Submission To CRA For An Updated Technical Interpretation On The Deductibility Of Foreign Internet Advertising

Submitted by:

Friends of Canadian Broadcasting

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Summary

The Friends of Canadian Broadcasting (FCB) is pleased to submit this request to the Canada Revenue Agency (CRA) for an updated interpretation of the *Income Tax Act* (ITA) on the question of the deductibility of expenses for advertising purchased on foreign internet-delivered services.

As it stands, CRA allows full tax deductibility of advertising expenses on foreign internet-delivered media. CRA's interpretation of the *ITA* in this respect has not been updated since 1996, and it is based on (a) case law prior to that date (some of it from as early as 1935) and (b) definitions that do not reflect developments in on-line media since 1996.

FCB respectfully submits that CRA should consider new developments and definitions, and develop a revised interpretation reflecting current internet realities. FCB's concern is that much internet advertising by Canadians is on media that are, in fact and in law, foreign broadcast services. When this is the case, these expenses should not be deductible under the wording of the *Income Tax Act, Section 19.1.*

The basic reasoning of this submission is:

1. The *Income Tax Act* states that *"no deduction shall be made for ... an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking",* defined therein as *"a network operation or broadcasting transmitting undertaking located outside Canada".*
2. The CRTC's original *New Media Exemption Order (1999) (*now updated as the *Exemption Order for Digital Media Broadcasting Undertakings)* established that most internet-delivered media are broadcasting undertakings, specifically, "digital media broadcasting undertakings" (DMBU), based on the definition of "broadcasting" in the *Broadcasting Act.*
    a. Some services are excluded – e.g. those whose content is *"still images consisting predominantly of alphanumeric text"* – but most of the significant advertising carriers are DMBUs.
    b. The 1999 CRTC decision also ruled that delivering content over the internet is "transmission" within the meaning of the *Broadcasting Act*, and therefore it follows that *"broadcasting transmitting undertaking",* the term used in the *ITA,* is included in the term DMBU.
3. Therefore, foreign DMBUs are "foreign broadcasting undertakings" for the purposes of the *Income Tax Act,* and advertisements placed with foreign DMBUs directed primarily to a market in Canada are not deductible expenses.
4. CRA's interpretation of 1996 determined that advertising on foreign "web sites" was deductible. However, this interpretation applied only to "web sites" as they existed in 1996, not to the current reality of internet media delivery.
5. In addition to this legal interpretation, FCB notes that most advertisers have already substituted placement on internet media for much of their traditional media buys. This demonstrates that internet-delivered broadcasting performs the same function as traditional broadcasting, and is therefore broadcasting "in fact" as well as "in law".

FCB notes that arguments can also be made to the effect that certain foreign internet sites should be deemed non-deductible by virtue of their being newspapers and or periodicals as defined in the *ITA*. FCB has, however, chosen not to make such arguments in this submission, and leaves that matter to other parties with greater knowledge of print media and/or future interpretation requests.

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The Policy Rationale

FCB notes that, in considering a new interpretation, CRA must look primarily to the wording of the *Income Tax Act* (*ITA*) and related regulatory and legislative instruments. However, we believe it relevant to briefly consider the policy motivations that created the pertinent legal provisions.

The purpose of the advertising deductibility provisions of the *ITA* is to protect Canadian media from unfair competition from foreign media, and thereby preserve Canadian jobs and voices.

In the 1960s and 70s, American TV & and radio stations located close to the Canadian border realized that they could lucratively target Canadian markets with zero to minimal incremental investment in content and infrastructure. Border over-the-air TV and radio stations in markets like Buffalo and Rochester, New York, Bellingham, Washington and Burlington, Vermont started to sell advertising in neighbouring major Canadian markets such as Toronto, Vancouver, and Montreal, undercutting Canadian stations, with no incremental investment other than the cost of sales.

By the time broadcast advertising deductibility rules were introduced in 1976 through Bill-C-58 (section 19.1 of the *ITA*), US Border TV stations were estimated to be drawing $10 million annually from a then total Canadian TV advertising spend of $100 million.[1]

FCB notes that Section 19.1 was not, and is not, aimed at denying foreign media access to the Canadian market; instead, it addresses the unfair competition that arose from foreign media competing directly with Canadian media for advertising revenue, without the same investment in Canadian jobs and infrastructure required of Canadian firms.

While not explicitly stated in the *ITA* (though it is alluded to in the *Broadcasting Act*[2]), in the absence of provisions to the contrary, it must be assumed that this legislation was intended to be technology-neutral.[3]

In 1996, given the state of the internet at that time, the CRA determined that foreign "web sites" could not be considered foreign periodicals or broadcasters, and therefore allowed full tax deductibility of advertising expenses on such sites.

In the two decades since CRA's interpretation, the internet has emerged as a direct and material competitor to traditional print and broadcasting media. Its power as an advertising medium has grown substantially as the addition of audio, video, and other images to its offering has increased its usage.

While internet advertising was inconsequential in 1996, it has grown to more than $4.6 billion in 2015, well over a third of all Canadian advertising revenues. In 2016, Canadian internet advertising revenue is

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[1] Value of Public Support for Broadcasters – Simultaneous Substitution and Tax-based Advertising Incentive, Nordicity, November 4, 2011.
http://www.cbc.radio-canada.ca/_files/cbcrc/documents/latest-studies/nordicity-value-public-support-en.pdf

[2] Section 3(1)(d)(iv) of the Broadcasting Act states that "the Canadian broadcasting system should be readily adaptable to scientific and technological change".

