



Broadcasting Order CRTC 2009-452

Ottawa, 28 July 2009

Route reference:

Broadcasting Notice of Public Hearing 2008-11

Additional reference: 2009-329

Reference to the Federal Court of Appeal – Applicability of the *Broadcasting Act* to Internet service providers

In Review of broadcasting in new media, Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009, the Commission set out its determinations in its proceeding on Canadian broadcasting in new media. However, the Commission did not determine the legal issue as to whether Internet service providers carry on, in whole or in part, “broadcasting undertakings” subject to the Broadcasting Act when they provide access to broadcasting through the Internet. Instead, the Commission stated that it would refer the matter to the Federal Court of Appeal. Accordingly, in this order, the Commission refers this question to the Court for hearing and determination.

Introduction

1. On 17 May 1999, following public consultations on the range of services referred to as “new media,” the Commission announced its determination that the transmission of “programs”¹ through the Internet, with certain exceptions, constituted “broadcasting” within the meaning of section 2 of the *Broadcasting Act* and that consequently some of these services, such as audio and audiovisual services streamed through the Internet, fell within the scope of the definition of “broadcasting” in the *Broadcasting Act*.² The Commission concluded that regulation of broadcasting undertakings that provide broadcasting services delivered and accessed through the Internet was not necessary to implement the broadcasting policy established in the *Broadcasting Act*. Accordingly, in Public Notice 1999-197, the Commission issued an exemption order for those undertakings, pursuant to section 9(4) of the *Broadcasting Act*.
2. In Broadcasting Notice of Public Hearing 2008-11, the Commission commenced a proceeding on Canadian broadcasting in new media to determine whether the above-mentioned exemption order ought to be maintained and, if so, whether any revisions were necessary. In the course of the proceeding, the Commission received over 150 comments addressing various aspects of broadcasting in new media. Among the many issues raised was the question as to whether Internet service providers (ISPs) are subject to the *Broadcasting Act* when they provide end-users with access to broadcasting through the Internet. ISPs argued that they are not engaged in broadcasting and are involved solely in telecommunications activities, while cultural groups argued that ISPs play a critical role in the Canadian broadcasting system and operate as broadcasting undertakings subject to the *Broadcasting Act*. Both sides filed legal opinions in support of their positions.

¹ As defined in section 2 of the *Broadcasting Act*.

² See Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14.

3. In Broadcasting Regulatory Policy 2009-329, the Commission set out its determinations in the proceeding on Canadian broadcasting in new media. However, the Commission did not determine the legal issue as to whether ISPs constitute broadcasting undertakings subject to the *Broadcasting Act* when they provide access to broadcasting through the Internet. Instead, the Commission stated that it would refer the matter to the Federal Court of Appeal for determination. Consequently, that part of the proceeding will only be concluded after the Court has ruled.
4. With respect to its determination to refer this matter to the Court, the Commission stated the following in its regulatory policy:

The issue of the applicability of the Act to ISPs was raised primarily in relation to the proposal by cultural groups in the Proceeding for a levy on ISPs to create a fund to support the creation and presentation of Canadian new media broadcasting content. Although the Commission has determined that funding (and, consequently, a levy) is neither necessary nor appropriate at this time, it considers that the question as to whether ISPs are subject to the Act must be resolved. If ISPs were subject to the Act, they would fall within the scope of the New Media Exemption Order given that it was intended to encompass all broadcasting undertakings whose services are delivered and accessed over the Internet. Accordingly, legal certainty with respect to the status of ISPs under the Act is necessary in order to know whether ISPs are subject to the New Media Exemption Order and, as such, whether the proposed amendments to that order to impose reporting requirements and undue preference provisions for new media broadcasting undertakings will apply to them.

