



CFTPA

Representing television, film
and interactive production in Canada

ACPFT

Porte-parole de l'industrie de la production télévisuelle,
cinématographique et interactive au Canada

www.cftpa.ca

April 30, 2010

Via CRTC comments/interventions form

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Dear Mr. Morin:

Re: Broadcasting Notice of Consultation CRTC 2010-97 – Call for comments on the reporting requirements for new media broadcasting undertakings

1. The Canadian Film and Television Production Association (the “CFTPA” or the “Association”) welcomes the opportunity to provide these **comments** with respect to the above-referenced Notice of Consultation.
2. The CFTPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. Our almost 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.
3. Independent producers are increasingly creating new media broadcasting content for distribution on digital platforms in order to provide consumers with content how and when they want it.

Introduction

4. At the outset, the CFTPA notes that its comments in this submission are limited to issues related to English-language new media audio-visual content (i.e., new media content related to television-type content and not audio or radio-type content) and new media non-linear content related to audio-visual content. CFTPA support should not be assumed for any questions or issues related to this Call for comments that are not covered in this submission.
5. The Association shares the CRTC’s view expressed in *Broadcasting Regulatory Policy 2009-329* (the “New Media Policy”), and repeated in the Notice of Consultation, of the importance of measuring and monitoring Canadian broadcasting content in the new media environment. This proceeding seeks to establish what information, and from which new media broadcasting undertakings, the Commission should collect pursuant to the New Media Exemption Order in order to monitor broadcasting in new media in Canada.

6. The CFTPA supports the Commission's intention not to impose any reporting requirements on undertakings engaged exclusively in the transmission of user-generated content. We also agree with the Commission's view that, to the extent that an undertaking offers both user-generated and professionally produced broadcast content, any reporting requirements will apply only to the latter form of content.
7. The CFTPA's proposals in this submission seek to strike a reasonable balance between the objective of compiling basic information and data necessary to monitor the growing significance of Canadian new media broadcasting and the burden associated with such reporting.

Which New Media Broadcasting Undertakings Should be Required to Report?

8. A fundamental and necessary first question to address in this proceeding is which new media broadcasting undertakings should be subject to reporting requirements. For the purpose of reporting requirements, the Commission has identified the following two general categories of new media broadcasting undertakings:
 - new media broadcasting undertakings affiliated with a broadcasting undertaking that is not subject to the New Media Exemption Order (i.e., a conventional broadcasting undertaking) (hereinafter referred to as "affiliated new media broadcasting undertakings"); and
 - unaffiliated new media broadcasting undertakings.

Q7. Should all affiliated new media broadcasting undertakings be subject to reporting requirements? If not, what are the appropriate criteria and methodology for identifying those new media broadcasting undertakings affiliated with a conventional broadcasting undertaking that ought to submit data?

Q8. Considering the potentially large number of unaffiliated new media broadcasting undertakings, what criteria and methodology should the Commission use to define the subset of unaffiliated new media broadcasting undertakings, carried on in whole or in part in Canada, that should submit data? In particular, should the subset be defined by level of revenue, unique visitors, and/or the amount of content transmitted?

9. The CFTPA acknowledges that a potentially large number of new media broadcasting undertakings fall under the New Media Exemption Order. As such, we accept that it would be difficult to identify all of these undertakings and require them to file reports with the Commission.
10. Accordingly, we believe it would be appropriate to limit, at this time, the application of reporting requirements to a subset of these undertakings. While, unfortunately, this approach will provide the Commission and interested parties with an incomplete picture of Canadian new media broadcasting activities, it is a reasonable starting point that will provide a fairly good understanding of the new media broadcasting environment that can be measured and tracked over time.
11. Therefore, the CFTPA submits that it would be appropriate and reasonable to collect information and data, at this time, from new media broadcasting undertakings that are active in, or affiliated with parties active in, the traditional broadcasting and telecommunications sectors. In other words, parties that currently fall within the purview of the Commission's activities would be subject to reporting requirements. These would include programming undertakings (conventional, specialty, pay, video-on-demand, and pay-per-view), broadcasting distribution undertakings (BDUs), telecommunications common carriers, and Internet service providers (ISPs).