[3] The so-called Supreme Court "copyright pentalogy" – five copyright judgments released concurrently by the Court in July 2012 – confirmed the importance accorded by the Court to the principle of technological neutrality. See for example, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231, where the court states at para 9:

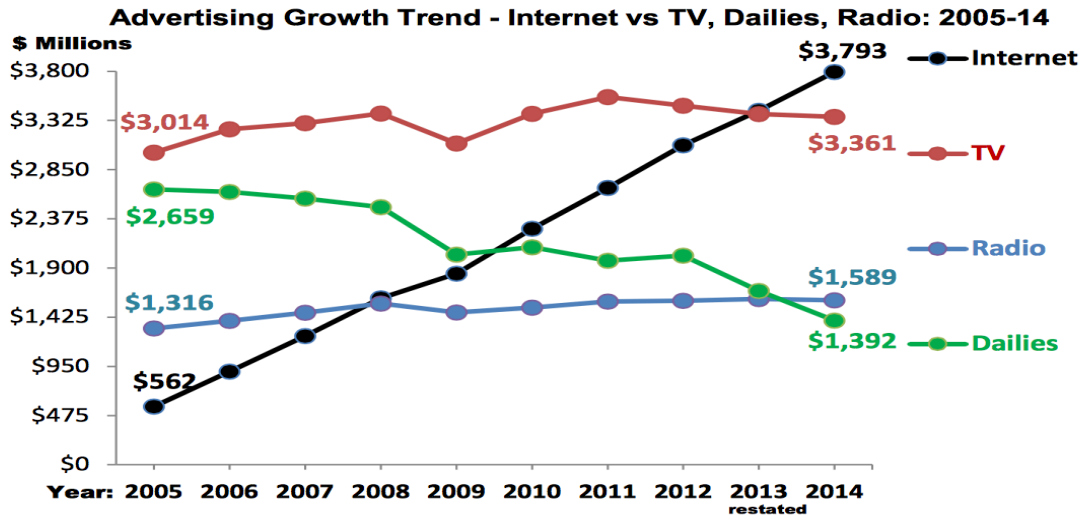
> "SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to *both* a fee for reproducing the work *and* a fee for communicating the work. The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies."

projected to increase 21% to $5.55 billion. Double-digit percentage increases have been the norm for two decades, with little indication they are about to end.[4]

Meanwhile, as overall Canadian advertising spending tracks the economy at a relatively fixed ratio,[5] the growth of traditional media has stalled and collapsed. In aggregate, Canadian TV advertising revenue peaked at $3.55 billion in 2011 and declined to $3.22 billion in 2015.[6]

Radio is the most recent traditional media segment to see evidence of this impact. The CRTC reports a small decline, from a peak of $1.62 billion in 2013 to $1.60 billion in 2015.[7] Going forward, the growth of streaming audio, growth of mobile advertising, smart phone usage and the connected car are expected to increase downward pressure on radio advertising.

Until 2016, the Canadian Internet Advertising Bureau (IAB) published a compelling graph that tracked the year-over-year trend among major media. The following is from the 2015 IAB Report:



Source: IAB Annual Internet Advertising Revenue Report, 2015

The Increasing Role of foreign media

The decline of traditional media advertising in favour of the internet might not be of tax policy concern, but for a troubling economic reality.

Almost 90% of Canadian internet advertising accrues to foreign internet sites and platforms, with two thirds of expenditures going to top US-owned internet platforms Google and Facebook.[8]

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[4] Data from the Internet Advertising Bureau (Canada) (IAB) *Annual Internet Advertising Revenue Report*, 2016. September 8, 2016 (IAB Report). Current growth is largely driven by mobile, which grew 70% in 2015, as opposed to 3% for online. Mobile has grown from a 3% share of internet revenues in 2011 to a 35% share in 2015.

[5] A ratio that has nevertheless declined over the last three decades. See, for example, *Progress Amid Digital Transformation*, Scotiabank Equity Research, November, 2013. p.18.

[6] IAB 2012 & 2106 Reports.

[7] CRTC statistical summaries.

[8] IAB reports that the Top 10 Internet Advertising Earners bringing in 86% of all Canadian internet Ad Revenues in 2015, and the top 20, 90%. This is an increase from the equivalent 2009 numbers of 77% and 87%. The 2016 IAB Report does not identify these companies, but they are understood to be mostly US-owned and controlled, a presumption reflected in viewing stats. The Canadian Media Concentration Project, *Growth of the Network Media Economy in Canada, 1984-2015*, identifies Google and Facebook alone as representing 66.5% of internet advertising revenues in 2015; with identified Canadian media representing 8.2%. This represents a material shift away from Canadian media in a single year, as 2014 #s had 64.1% and 9.9% respectively

The reason is not a failure on the part of Canadian media to transition to the internet age, or to meet consumer needs. The reason, in economic or trade terms, is the 'dumping' of advertising inventory into the Canadian marketplace by foreign-based internet conglomerates, which do not contribute the same level of investment, jobs and Canadian content as Canadian media.[9]

This is exactly what the advertising deductibility provisions of the *ITA* were designed to address.

In short, broadcasting, and broadcast advertising, has substantially moved from over-the-air, cable and satellite delivery to internet delivery. The current wording of the ITA can address much of this new reality – all that is needed is an interpretation that recognizes it.

The Income Tax Act

Appendix A of this paper contains the full text of Section 19.1 of the *Income Tax Act.* There are many detailed provisions, but the essential meaning of this section is:

For broadcasting, advertising expenses are <u>not</u> deductible if:

- the advertising is placed in a "broadcasting transmitting undertaking" or network (two or more undertakings whose content is controlled by a network operator) located outside Canada, and
- the advertisement is directed primarily to a market in Canada.

The question raised by these provisions is, "Is broadcasting still broadcasting within the meaning of the *Income Tax Act* when it is transmitted over the internet?"

Several subsidiary questions need to be raised in some specific instances to determine the deductibility of an expense, e.g. what constitutes "located outside Canada", but the primary question is whether current internet services are or are not "broadcasting".

Interpretation of the *Income Tax Act*

Sections 19.1 and 19.01 of the *Income Tax Act*, governing broadcasting and newspapers respectively, date back to the 1960s and 70s. As recently as 2001, when the *ITA* was amended to include Section 19.01(1) (on periodicals), internet advertising was not significant, and the issue was not discussed – only traditional media were part of the discussion at that time. It is therefore understandable that the *ITA* does not contain clarifying definitions explicitly including or excluding internet activities.

The only significant document that bears on the question of a definition is a letter issued by the Income Tax Rulings and Interpretation Directorate on October 24, 1996 (full text in Appendix B). This was not an official advance ruling but provided *"general comments"* in response to a taxpayer request for clarification. It also stated that the comments represented a current position only and might not reflect future views.