The Commission notes that, pursuant to subsection 4(4) of the *Broadcasting Act*, a telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity, is not subject to the *Broadcasting Act*. Likewise, pursuant to section 4 of the *Telecommunications Act*, that statute does not apply in respect of broadcasting by a broadcasting undertaking. The legal issue as to whether ISPs are subject to the *Broadcasting Act* raises fundamental questions regarding the distinction, for the purpose of the *Broadcasting Act* and the *Telecommunications Act*, between telecommunications common carriers and broadcasting undertakings.

5. The Commission notes that “broadcasting undertaking” and “telecommunications common carrier” are defined in the *Broadcasting Act* and the *Telecommunications Act* respectively. Specifically, as set out in section 2 of the *Broadcasting Act*, “‘broadcasting undertaking’ includes a distribution undertaking, a programming undertaking and a network.” Each of these terms is in turn defined in section 2 of the *Broadcasting Act*.
6. As noted above, broadcasting undertakings that provide broadcasting services delivered and accessed through the Internet are exempt from regulation pursuant to the exemption order for new media broadcasting undertakings. Further, as stated in Broadcasting Regulatory Policy 2009-329, to the extent that ISPs are “broadcasting undertakings” within the meaning of section 2 of the *Broadcasting Act*, then they are also subject to this order and its requirements.

7. As set out in section 2 of the *Telecommunications Act*, “telecommunications common carrier” means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation.”
8. ISPs are either “telecommunications common carriers” within the meaning of section 2 of the *Telecommunications Act* or are known as resellers. ISPs that are resellers do not own or operate the transmission facilities they use to provide Internet services but rather lease them from Canadian carriers.³ The provision of retail Internet services by telecommunications common carriers that are Canadian carriers is subject to direct regulation under the *Telecommunications Act*. The Commission has determined that it is appropriate to refrain from exercising its rate regulation powers (and in some cases certain other powers) in relation to retail Internet services, pursuant to section 34 of the *Telecommunications Act*.⁴ With the exception of Internet services provided by wireless service providers, the Commission has retained its power to impose conditions on the provision of retail Internet services by Canadian carriers and to address issues regarding compliance with subsection 27(2) of the *Telecommunications Act*. All ISPs must pay contribution⁵ in respect of any voice over Internet protocol (VoIP) services they may provide but are exempt from paying contribution with respect to their retail Internet services. The Commission notes that retail ISPs provide services to customers who are end-users, in contrast to wholesale ISPs, which offer services to other service providers.
9. That retail Internet services are “telecommunications services” as defined in the *Telecommunications Act* is not subject to question, at least to the extent that such services provide access to content that is not broadcasting through the Internet to end-users. The issue that arose in the proceeding is limited to whether ISPs are carrying on, in whole or in part, “broadcasting undertakings” subject to the *Broadcasting Act* when they provide access through the Internet to broadcasting requested by end-users. In its various determinations made under the *Telecommunications Act* regarding retail Internet services, the Commission has neither specifically included nor excluded the provision of access to broadcasting by retail ISPs.
10. It is important to note that the legal issue in question relates solely to the functions of retail ISPs in providing access to the Internet to end-users and not to other roles that an ISP might assume, such as that of a website operator. In order to facilitate the analysis of the legal issue of the applicability of the *Broadcasting Act* to ISPs, a basic description of how content is accessed through the Internet and the functions of ISPs, which is not in dispute, is set out below.

Accessing content through the Internet

11. The Internet can be described as essentially a network of networks that allows for the communication of digital information. The content (e.g. websites) available through the Internet is stored on host servers located around the world, except where the content is streamed by the content provider live to end-users or in real time between end-users.

³ Section 2 of the *Telecommunications Act* defines “Canadian carrier” as “a telecommunications common carrier that is subject to the legislative authority of Parliament.”

⁴ See, for example, Telecom Order 99-592.

⁵ Contribution is paid pursuant to subsection 46.5 of the *Telecommunications Act*, which provides for a fund that supports expanded access to basic telecommunications services.

