement, but rather available remedies must be related specifically to non-compliant foreign reception. ***Comment*** is also sought on the following specific questions:

° should remedies be limited to injunctive relief?

° if damages are available, what account, if any, should be taken of the possibility for the recovery of damages both pursuant to such a remedy and in the jurisdiction(s) of reception?

° if damages are available, should there be a requirement to prove harm or should statutory damages be available in place of, or as an alternative to damages available for proven harm?

° Should available remedies be accessible pursuant to a summary procedure?

Comments addressing both the nature of an appropriate territorial restriction and the remedies available for a violation thereof should take into account the possibility that a retransmitter subject to an injunction against an unacceptable level of foreign reception may be unable to comply, in at least the short term, except by the termination of all retransmission. The departments are concerned that this could have consequences inconsistent with Canadian broadcasting law and policy, and seek ***comment*** on how this concern can be properly addressed with due regard for the legitimate interests of rights holders.

Restriction on foreign reception lawful in that other place

It has been argued that a territorial restriction imposed without regard to the legality of the activity, and the availability of mandatory compensation under the laws of other countries would be inconsistent with the growing internationalization of Canada's satellite infrastructure. For example, the potential future use of Canadian satellite facilities to retransmit signals to locations in both Canada and the United States, consistent with all applicable Canadian and US laws might be hindered by a territorial restriction. The departments therefore seek ***comment*** on whether and how a territorial restriction might take account of these concerns.

5.3 Banner Advertisements

As earlier noted, in the case of iCraveTV advertising was contained throughout the service's web site and in banners directly bordering the area in which signals were displayed on user's computer monitors. It is uncertain whether this unprecedented use of banner advertising in association with retransmitted signals is contrary to paragraph 31(2)(c) of the Licence as currently drafted. The departments note that over-the-air broadcasters are (1) heavily reliant upon advertising-based revenue, and (2) reach a

substantial majority of their audience via retransmitters. The departments seek ***comment*** on the potential affect which such advertising could have on over-the-air broadcasters if retransmitters were afforded the benefit of the Licence even though they employ banner advertising.

The departments note that for the purposes of the Licence a retransmission must be lawful under the *Broadcasting Act*, and the CRTC has the jurisdiction to regulate the use of banner advertising by retransmitters, and in the case of conventional BDUs this activity might implicate section 7 of the *Broadcasting Distribution Regulations.*[15] However, the departments seek ***comment*** on the view that this activity equally raises issues of copyright policy and deserves a copyright response. In this respect, the departments seek ***comment*** on whether the Licence should be amended to expressly provide that (1) except as otherwise required or permitted by law, a signal must be retransmitted without additions to the content thereof, and (2) without the consent of the affected broadcaster, no information of a commercial nature transmitted by the retransmitter, or a person acting in association with the retransmitter, is to be rendered perceivable by a recipient's broadcasting receiving apparatus at the same time as is the content of the signal, unless a result of the recipient's own actions which are not necessary to render the content of the signal itself perceivable.

5.4 Unauthorized Retransmission by Authorized Users

The departments note that even if an Internet-based retransmitter appropriately ensured that only persons located in Canada could access signals in the first instance, there is a risk that at least some authorized recipients may themselves redirect the signals to locations outside Canada. In light of such concerns it has been suggested to the departments that all retransmitters be required by law to immediately discontinue service to any authorized users, if the retransmitter is aware that such users are or have used the Internet to retransmit a signal provided by the retransmitter.

In the view of the departments, this could have the disproportionate effect of denying Canadian households access to broadcasting services. This would be contrary to Canadian broadcasting policy, and may impose on conventional BDUs obligations inconsistent with those imposed by or under the *Broadcasting Act*.

The departments seek ***comment*** on this issue. Readers wishing to comment on the possible liability of the Internet service provider which is used for such unauthorized retransmissions may wish to consult section 4.4 of the departments' discussion paper entitled *Consultation Paper on Digital Copyright Issues* available at www.pch.gc.ca/culture/cult_ind/cpb-pdd/english.htm and www.strategis.ic.gc.ca/SSG/ip00001e.html.

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15 Http://laws.justice.gc.ca/en/B-9.01/SOR-97-555/18942.html.