(with the latter missing in 2014 a major French Canadian Media Group, Group Capitales Media). Internet revenues of Canadian radio and television are generally not publicly reported, but are believed to represent under 5% of traditional advertising revenue. Assuming a 5% level, Canadian media would represent approximately 11% of total internet advertising revenue in Canada.

[9] While some foreign internet companies make investments in Canada, the *level* of such investment pales in comparison to Canadian companies. For example, Google, which has R&D and YouTube facilities in Canada, reportedly employs on the order of 800 Canadians. Google's Canadian internet advertising revenues are estimated at over $2 billion in 2015 – more than Canadian conventional TV advertising, radio advertising and more than print advertising. By contrast, Canadian conventional TV alone employs close to 6,000 people, 10 times Google's estimated Canadian employment. (Source: CRTC Statistical Summaries.)

The issue was: *"Whether section 19 or 19.1 of the Income Tax Act applies to deny a deduction for expenses incurred by a Canadian taxpayer to advertise on a foreign owned World Wide Web site on the internet."* The letter stated that Sections 19 and 19.1 did not apply, because *"A web site is not a newspaper, a periodical or broadcasting undertaking."*

Within the context of the time – twenty years ago – this interpretation made sense. A typical "web site" in 1996 did not perform the functions of print media or broadcasting. In 1996, web sites generally contained content made up only of text and still images formatted with the HTML presentation language. Consumer internet speeds did not permit the reliable transmission of video and audio to most users; the widespread public use of high-speed broadband internet connections came some years later. Moreover, the only effective means for using internet content was the personal computer; mobile smartphones and tablets which have accelerated the popularity of online media, did not yet exist.

Therefore, while the interpretation was appropriate for 1996 technology, it does not apply to media in 2016. Even the term "web site" is outmoded. It does not reflect current practice, in which content is distributed over the internet using a variety of technologies and program languages[10] that permit extensive use of video and audio, and to a wide variety of devices. While a 1996 web site could not provide broadcasting, internet media in 2017 can, and do. An updated interpretation of the *ITA* is required, one that acknowledges this reality.

The 1996 interpretation comments noted that their definition of broadcasting was based on "*diverse definitions of words used in paragraphs 19.1(1) and (4) of the Act."* This was appropriate, since no other source was readily available in 1996. In 1999, however, the CRTC provided a definition of broadcasting transmitted over the internet in its New Media Exemption Order.[11] Since the CRTC is the body charged with interpreting the meaning of 'broadcasting" in Canadian law, its definitions should be used to interpret the *Income Tax Act.*[12]

The CRTC and the Definition of "Broadcasting"

The limited definition of 'broadcasting' in the *ITA* is appropriate, given that the *Broadcasting Act* (1991) provides a detailed definition, and creates a body – the Canadian Radio-Television and Telecommunications Commission (CRTC) – whose role includes interpretation of that Act.

Three years after the 1996 comments cited above, the CRTC dealt with the question of broadcasting over the internet, and issued a decision in Broadcasting Public Notice CRTC 1999-84 (or DMEO – text of the relevant section in Appendix C) in which the Commission determined that broadcasting over the internet was indeed broadcasting, since the internet represented simply another form of telecommunication:

> *'The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, the mere fact that a program is delivered by means of the internet, rather than by means of the airwaves or by a cable company does not exclude it from the definition of "broadcasting".'*

[10] Including HTML5, a revision of the standard HTML language designed specifically to accommodate audio and video delivery.
[11] Called, at the time, the New Media Exemption Order but now known as the Exemption Order for digital media broadcasting undertakings or DMEO. See Broadcasting Order CRTC 2012-409.
[12] A limited number of other Canadian statutes (e.g. the federal *Copyright Act* or the Ontario *Libel and Slander Act)* contain definitions of broadcasting that parallel the *Broadcasting Act* or expand on it to suit their purposes, but it is reasonable to conclude that the legislation that governs broadcasting should provide the ruling definition.

The CRTC's 'technology - neutral' approach is based directly on the *Broadcasting Act* and is both a principle of sound regulation and a basic principle of statutory interpretation by the courts. There is no legal basis to see the *Income Tax Act* differently.[13]

The DMEO has been re-examined several times since 1996, and the original determination has stood the test of time. It has occasionally been challenged, but nearly two decades later, and given the judicial deference given it by the Courts, that position must be regarded as the position of the Government of Canada, and therefore appropriate for the interpretation of the *Income Tax Act*. Indeed, there is no contradiction between the two instruments: the DMEO amplifies the definitions in the *ITA*.

Broadcasting Public Notice CRTC 1999-84 (DMEO)

The Commission's determination in this decision begins with the *Broadcasting Act:*

The *Broadcasting Act* defines "broadcasting" as the "*transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place."*

This definition contains several elements, which are treated in detail in the decision:

1. Has "transmission" taken place when the program is delivered over the internet?
2. What media activities constitute "programs", whose transmission is therefore broadcasting?
3. Does the use of programs delivered over the internet constitute "reception by the public"?
4. Are the devices used in internet reception, "broadcasting receiving apparatus"?
5. What is excluded from the definition by the provision about "display in a public place"?

Transmission

The Commission rejected the proposal that no transmission could take place on the internet, noting that the *Broadcasting Act* is meant to be technologically neutral. "Other means of telecommunication" would certainly include the internet. Nor is the "on-demand" nature of the communication a barrier.

> *39. ... The fact that an end-user activates the delivery of a program is not, in the Commission's view, determinative. As discussed below, on-demand delivery is included in the definition of "broadcasting". ... Based on a plain meaning of the word, and recognizing the intent that the definition be technologically neutral, the Commission considers that the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user's apparatus) by means of the internet involves the "transmission" of the content.*

This is particularly significant because the *ITA* states:

> ***foreign broadcasting undertaking** means a network operation or a broadcasting transmitting undertaking located outside Canada or on a ship or aircraft not registered in Canada; (entreprise étrangère de radiodiffusion)*

The use of the term "transmitting undertaking" is thus covered by the Commission's definition. A digital media broadcasting undertaking is a broadcasting transmitting undertaking as described in the *ITA*.