12. Under our proposal, all new media broadcasting undertakings that are affiliated with entities that are currently subject to reporting requirements related to their traditional broadcasting and telecom activities would be subject to new reporting requirements regarding new media. These entities would simply be required to provide information and data related to their new media broadcasting activities as part of their existing reporting requirements (e.g., with the annual broadcasting survey). In our view, such an approach would not pose an undue burden on these companies.
13. With respect to parties that currently fall within the purview of the Commission's activities that do not currently file reports with the Commission, these entities would be subject to reporting requirements regarding new media, to the extent that they are engaged in new media activities.
14. To be clear, reporting requirements would apply to these new media broadcasting undertakings only in their capacity as audio-visual content providers or aggregators, to the extent that they are engaged in such activities.
15. For greater clarity, the CFTPA would include the following in our proposed list of new media broadcasting undertakings that would be required to report to the Commission:
 - broadcaster websites (e.g., CTV.ca, Teletoon.com);
 - broadcaster audio-visual mobile content applications (e.g., TSN Mobile site, Score Mobile for Blackberry);
 - content aggregators associated with conventional BDUs (e.g., Rogers On Demand Online, Bell TV Online);
 - broadband portals offering professionally produced broadcasting content (e.g., Sympatico.ca); and
 - any "walled garden" or audio-visual content applications offered by mobile wireless carriers (e.g., TSN Mobile Highlights on Telus Mobility).
16. In assessing which new media broadcasting undertakings should be subject to reporting requirements, the CFTPA also considers it appropriate to include entities that receive federal public funding for new media broadcasting content development and/or creation, namely through the Canada Media Fund (CMF). In this regard, we note that by collecting information and data from Canadian television broadcasters, as proposed above, the Commission will capture a significant amount of existing new media broadcasting activity in Canada that is being funded via the CMF's Convergent Stream.
17. However, given that the CMF will likely be collecting information and data from broadcasters accessing funds through the Convergent Stream as a way of assessing performance of the fund, we strongly encourage the Commission to work closely with the CMF to streamline reporting requirements in order to reduce the administrative burden on broadcasters. Ideally, broadcasters should be required to file the same or similar information and data, in the same or a similar format, to both the CMF and the CRTC.
18. The CFTPA also considers it appropriate to require funding recipients of the CMF's Experimental Stream to file information and data on any new media broadcasting audio-visual content development and/or creation project and related non-linear content. Some of these recipients would be affiliated new media broadcasting undertakings and some might not be. Again, in cases where new media broadcasting undertakings are affiliated with an existing programming service or BDU, the streamlining of reporting requirements between the CMF and the CRTC on Experimental Stream funding recipients would be an important objective, in order to reduce the administrative burden on them.

19. In cases where a CMF Experimental Stream funding recipient is not affiliated with a programming undertaking, BDU, telecom carrier, or ISP, a sharing of relevant reporting information between the CMF and the CRTC would augment the CRTC's collection of information and data related to new media broadcasting undertakings.
20. The Commission might also wish to consider working cooperatively with the private CRTC-certified independent production funds, such as the Bell Fund, in terms of collecting and sharing information and data related to new media broadcasting as a way of obtaining additional information. Again, an important principle would be streamlined reporting requirements between the independent production funds and the CRTC.
21. While the CFTPA believes it would be appropriate to limit, at this time, the application of reporting requirements to a subset of new media broadcasting undertakings, as proposed above, the Commission could consider encouraging all unaffiliated new media broadcasting undertakings that are subject to the New Media Exemption Order to register with the Commission on a voluntary basis. A registration approach would mirror the approach used on the telecom side for such parties as competitive local exchange carriers, resellers of telecommunications services, and competitive pay telephone service providers.
22. Given the potentially large number of unaffiliated new media broadcasting undertakings that fall under the New Media Exemption Order, a voluntary registration list approach would provide the Commission and interested parties with potentially a basic snapshot of the number of unaffiliated players active in the new media broadcasting environment, while being cognizant of the administrative burden associated with reporting.
23. The Commission could also consider encouraging registered unaffiliated new media broadcasting undertakings to file basic information and data on their activities with the CRTC on a voluntary basis.
24. Depending on the response to voluntary registration and reporting, formal reporting requirements could be extended to certain unaffiliated new media broadcasting undertakings in the future as the market evolves and the need arises.

What Information Should be Collected?

25. The Commission seeks comment on what type of information should be collected (e.g., availability, consumption, financial data) from new media broadcasting undertakings, and on the metrics that should be used in the collection of such data.