5.5 Subsidiary Signals

In the course of the litigation associated with iCraveTV it was alleged that the service was deleting material contained in the vertical blanking interval (VBI) associated with the signals it retransmitted. This included the alleged deletion of such material as Special Audio Programming (SAP) which can provide audio in a second language to viewers equipped with an appropriate decoder, closed captions, and program rating codes.

There may be some question whether such activity would be contrary to paragraph 31(2)(c) of the Act in so far as the information contained in the VBI is arguably part of a separate, subsidiary signal. However, the departments note that for the purposes of the Licence a retransmission must be lawful under the *Broadcasting Act*, and seek ***comment*** on whether express obligations concerning the retransmission of subsidiary signals might not be best left for determination by the CRTC.[16]

6. SIMULTANEITY AND ENTIRETY

The departments seek ***comment*** on whether the Licence should be amended to clarify that the requirement for a signal to be retransmitted "simultaneously and in its entirety" does not exclude from the benefit of the Licence a retransmission involving any reasonable delay, or loss of information (which lost information is not evident to a viewer) arising solely from steps necessary to convert a signal into a format suitable for retransmission.

7. OTHER JURISDICTIONS

The departments are aware of no other jurisdiction in which Internet-based retransmission is expressly permitted under the terms of a compulsory licence. However, in the United States, at least some persons have claimed that Internet services could have the benefit of compulsory retransmission licensing in that country.[17] This view has been contested by Marybeth Peters, U.S. Register of Copyrights, with the U.S. Copyright Office opposed to any extension of compulsory licensing to

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[16] See, for example, section 7(f) of the *Broadcasting Distribution Regulations*, http://laws.justice.gc.ca/en/B-9.01/SOR-97-555/18942.html.

[17] See for example, *Testimony of Jonathan Potter, Executive Director of the Digital Media Association (DiMA) before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, June 15, 2000.

Internet-based retransmission.[18]

It appears that Australia is the sole jurisdiction to have expressly dealt with this issue in its legislation. In particular, Australia's Copyright Amendment (Digital Agenda) Bill 2000 recently introduced a new compulsory retransmission licence which expressly excludes the Internet therefrom. According to a government issued overview of the bill, the exclusion "is a result of concerns that Internet retransmissions will have an adverse effect on existing program licensing arrangements."[19]

The departments also note that, apart from the United States, they are aware of no other jurisdictions in which an express territorial restriction has been imposed upon a compulsory retransmission licence. In the United States, the compulsory licence applicable to satellite-based retransmission provides that it "shall apply only to secondary transmissions to households located in the United States".[20]

8. CONCLUSION

This paper is intended to elicit public comment on a range of issues related to the potential application of the *Copyright Act's* compulsory retransmission licence to the Internet.
The present document represents the current state of analysis on these issues. The departments would appreciate your comments on any aspect of this document. **We would ask that you provide a written response by September 15, 2001**.

Written comments may be sent by e-mail (WordPerfect, Microsoft Word or HTML formats) to:
copyright-droitdauteur@ic.gc.ca

Comments may also be sent by mail or fax to:

Comments - Government of Canada Copyright Reform
c/o Intellectual Property Policy Directorate

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18 See for example, *Statement of the Register of Copyrights before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary,* June 15, 2000, and *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, U.S. Copyright Office, August 1, 1997, Part VIII.

19 *Copyright Amendment (Digital Agenda) Act 2000 Fact Sheet*, http://law.gov.au/publications/copyright_enews/Welcome.html

20 Title 17 USC Sec. 119(a)(7).

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Comments received, including the name of the person or organization making the submission, will be posted, in the official language in which they were submitted, on the Web site of the Intellectual Property Policy Directorate, Industry Canada, located at: http://strategis.ic.gc.ca/SSG/ip00001e.html and the Web site of the Copyright Policy Branch, Canadian Heritage at: http://www.canadianheritage.gc.ca. If you do not wish for your submission to be so used, please expressly indicate so therein. Paper copies of the submission will be made available on request.

Comments on the submissions received should be provided in the same manner by October 5, 2001.

Consultation meetings could be held by the two departments later in the Fall and policy options would be developed, if necessary, by early 2002.

Acceptable Use Policy

This consultation is intended to promote constructive debate. Submissions of an inflammatory nature such as personal or slanderous/libelous attacks, threatening messages or hate speech will be neither accepted nor displayed.

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