[13] See note 4,supra.

Program

The definition of "program" is key, and results in the one significant exclusion of internet media from the definition of "broadcasting". If what the internet service transmits does not include "programs" then it is not broadcasting. In the original DMEO, the CRTC said:

> *34. The term "program" is in turn defined in section 2 of the Act as:*
>
> > *sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.*
>
> *Explicit statutory exclusions from the definition of broadcasting*
>
> *35. The Commission notes that, as stated above, much of the content available by way of the internet, Canadian or otherwise, currently consists predominantly of alphanumeric text and is therefore excluded from the definition of "program". This type of content, therefore, falls outside the scope of the Broadcasting Act.*

This definition is exclusionary – "program" includes every kind of content that is not excluded: all sounds and visual images – except those that "consist predominantly of alphanumeric text."[14] As the Commission noted, in 1999 a great deal of internet content consisted predominantly of text. The CRA's 1996 exclusion of "web sites" from the provisions of Section 19.1 was a parallel observation.

That observation is far less true today. Certainly on the services that attract the most viewers and therefore attract the most advertising, there is a great deal of audio, video, and images that are not text.

Even a cursory examination of different kinds of advertising-carrying internet services available today reveals a wide spectrum – from, at the extremes, sites that are predominantly video, such as YouTube, to some informational sites that rely exclusively on text. In between these extremes are services like Google search, Facebook, Instagram, and Twitter, which provide posts containing video, audio, non-alphanumeric images as well as text. Whether such in-between services transmit "programs" and constitute "broadcasting" requires a more detailed examination. Key cases are discussed below under "Some Examples of Specific Sites and Services".

Reception by the Public

The CRTC also dealt with the argument that much internet-transmitted content was not "for reception by the public" because it was delivered on-demand, and was, to some extent, customizable. Since the Commission had been licensing on-demand broadcast services for some time by 1999, it did not consider that a relevant exclusion.

> *44. … The Commission notes that the legislator could have, but did not, expressly exclude on-demand programs from the Act. As noted by one party, the mere ability of an end-user to select content on-demand does not by itself remove such content from the definition of broadcasting. The Commission considers that programs that are transmitted to members of the public on-demand are transmitted "for reception by the public".*

[14] This also means that the transmission of still images, whether or not accompanied by audio and including graphic images, constitutes a broadcasting undertaking. While the Commission has chosen to exempt such undertakings from licensing, this does not change their legal status as broadcasting undertakings. See http://www.crtc.gc.ca/eng/archive/1993/PB93-51.htm

> *45. The Commission considers, however, that some internet services involve a high degree of "customizable" content. This allows end-users to have an individual one-on-one experience through the* ***creation of their own uniquely tailored content.*** *(emphasis added) In the Commission's view, this content, created by the end-user, would not be transmitted for reception by the public. The Commission therefore considers that content that is "customizable" to a significant degree does not properly fall within the definition of "broadcasting" set out in the Broadcasting Act.*
>
> *46. By contrast, the ability to select, for example, camera angles or background lighting would not by itself remove programs transmitted by means of the internet from the definition of "broadcasting". The Commission notes that digital television can be expected to allow this more limited degree of customization. In these circumstances, where the experience of end-users with the program in question would be similar, if not the same, there is nonetheless a transmission of the program for reception by the public, and, therefore, such content would be "broadcasting".*

Facebook and other social media provide an interesting example. While users do create or, more usually, retransmit "programs", the individual user has not significantly customized what they themselves see – they have simply provided "profiles" that are then used by the application to select and blend a stream of items for each user. It would therefore seem likely that the most popular social media would be included in "broadcasting", when their content is not predominantly alphanumeric text. The Facebook "news feed" and "live streaming" should be considered broadcasting, while "messaging", a form of one-to-one communication, would not usually be for reception by the public, and therefore would not be broadcasting.

However, advertising is not placed in "messaging" applications. It is placed alongside content that is clearly part of a broadcasting offering, and is therefore non-deductible.

Broadcast Receiving Apparatus

This part of the *Act's* definition of broadcasting is not very useful since it is clearly a circular definition, i.e. the *Broadcasting Act* says the content is broadcasting if it's received on "broadcast receiving apparatus", and "broadcast receiving apparatus" is defined by its use to receive "broadcasting".

The Commission therefore determined that the various devices used to receive content from the internet were "broadcast receiving apparatus" when they were used to receive broadcasting.

"Public Place" and other Exclusions from the Definition

The Commission rejected the argument that the internet was "a public place" …

> *36. … in the sense intended by the Act. Programs are not transmitted to cyberspace, but through it, and are received in a physical place, e.g. in an office or home.*

It confined the use of this exception to narrow circumstances:

> *37 … to a particular service delivered via the internet that is accessible by end-users only in a terminal or kiosk located in a public place, such as a public library.*

In the current context – the application of the *Income Tax Act* – this exclusion is therefore not relevant.

It is clear that the possible exclusions described in the decision do not apply to the most popular internet-delivered services that contain advertising. The great majority of ads are placed in popular sites that either contain, or consist almost entirely of, "programs" as defined in the *Broadcasting Act.* The decision

exempts these undertakings from broadcast regulation, but they are nonetheless DMBUs and therefore constitute "broadcasting transmitting undertakings" in the terms of the *Income Tax Act.*

Determination of "Located Outside Canada"

The *ITA* defines "foreign broadcasting undertaking" as a network operation or a broadcasting transmitting undertaking located outside Canada. The term "located outside Canada" is not further defined in the *ITA* and therefore must be defined based on broader current and historic context.