Q1. What information should the Commission collect to better understand the new media broadcasting industry in Canada? What are the appropriate metrics for measuring such information?

26. The CFTPA submits that it is important to collect information and data from the new media broadcasting undertakings that will be subject to reporting requirements on the following broad categories:
 - What new media broadcasting content is being offered and how?
 - Usage of new media broadcasting content
 - What are the expenses and revenues associated with new media broadcasting content?
27. Our responses to questions 2 to 4 below provide greater detail on our recommendations related to the first two bullets above.
28. With respect to expenses and revenues associated with new media broadcasting content, the CFTPA submits that the collection of this information is absolutely essential to curb "gaming". As consultant Peter Miller wrote recently in a paper for a national conference, "...the exclusion

[from the CPE formulation] of smaller category B, third language, VOD and PPV, not to mention unregulated new media revenues, will create a small but growing incentive for cost allocation and revenue gaming.¹ [*emphasis added*]

29. As the Commission is aware, virtually all advertising sales made by broadcasters today are integrated TV-new media sales. While the new media portion of these sales is likely currently small, broadcasters have an incentive to allocate a greater portion of the revenues from integrated sales to the unregulated new media sides of their businesses (i.e., to their affiliated new media broadcasting undertakings) and to load as many costs on the regulated sides of their businesses (e.g., to licensed programming undertakings).
30. This is problematic since, for the most part, broadcasters' required expenditures on Canadian programming are based on gross regulated revenues. In fact, the potential for "gaming" of costs and revenues will be even greater going forward as the group-based regulatory framework for television services, which includes expenditure requirements based on regulated revenues, takes effect in 2011.
31. Accordingly, the CFTPA respectfully submits that transparency with respect to new media expenses and revenues is absolutely necessary to curb the potential for cost and revenue misallocation as between regulated and unregulated activities. Moreover, we recommend the Commission issue guidelines regarding proper financial allocation to licensees affiliated with new media broadcasting undertakings, and to affiliated new media broadcasting undertakings themselves, as a way of ensuring consistent and accurate reporting.

Q2. What are the most appropriate metrics for monitoring the availability of new media broadcasting content? In particular, address the appropriateness of using the following metrics for monitoring availability of new media broadcasting content:

- *the number of audio and audio-visual programs offered by a new media broadcasting undertaking in the past year; and*
- *the total hours of new media broadcasting content offered by a new media broadcasting undertaking in the past year.*

32. While the Commission might be inclined to use the total number of hours of new media broadcasting content offered by a new media broadcasting undertaking as the metric for monitoring the availability of new media broadcasting content given that this is the approach used in traditional television, using this metric alone poses some problems.
33. The CFTPA notes that some types of new media broadcasting content, such as clips of longer programs or repurposed content, interactive games, and user-guided storytelling (i.e., where users choose the direction of a story and its characters) may not lend themselves to measurement by hours and, therefore, reporting by the number of "content offerings" may be more appropriate. Given this reality, the Association submits that it would not be unreasonable to require that both metrics be reported, i.e., both the number of content offerings (e.g., programs, clips, interactive games, etc.) and the total hours of content offered.

Q3. What are the most relevant and feasible metrics for measuring the availability of Canadian content in new media broadcasting? In particular, address the appropriateness of using the percentage of Canadian content, either in terms of total number of hours or total number of programs, offered on new media platforms as a possible metric for monitoring availability of Canadian new media broadcasting content.

¹ Miller, Peter H. "Group-Based Licensing of TV Services: New Developments," April 23, 2010. Paper for the 15th Biennial Law Society of Upper Canada National Conference, New Developments in Communications Law and Policy.

34. Before addressing the Commission's third question above, it is important to establish how Canadian content will be defined in the new media broadcasting environment. With respect to traditional certified Canadian television content made available on new media platforms, the Commission should consider this type of content Canadian by virtue of the fact that it would have received CAVCO certification and CRTC CanCon numbers. However, there is currently no standard definition of Canadian for truly original audio-visual new media broadcasting content, such as webisodes and web-only series. There is also no standard definition of Canadian for non-linear new media broadcasting content, such as interactive games.
35. Therefore, the CFTPA recommends that in order to qualify as Canadian, original audio-visual new media broadcasting content such as webisodes and web-only series should follow the existing CAVCO rules for certifying television programming.
36. With respect to non-linear new media broadcasting content such as interactive games, as a starting point, we recommend the Commission look to the definitions used by the Bell Fund and the CMF in determining whether this type of content is Canadian or not.
37. With respect to question 3 above, we submit that it is appropriate to measure the availability of Canadian new media broadcasting content as a percentage of the total content offered by a new media broadcasting undertaking. Consistent with our response to question 2 above, we believe it would not be unreasonable to require the reporting of Canadian content in new media broadcasting that is available both as a percentage of the total number of hours and total number of content offerings.

