

APPENDIX 4

**Joint Submission of ACTRA, APFTQ, CMPA, DGC and WGC
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Enforcement of CRTC Jurisdiction over Foreign OTT Services

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With the introduction of foreign “over-the-top” programming services into Canada, questions have arisen as to the tools available to the CRTC or the private sector to enforce any regulatory requirements that may be imposed on such services. After all, these internet-based services may have no physical assets in Canada and operate entirely from file servers located outside the country.

Currently these services can operate under the CRTC new media exemption order, which exempts them from CRTC licensing provided they furnish information when requested and do not grant an undue preference. The purpose of this memorandum is to assess whether the CRTC could impose other regulatory requirements on such services. Could regulatory requirements be enforced against an internet service with no physical assets in Canada?

The answer is clearly yes. As indicated below, Canadian courts can and have asserted jurisdiction over such undertakings and there are a number of steps that can be taken to enforce such requirements if deemed appropriate.

A key decision is *SOCAN v. CAIP*,¹ where the Supreme Court of Canada held that internet music sites with file servers outside Canada that communicated music to Canadians were subject to Canadian copyright law. Canadian jurisdiction applied to such services if they had a “real and substantial connection to Canada.”

Ten years earlier, the CRTC made a similar finding in regard to foreign DBS operators, even if they had no assets in Canada. As the Commission stated at the time,²

“A DBS service provider whose signal is receivable in Canada could be found to be carrying on a broadcasting undertaking in Canada in whole or in part where, for example, it has some or all of the following characteristics:

- it acquires program rights for Canada;
- it solicits subscribers in Canada;
- it solicits advertising in Canada;
- it activates and deactivates the decoders of Canadian subscribers.

The Commission will apply the appropriate enforcement tools to assert its jurisdiction over these undertakings should they enter the Canadian market without making contributions to the Canadian system as required of all broadcasting undertakings under the Act.”

A number of courts have similarly held that Canadian jurisdiction applies to broadcasting operations outside the country, whether they are foreign radio stations beaming signals into Canada,³ cable systems with

¹ *SOCAN v. CAIP*, [2004] 2 S.C.R. 427.

² *Structural Public Hearing*, Public Notice CRTC 1993-74, June 3, 1993

³ *Jenner v. Sun Oil*, [1952] 2 D.L.R. 526; *CAPAC v. International Good Music*, [1963] S.C.R. 136.

their head ends outside Canada,⁴ or foreign DBS operators sending signals to Canadians without CRTC or copyright authorization.⁵

So our jurisdiction clearly extends to such foreign services. But how can we enforce that jurisdiction?

To begin with, once requirements are imposed and jurisdiction is asserted, the overwhelming likelihood is that the services will voluntarily comply in order to be seen as compliant with Canadian law and in order to avoid enforcement action. In the music field, for example, SOCAN is currently receiving revenue under its Canadian copyright tariff from over thirty offshore music sites.

Why do these sites adhere to Canadian requirements? The reason is obvious. If these companies are publicly traded, or if they are supported by venture capital, they need to be able to say that they are compliant with Canadian law in order to retain investor support. It is not helpful if they have to disclose to investors that Canada has come after them for non-compliance or that they may be vulnerable to enforcement action. There are therefore significant pressures on such firms to bring themselves into compliance.

Apart from voluntary compliance, however, there are also a number of steps available to enforce the Canadian requirements. Court cases can proceed in Canada using the established processes for service *ex juris*, which can be found in the Federal Court Rules or the equivalent rules of the provincial superior courts. Two such cases in the past have involved foreign broadcast services and both of them resulted in satisfactory settlements once service *ex juris* was granted.⁶

The Commission also has the power to issue mandatory orders under s.12 of the *Broadcasting Act* to any person (not just broadcasting undertakings) requiring that person to do anything that it may be required to do under the Act.⁷ Once the order is filed with the court, persons disobeying the order would be guilty of contempt of court and can be punished with a fine or prison term. In that connection, it is important to note that by virtue of sections 21 and 22 of the *Criminal Code*, a person can be a party to an offence under the *Broadcasting Act* whether they actually commit the offence, aid or abet someone else to commit it, or counsel someone to commit the offence.⁸

Thus, a mandatory order could also be issued to any persons aiding or abetting the foreign OTT operation, such as a domestic internet service operator, if it has been given proper notice. Faced with the prospect of cessation of service, no foreign OTT operator could afford to ignore the CRTC order. If this approach was taken, it would not be necessary to seek enforcement of the Canadian order in a foreign court, although in fact there are procedures to enforce a civil contempt citation in such cases.

⁴ *R. v. Continental Cablevision*, (1974), 5 O.R. (2d) 523; *R. v. Maahs and Teleprompter Cable Communications Corp.*, (1975) 21 C.C.C. (2d) 497.

⁵ *WIC Premium Television Ltd. v. General Instrument Corp.*, (2000) 243 A.R. 329

⁶ In the *CAPAC v. International Good Music* case, the station agreed to pay ASCAP tariffs on its Canadian revenue; in the *WIC Premium Television Ltd. v. General Instrument Corp.* case, DirecTV agreed to stop serving grey market subscribers in Canada and supported efforts to enjoin such activity.

⁷ Under this section, the Commission has issued a mandatory order prohibiting named persons from operating broadcasting undertakings transmitting foreign religious programming obtained from a foreign satellite feed on an unauthorized basis. See Public Notice CRTC 1992-34, May 8, 1992

⁸ For the applicability of these provisions to the *Broadcasting Act*, see *R. v. Continental Cablevision Inc.* (1974), 19 C.C.C. (2d) 540; appeal dismissed (1975), 21 C.C.C. (2d) 497.