One quick way to determine the location of a company and its services is to look at the Wikipedia entry – which the company itself could edit if it deemed it inaccurate. For the major providers of internet-delivered advertising, sample results include:

> *Google is an American multinational technology company specializing in Internet-related services and products that include online advertising technologies, search, cloud computing, software, and hardware. (https://en.wikipedia.org/wiki/Google)*
>
> *Facebook is an American for-profit corporation and online social media and social networking service based in Menlo Park, California, United States.(https://en.wikipedia.org/wiki/Facebook)*
>
> *Twitter is an online news and social networking service where users post and read messages restricted to 140-characters, which are called "tweets". … Twitter Inc. is based in San Francisco and has more than 25 offices around the world. (https://en.wikipedia.org/wiki/Twitter)*

Shares for these companies trade on NASDAQ, the NYSE, and the Hamburg stock exchange. It is evident that the common understanding of the public, tacitly supported by the firms themselves, is that these are not Canadian entities.

FCB acknowledges that the location of the parent company is not necessarily the location of the "broadcasting transmitting undertaking" that it operates. But the clearly foreign nature of the parent companies suggests that it is up to the company, or the taxpayers that advertise with it, to prove that the transmitting undertaking is not "located outside Canada" if advertising expenses are to be deductible. FCB threrefore submits that a new interpretation of Section 19 should establish that, if audited, taxpayers bear the burden of proof that the expenses claimed were in respect of DMBUs located inside Canada.

There are several tests that might be applied to prove or disprove such a case. These are drawn from analogous decisions that deal with the location of a broadcaster, and from the *Broadcasting Act*[15]. Parenthetically, FCB notes that the DMEO decision does not distinguish between foreign and domestic DMBUs. Since the intent of that decision was to exempt all DMBUs from broadcast regulation, no distinction was needed.

The tests are:

- the location of the transmission's origination;

[15] Section 3(1)(a) of the Broadcasting Act states that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians". Specific rules on Canadian ownership are set out in the Direction to the CRTC (Ineligibility of Non-Canadians) P.C. 1997-486, 1997-04-08. The CRTC's definitions of Canadian ownership are informative, but given the *ITA*'s own "located outside Canada" test, failure to meet the Commission's test need not necessarily be determinative of what would constitute a "foreign" broadcasting undertaking. On the other hand, as discussed further below, an entity that meets the Canadian ownership test can clearly be considered a Canadian broadcasting undertaking.

- the location of the content origination; and
- the location of the undertaking's general operations; it may also be worthwhile to consider the undertaking's ownership.

Transmission

For traditional broadcasting, delivered by over the air transmission, the location of the transmitter is determinative. If the transmitter's latitude and longitude are not in Canada, the undertaking is not Canadian.

For internet-delivered services, there is no traditional transmitter; only an "originating server" or "host server" i.e. the computer that stores and feeds the content. Given the Commission's conclusion that "the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user's apparatus) by means of the internet involves the "transmission" of the content" and thus constitutes broadcasting[16], the location of this originating server can be a determining factor.

In 2009, the Federal Court of Appeal dealt with a reference from the CRTC on whether ISPs were engaged in broadcasting. In its decision, the Court quoted Paragraph 95 of the Supreme Court's CAIP decision, which contained a conclusion on location:

> *95. Having properly instructed itself on the law, the [Copyright] Board found as a fact that the "conduit" begins with the host server. No reason has been shown in this application for judicial review to set aside that conclusion.*[17]

However, the location of the "host server" is not always self evident. Given the nature of internet transmission, the same content may be stored on multiple servers in different locations. It may not be easy to determine which of these servers actually feeds the content to the user. Or, the content may originate in a foreign location and be "cached" temporarily on a server in Canada that is closer to the user – this server would not be the "host".

That said, the presence of a server in Canada is not in itself sufficient to determine that the transmission does not originate outside Canada. In other words, while a transmission on the internet can take many routes from origination to user, including temporary storage in a Content Delivery Network or more permanent storage in a local server, the transmission begins with the first server in the content chain – if that is outside Canada, then so is the broadcasting transmitting undertaking.

In situations where the "host" or all of the providing content servers are located inside Canada, one can prove that the transmission is not "outside Canada". Otherwise, the test cannot be met, and, unless otherwise proven, the undertaking should be deemed to be "located outside of Canada".

Content origination

It may be helpful to CRA to consider the location of content production, but this is not necessarily determinative, as shown by precedent in CRTC decisions.

The CRTC has ruled in the past that the presence of production facilities in Canada does not make a service Canadian and may in fact be evidence that the service is operating in violation of Canadian law. Recently, CRTC Mandatory Order 2014-592[18] prohibited "*Sher-E-Punjab Radio Broadcasting Inc. from producing radio programming in Canada and transmitting it to Canadian audiences using the facilities of radio stations located in the United States."* In this case, an ethnic radio broadcaster served a Canadian

[16] DMEO, cited above.
[17] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 ("*SOCAN v. CAIP*").
[18] http://www.crtc.gc.ca/eng/archive/2014/2014-412.htm

audience, and had studios in Canada to do so, but it broadcast its programming from a US transmitter. The Commission forced it to cease this practice, but ultimately allowed it, in 2016, to be licensed on a Canadian AM transmitter in Vancouver. Clearly, the CRTC considered services like this to be foreign undertakings.

FCB notes that the fact that a foreign broadcasting undertaking might have some physical presence in Canada, such as a sales team, or even journalists or an originating studio, does not place the undertaking inside Canada. In fact, Section 19 of the *Income Tax Act* was created to alleviate the unfair competition brought about by this practice.

In a general sense, FCB notes however that, on the other hand, the presence of foreign content on a service does not prevent it from being Canadian. Hollywood productions have a presence on Canadian licensed services. However, within the licensed system, all Canadian services have regulatory obligations that ensure a Canadian programming presence.

FCB submits that, in line with these precedents, the presence of some Canadian content or Canadian production facilities on a service does not prove that it is located inside Canada. That said, the presence of a predominance of foreign user generated content, for example on YouTube, that would have been uploaded "outside Canada", would be a clear indication that the entire undertaking should be considered "located outside Canada". Moreover, if all, or the great majority of content originates outside Canada, CRA would be within its discretion to determine that the undertaking was "outside Canada" on these grounds.

The Operation

The third possible test focuses on the undertaking itself: the location of physical infrastructure, including where the majority of equipment and employees are located. In other words, even with a transmission point inside Canada, the "undertaking" may be still be "located outside Canada".