12. For the purposes of transmission on the Internet, content is broken down into data packets. In order for an end-user to access content on the Internet, the end-user must send a request to a host server or network device. Data packets are transmitted from host servers or network devices via switches and routers, which examine the header information and determine the appropriate transmission route for the packets. Packets are transmitted through multiple routers until they reach the end-user's ISP for delivery to the computer or other Internet aware device operated by the end-user.⁶

Functions of ISPs

13. ISPs enable end-users to access the Internet and enable the delivery of content through the Internet to end-users, as described above. To that end, the ISPs' routers respond to end-user activity by routing data packets using Internet protocol. The functions and operations of ISPs do not generally differ according to the type of content being delivered to the end-user – whether it be alphanumeric, audio or audiovisual.
14. Source and destination Internet addresses for each packet are assigned by the end-user device and are not generally modified by ISPs. The ISP reads the packet's header to determine the most appropriate transmission route. The ISP's routers route packets of data sourced from or destined to an end-user's computer or other Internet aware device. Upon reception of packets, the end-user device reassembles the packets of data and translates the data into a format which will be accessible to the end-user.
15. ISPs deploy routers and other network infrastructure to interconnect their subscribers with the other networks that make up the Internet. In addition, ISPs generally provide their subscribers with hardware such as a modem and/or router to connect them to their network, as well as customer authentication (e.g. username and password).
16. In order to access broadcasting through the Internet, the end-user must make use of the services of an ISP. In addition, content providers depend on ISPs' services for the delivery of their content to end-users. In their role as providers of access to broadcasting, ISPs do not select or originate programming or package or aggregate programming services. While ISPs may perform these functions when they operate their own websites, this activity is separate from their role as ISPs, which is to provide for the transmission of content requested by their end-users.
17. Retail Internet access services are offered at different speeds for different prices. ISPs generally market and promote particular service offerings in part with reference to the speed at which end-users can access audio and video content through the Internet.

⁶ Source: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, paras. 8-9, 20.

18. As noted above, the Commission has previously found that the transmission of programs⁷ through the Internet, with certain exceptions, constituted broadcasting within the meaning of section 2 of the *Broadcasting Act*. Although there was some debate at the proceeding as to the extent of broadcasting, if any, on the Internet,⁸ the fact that there has been a significant increase over the past decade in the amount of audio and audio-visual content available through the Internet and that ISPs provide end-users with access to that content was not in dispute. The legal question that is currently unresolved in this proceeding is whether in providing access to broadcasting ISPs are subject, in whole or in part, to the *Broadcasting Act*.
19. In light of all of the foregoing and pursuant to section 18.3 and subsection 28(2) of the *Federal Courts Act*, the Commission orders that the following question of law be referred to the Federal Court of Appeal for hearing and determination:

Do retail Internet service providers (ISPs) carry on, in whole or in part, “broadcasting undertakings” subject to the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to “broadcasting” requested by end-users?

The terms “broadcasting” and “broadcasting undertaking” are as defined in the *Broadcasting Act*, S.C. 1991, c. 11, as amended.

Procedure

20. The Commission expects to receive directions on procedure from the Federal Court of Appeal. The Court’s directions on procedure will be available at the Court, and copies can be obtained from the Commission on request.

Secretary General

Related documents

- *Review of broadcasting in new media*, Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009
- *Canadian broadcasting in new media* – Notice of consultation and hearing, Broadcasting Notice of Public Hearing CRTC 2008-11, 15 October 2008
- *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, 17 December 1999

⁷ As defined in section 2 of the *Broadcasting Act* and including, for example, audio and video services.

⁸ Some parties in the proceeding submitted that the Commission’s interpretation that the transmission of audio and audiovisual content through the Internet to end-users constituted “broadcasting” within the meaning of the *Broadcasting Act* was incorrect. In Broadcasting Regulatory Policy 2009-329, the Commission reaffirmed its conclusion that there is broadcasting in new media for the reasons set out in Broadcasting Public Notice 1999-84/Telecom Public Notice 99-4.

- *Forbearance from retail Internet services*, Telecom Order CRTC 99-592, 25 June 1999
- *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999

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