Q4. To understand whether broadcasting in the new media environment is serving a comprehensive range of interests and tastes, consistent with the broadcasting policy set out in the Act, to what extent is it appropriate to categorize content based on the following five characteristics for the purposes of reporting? What are the most appropriate metrics for measuring these characteristics?

- type of programming (e.g., original new media content/content common to new media and conventional broadcasting, live content/on-demand content, complete program/clip);
 - origin (e.g., Canadian/foreign, independent/broadcaster-affiliated/in-house production);
 - genre;
 - accessibility (e.g., captioned and/or described); and
 - language of content.
38. The CFTPA submits that it is entirely appropriate and reasonable to require all new media broadcasting undertakings that will be subject to reporting requirements to provide the information listed above.

Issues related to new media or digital rights

39. The CFTPA submits that one of the key drivers for the creation of new media broadcasting content is the establishment of a vibrant digital rights marketplace. This, in turn, depends on independent producers and broadcasters reaching a mutual understanding with respect to the definition, ownership, and exploitation of digital rights.
40. The Association appreciates the Commission's consistently stated expectation, most recently in *Broadcasting Regulatory Policy CRTC 2010-167* ("BRP 2010-167"), that Terms of Trade are a vehicle for achieving this end. As the Commission stated in BRP 2010-167:

The Commission reiterates its expectation, set out in Broadcasting Regulatory Policy 2009-329, that the broadcasting and production sectors develop the appropriate frameworks from which to base individual negotiations respecting the ownership and exploitation of digital rights. A uniform terms of trade agreement would identify those rights in independently-produced programs that will be sold to broadcasters, and those that will be retained by independent producers. With that issue defined, independent producers would be able to exploit those rights that they retained, and would thus be able to effectively plan and produce their programming. Broadcasters, in the same way, could focus on the exploitation of those rights that they had acquired. Flexibility and scope would be created for the development of Canadian programming on new platforms.²

41. The CFTPA submits that in addition to adopting Terms of Trade, fostering a healthy digital rights marketplace also depends on independent producers and broadcasters having access to market data that enables them to make fully informed decisions about how best to exploit the digital rights to their programming. The Association notes that currently, the absence of useful market data with respect to the valuation and exploitation of digital rights has created an informational asymmetry as between broadcasters and independent producers. Simply put, independent producers lack the market information that they need in order to ensure that the rights to their programming are being maximally exploited across all digital platforms.
42. The Association notes that facilitating the collection and dissemination of digital rights data is a goal that is also shared by some broadcasters. For example, in explaining its recent proposal to create a digital rights taxonomy as one of its tangible public benefits initiatives in relation to its acquisition of specialty television services SexTV and Drive-In Classics³, Corus Entertainment noted the following:

The reason that Corus and everyone else needs to do this research work is that we need to develop a common language that we can use to support our ECM [enterprise content management] systems but also other rights-based discussions such as the regulation of the Canada Media Fund, etc. If we don't have a common taxonomy the result will be confusion and inefficiency.⁴

43. Leaving aside the merits of Corus' specific proposal, the CFTPA agrees with the underlying principle that where stakeholders lack a common understanding of the digital rights marketplace, the inevitable result is "confusion and inefficiency". In our view, this principle applies not only with respect to the importance of developing a common digital taxonomy, but also a common database of information with respect to how, and according to what terms, digital rights are being exploited by new media broadcasting undertakings.
44. The CFTPA accordingly proposes that, as a starting point, the Commission require affiliated new media broadcasting undertakings to report the following in relation to their licensing of digital rights from independent producers:
- The digital rights acquired;
 - The consideration paid by the affiliated new media broadcasting undertaking for the rights in question (e.g., licence fee, revenue-sharing arrangement);
 - The length of the licence term for the digital rights acquired; and

² *Broadcasting Regulatory Policy CRTC 2010-167 – A group-based approach to the licensing of private television services*, March 22, 2010, paragraph 93.