The key here is to address situations where a Canadian internet corporation is essentially a shell for a service whose content is assembled and transmitted from abroad. This is the case with much of the internet media available in Canada. The service must be able to prove that it has substantial and meaningful operations within Canada, and is not a "branch plant" operation whose primary purpose is to import a foreign service, while doing a small amount of business here.[19]

OWNERSHIP

DMBUs are exempt, not licensed, and therefore the strict rules of ownership determining nationality do not legally apply to them. DMBUs may, under current rules, operate in Canada without meeting the requirements placed on Canadian broadcast licensees.

However, FCB notes that some of the CRTC's ownership tests may be of use to CRA in determining whether the undertaking is in fact, operating within Canada. For example, the location of the head office, the incorporating jurisdiction, the nationality of its directors and shareholders – these factors determine whether an undertaking can be considered Canadian for the purposes of licensing and could therefore be helpful, within CRA's discretion, in determining that the undertaking is "located outside Canada".

Combining the Tests

In summary, FCB submits that a multi-layered test is appropriate to determine if an undertaking operates inside Canada within the meaning of the *ITA*.

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[19] An extreme example of this would be internet services that serve Canada but do not collect GST/HST for their sales here. The tax is due, but they are not obliged to collect it because they have no facilities in Canada. By definition, such services are serving Canadians from abroad and their transmissions are foreign.

FCB further submits that, since a failure to meet any one of the relevant tests is sufficient to determine that the undertaking is "located outside Canada", the CRA's interpretation should be that a DMBU is foreign unless it can demonstrate that it is an undertaking that operates inside Canada, i.e. the undertaking must demonstrate to CRA's satisfaction that:

- the transmission originates from host servers that are clearly within Canada and are not fed from outside Canada; and
- its physical infrastructure and the majority of its employees and operation are within Canada.

In addition, FCB submits that CRA would be within its discretion to consider other factors that could be deemed determinative, that is:

- that the content provided by the undertaking is substantially Canadian in origin; and
- that it can meet some or all of the regulatory requirements for Canadian ownership.

Targeted to a Canadian Market

This is a subject on which there is already case law, which need not be different because the transmission takes place over the internet.

As a practical matter, the way advertising on the internet is now sold – the micro-targeting of specific geographies, and specific interest profiles – allows Canadian advertisers on both foreign and domestic media to target Canadians with precision. By definition, Canadian advertisers advertising on such foreign media are targeting people they can serve, i.e. Canadians.

Of course, there are many forms of advertising on the internet that target specific groups of consumers based on their internet activity, with or without the consumers' knowledge. One can imagine that the argument will be made that these are not directed to a Canadian market, because people may receive them anywhere in the world.

However, the situation is no different from that of a business buying an ad in one television market, knowing that the ad will 'spill' into another geographical market via on the station's cable and DTH carriage. In such cases, it is fair to say that the ad is also directed at the second market if people in that market can avail themselves of the service being advertised, because of the Canadian advertiser's ability to serve that market, whether through physical or e-commerce means.

Appendix D contains text of an analysis by McCarthy-Tétrault of a court decision on this question. It is useful in that it establishes that "directed to the Canadian market" is not dependent on the use of technology that ensures the ad can only be seen by Canadians, or even content in the ad identifying the product or the service as Canadian. Instead, it can be based on some part of the content of the ad or the service itself that makes it more useful to Canadian customers – in this case a Canadian telephone number.

Some examples of Specific Sites and Services

As noted above, the tests of whether or not a given DMBU is foreign or not are practical, and the burden of proof should be on the taxpayer and the DMBU. That is, a company making a claim for deductibility of an advertising expense should be able to demonstrate that the DMBU on which it purchases advertising is not "located outside Canada".

The question of whether a service is in fact a DMBU may also be raised. Is the service a DMBU, or is it more akin to the "web site" referenced in the 1996 technical interpretation? This question in turn rests on whether the images it provides are "predominantly alpha-numeric text", and are therefore not "programs" as defined by the *Broadcasting Act.*

There are, of course, plain alphanumeric web sites still available on the internet. But those services attracting significant advertising offer a much richer mix of images, video, and audio. For this reason, FCB submits that once again, the burden of proof should be on the service to prove that it is not a DMBU.

As can be seen in the sections that follow, for the most popular internet services, such a contention would be difficult to prove.

YouTube

The content provided on YouTube clearly lies within the CRTC's definition of broadcasting: video is what internet consumers go to YouTube to see. There is a section of text comments attached to each video, but the comments are clearly supplementary to the video – without the video the comments are meaningless, whereas the video itself is meaningful content even if there are no text comments. YouTube is clearly a Digital Media Broadcasting Undertaking and the cost of advertising placed on YouTube is clearly non-deductible.[20]

Facebook

Facebook is the second-largest internet ad revenue generator in the United States, after Google, and is the venue for many advertisements directed to Canadians.

Ads appear throughout the site's various pages and are a mix of static images placed to one side of the screen and dynamic ads that are inserted into the user's NewsFeed, where most users spend the largest proportion of their Facebook time.

Facebook is a DMBU. The Newsfeed is a mix of text and images, and the images are a mix of video and static, non-alphanumeric pictures, with an occasional alphanumeric image. Typically, users "share" items to their feed drawn from somewhere else – online newspapers and periodicals, YouTube, broadcast sources, bloggers and a variety of user comments.

From a pure screen space perspective, it could be argued that a proportion of what Facebook presents is text – but the prevalence and attractiveness of images makes that argument unconvincing. Text can stand on its own more often than it does on YouTube, but typically the video/audio or image (of cats, dogs, music, etc.) is key to the user experience. Most text postings are accompanied by an image, and the great majority of images are not alphanumeric text.

The Commission determined over the course of a number of decisions in the late 1990s and early 2000s (as to whether certain services should be deemed alpha-numeric) that the term 'predominantly', "has no special legal definition and is used in its ordinary sense, i.e. that which is more influential or more powerful." In examining program guide channels, which combined video and text in a fixed format, it decided that even where an image occupies only one-quarter of the screen, if it is "the focus of attention," the image constitutes a "program",[21] In that case, of course, the "image" the Commission was examining was a TV screen in a fixed format. Services on the internet, however, provide a stream of content in an ever changing format. Images are often combined with text or alternated with text.

[20] This legal conclusion does not suggest that in providing access and distribution for Canadians, YouTube doesn't not make a material contribution to the Canadian cultural and social landscape.
[21] Broadcasting Decision CRTC 2005-120.

It is therefore worth noting that the predominance test for "program" in the *Broadcasting Act* does not apply to a service as a whole but rather, in the case of screen based content, to the visual images that the service provides. A literal interpretation of the *Broadcasting Act* would therefore determine that a service is broadcasting if it transmits any "programs" within the stream; a less demanding interpretation would use the Commission's test that a service is broadcasting if the images are the "focus of attention".

Using the CRTC's terminology, videos and images on Facebook are clearly the "the focus of attention", meaning Facebook cannot be considered to "consist predominantly of alphanumeric text."

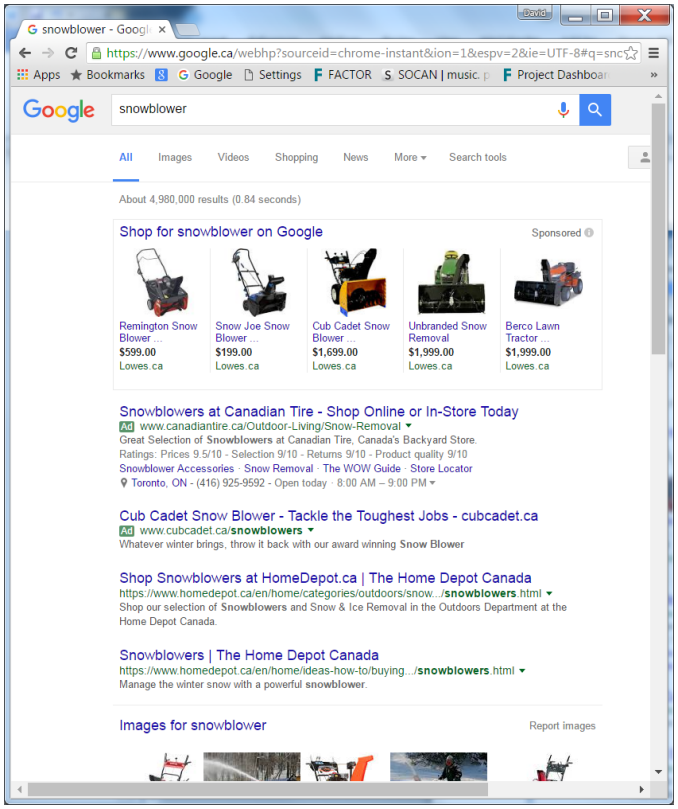
Moreover, in the last year Facebook has added a feature – "Facebook Live" - internet video/audio broadcasting provided by users for a period of time. Because this service is provided live, and a recording of the live broadcast remains on the site, this is even closer to traditional broadcasting than Youtube.

Some parties might also revive the argument cited in the CRTC's New Media Exemption Order of 1998 that because each user's experience is different, this is not broadcasting. The Commission dealt with that in its decision, however, and made it clear that unless the users themselves customized their own content and altered it in a truly interactive way – as in a game – that customization made no difference.

Therefore, since Facebook transmits content that falls within the definition of "program", and that content is the "focus of attention", it is a DMBU.

Google Search

Google Search is also a major generator of ad revenue. It is a somewhat more difficult case to analyze, as can be seen by the sample screenshot to the right.



In this example, a search for "snowblower" on the "All" setting, has resulted in a returned screen that contains:

1. Five images with accompanying text, all of them from a ".ca" address.
2. Four paragraphs of text, two from advertisements tagged as 'paid", two from retailers (all Canadian)
3. Five more images of snowblowers, these without text.

When the same search is done under the setting, "Images", the entire screen is Images but the advertising is less apparent – though there are branded retailers across the top of the screen.

Using the settings for "Videos" or "Shopping" the screen gives roughly equal prominence to images and text.

The page shown above apparently contains both program and non-program content. The non-alphanumeric images are programs, and those images that are predominantly alphanumeric text are not.

Can Google Search be both – a broadcaster and a non-broadcaster – simultaneously with the same page of content?

We note that a typical licensed broadcasting undertaking such as a television station may spend some part of its time transmitting images that are alphanumeric – e.g. a weather prediction, or a 'Jeopardy' question slide – but the undertaking does not cease to be a broadcaster for that time and purpose. Only services that are exclusively alphanumeric, like the service "Text-TV" (now defunct) have been permitted to operate without a broadcast licence or authorization.

Thus, it would appear that CRA has the discretion to deem internet Search a DMBU in its entirety because at least some of its search pages are legally "programs". Therefore, the ads on those pages are broadcast by a foreign broadcasting undertaking, and their costs are non-deductible.

Alternatively, there are at least two indices that suggest CRA should exercise its discretion to deem internet Search to be predominantly broadcasting:

1. By the CRTC's measure of "the focus of attention", even relatively little on-screen use of video or images can render the service non-alphanumeric; and
2. As Canadians' internet use gravitates more and more to audio and video content, use of search is gravitating in the same direction.

FCB notes that using this lesser standard, CRA could use its discretion on what percentage of advertising expenses are deductible, possibly permitting a small percentage of internet Search advertising expenses to be deductible, based on the taxpayer's proof that such advertising purchased was associated with non-broadcast material.

Music Streaming Services

Online services such as Spotify, Google Play, & and Apple Music provide streaming music. The content of such services is clearly comprised of "programs" within the meaning of the *Broadcasting Act*, and any advertising on them that is in some way directed to a Canadian market should be non-deductible.

Ruling Request

FCB respectfully submits that CRA's 1996 interpretation of "web sites" is no longer relevant to current advertising practice, and that under current circumstances, advertising purchased on foreign **internet-delivered** media that act as broadcast services **should not be deemed a deductible expense** under the *Income Tax Act (ITA)*.