³ We note that the Commission approved this benefit initiative in *Broadcasting Decision CRTC 2009-706 – SexTV: The Channel and Drive-In Classics Channel – Acquisition of assets*, November 19, 2009.

⁴ Corus Entertainment reply letter dated August 31, 2009 replying to the CRTC's deficiency letter dated August 21, 2009, at page 12.

- The length of any freeze on the exploitation of digital rights retained by the producer (typically referred to as a “holdback”).

45. The CFTPA notes that the Commission already collects and publishes data with respect to priority programming commissioned by the large private conventional television broadcast groups from the independent production sector. Such data includes, for example, the licence fees paid by the broadcasters for priority programming. The Association considers that having equivalent data, released on an aggregate basis, with respect to new media broadcasting will only become more critical as Canadians increasingly access broadcasting content over digital platforms.

Confidentiality of information

46. Given that much of the information currently submitted as part of the annual reporting by broadcasting undertakings is granted confidentiality, or is disclosed only in an aggregated manner, the Commission seeks comment on the following question:

Q5. Should confidentiality be extended to information regarding any of the data which parties propose the Commission collect in Questions 1 through 4 above? If so, to what extent should such confidentiality be extended?

47. The CFTPA urges the Commission to err on the side of transparency when deciding whether to extend confidentiality to the information and data collected from new media broadcasting undertakings. The onus should be on new media broadcasting undertakings to demonstrate why such information should be kept confidential.

48. Should the CRTC decide to publicly release data on an aggregated basis only, we would encourage the Commission to, at a minimum, segment such aggregated data by sector (e.g., new media broadcasting undertakings affiliated with broadcasters, new media broadcasting undertakings affiliated with BDUs, unaffiliated new media broadcasting undertakings, etc.).

49. Moreover, if the Commission is not inclined to publicly release data by individual new media broadcasting undertaking, the CFTPA submits it would be appropriate to measure and track the activities and performance of large corporate groups operating in the new media broadcasting environment. Given their privileged position in the Canadian market as large, consolidated companies, we believe it would be reasonable to require new media broadcasting undertakings that are part of large corporate groups to file aggregated data by corporate group. This would be consistent with the approach the Commission took in *Broadcasting Regulatory Policy CRTC 2009-560*, whereby it required the public disclosure of aggregate financial data for owners of large BDUs, conventional television, and radio ownership groups.

Frequency of reporting

Q6. Considering the dynamic nature of the new media environment, what is the appropriate frequency for reporting pursuant to the New Media Exemption Order? In particular, address the appropriateness of annual reporting, as proposed in paragraph 14.

50. The CFTPA agrees with the Commission’s proposal that new media broadcasting undertakings should be required to report on an annual basis concurrent with the annual broadcasting survey, and that reporting commence in the fall of 2010. We submit that annual reporting would not pose an undue burden on new media broadcasting undertakings that are subject to reporting requirements.

Conclusion

51. In conclusion, the CFTPA believes it would be appropriate to limit, at this time, the application of reporting requirements to a subset of new media broadcasting undertakings, namely those that are active in, or affiliated with parties active in, the traditional broadcasting and telecommunications sectors, as detailed above. To be clear, reporting requirements would apply to these undertakings only in their capacity as audio-visual content providers or aggregators.
52. The Association also considers it appropriate to require entities that receive federal public funding for new media broadcasting content development and/or creation, namely through the CMF, to report on their new media broadcasting activities. Moreover, the Commission could encourage all unaffiliated new media broadcasting undertakings that are subject to the New Media Exemption Order to register with the Commission on a voluntary basis.
53. In the CFTPA's view, our proposed approach regarding which new media broadcasting undertakings should be required to report would strike a reasonable balance between basic information and data necessary to monitor the growing significance of Canadian new media broadcasting and the burden associated with such reporting.
54. The CFTPA appreciates the opportunity to file these comments in this important proceeding. We look forward to reviewing the comments filed by other parties and we will respond accordingly in the reply phase of this proceeding.

All of which is respectfully submitted.

Yours truly,

[Original signed by Norm Bolen]

Norm Bolen
President and CEO

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