FCB submits that the great majority of relevant internet-delivered advertising expenses are being claimed in respect of advertising on popular foreign DMBUs, and that these should not be deductable under the *ITA*. Moreover the burden of proof should be now shifted to those claiming deductions services to prove that the services on which they advertise are either not engaged in broadcasting as defined by the CRTC, or that they are Canadian, using the tests described above.

This updated interpretation would reestablish the effectiveness and restore the purpose of section 19.1 of the *Income Tax Act*: to restrain the unfair competition for Canadian advertising dollars brought about by the entry of foreign internet media into the Canadian market, which avoid the Canadian programming obligations and economic contributions of Canadian broadcasters and other Canadian media.

Appendix A – Section 19.1 of the Income Tax Act (current)

Marginal note: Limitation re advertising expense on broadcasting undertaking

19.1 (1) Subject to subsection 19.1(2), in computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer made or incurred after September 21, 1976 for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking.

Marginal note: Exception

(2) In computing income, a deduction may be made in respect of an outlay or expense made or incurred before September 22, 1977 for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking pursuant to

(a) a written agreement entered into on or before January 23, 1975; or

(b) a written agreement entered into after January 23, 1975 and before September 22, 1976 if the agreement is for a term of one year or less and by its express terms is not capable of being extended or renewed.

Marginal note: Definitions

(4) In this section,

foreign broadcasting undertaking means a network operation or a broadcasting transmitting undertaking located outside Canada or on a ship or aircraft not registered in Canada; (*entreprise étrangère de radiodiffusion*)

network includes any operation involving two or more broadcasting undertakings whereby control over all or any part of the programs or program schedules of any of the broadcasting undertakings involved in the operation is delegated to a network operator. (*réseau*)

NOTE: Application provisions are not included in the consolidated text;

see relevant amending Acts. 1974-75-76, c. 106, s. 3;

1977-78, c. 1, s. 13;

1985, c. 45, s. 126(F).

Appendix B – The 1996 Interpretation Document

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Legislation

9618735 -- Deductibility of advertising expenses — internet

Date: October 24, 1996

Reference: 19, 19.1

SUMMARY: Whether section 19 or 19.1 of the Income Tax Act applies to deny a deduction for expenses incurred by a Canadian taxpayer to advertise on a foreign owned World Wide Web site on the internet.

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the Department.

PRINCIPAL ISSUES:

Whether section 19 or 19.1 of the Act applies to deny a deduction for expenses to be incurred by a Canadian taxpayer to advertise on a foreign owned web site.

POSITION:

No

REASONS:

A web site is not a newspaper, a periodical or broadcasting undertaking.

5-961873 XXXXXXXXXX L. Roy Attention: XXXXXXXXXX

October 24, 1996

Dear Sir\Madam:

Re: Deductibility of advertising expenses

This is in reply to your facsimile of May 24, 1996 in which you requested a ruling on whether expenses by a Canadian taxpayer to advertise on a foreign owned web site would be deductible under the Income Tax Act (the "Act").

Advance income tax rulings, in addition to there being a charge for the service, are given only in respect of proposed transactions involving specific taxpayers and will only be provided in response to a request for an advance income tax ruling submitted in accordance with the Information Circular 70-6R2 dated September 28, 1990, and the Special Release thereto issued on September 30, 1992, issued by Revenue Canada, Customs, Excise and Taxation. Nevertheless, we can provide you with the following general comments.

Advertising expenses related to the income earning process are generally deductible. However, pursuant to section 19 of Act, no deduction shall be made in respect of an otherwise deductible expense of a taxpayer for advertising space in an issue of a non-Canadian newspaper or periodical for an advertisement directed primarily to a market in Canada.

Also, subsection 19.1(1) of the Act provides that in computing income, no deduction shall be made in respect of an otherwise deductible expense of a taxpayer for an advertisement directed primarily to a Canadian market and broadcast by a foreign broadcasting outlet.

The words "newspaper" and "periodical" are not defined in the Act. The Webster's Ninth New Collegiate Dictionary has the following meaning for the word "newspaper":

"a paper that is printed and distributed usu. daily or weekly and that contains news, articles of opinion, features, and advertising".

The Supreme Court, in the King v. Montreal Stock Exchange, (1935) 4 D.L.R. 630 (S.C.C.), gave the meaning of newspaper for the purposes of the Excise Tax Act as follows:

"a paper printed and distributed at stated intervals... to convey news... and other matters of public interest".

The Department has taken the position that a periodical is a publication, other than a newspaper, the issues of which appear at regular intervals of less than a year.

Consequently, based on those definitions, it is our view that generally section 19 of the Act would not apply to expenses incurred by a Canadian taxpayer to advertise on a foreign owned web site, since the web site would not be a newspaper or a periodical.

Concerning the issue of broadcasting, subsection 19.1(4) of the Act defines "foreign broadcasting undertaking" to mean a network (as defined under subsection 19.1(4) of the Act), operation or a broadcasting transmitting undertaking located outside Canada or on a ship or aircraft not registered in Canada. Based on diverse definitions of words used in paragraphs 19.1(1) and (4) of the Act, it is our view that section 19.1 of the Act would not apply to expenses incurred by a Canadian taxpayer to advertise on a foreign web site since a web site is not a broadcast by a "foreign broadcasting undertaking".

As explained in paragraph 21 of Information Circular 70-6R2 dated September 28, 1990, the above comments do not constitute an advance income tax ruling and are not binding on the Department. We trust that our comments are of assistance to you.

Yours truly,

for Director Financial Industries Division Income Tax Rulings and Interpretations Directorate Policy and Legislation Branch

Appendix C – Excerpts From Broadcasting Public Notice CRTC 1999-84 / Telecom Public Notice CRTC 99-14 Ottawa, 17 May 1999

Is new media "broadcasting"?
Statutory Definitions
33. "Broadcasting" is defined in section 2 of the Broadcasting Act as follows:
[a]ny transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.
34. The term "program" is in turn defined in section 2 of the Act as:
[s]ounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.
Explicit statutory exclusions from the definition of broadcasting
35. The Commission notes that, as stated above, much of the content available by way of the internet, Canadian or otherwise, currently consists predominantly of alphanumeric text and is therefore excluded from the definition of "program". This type of content, therefore, falls outside the scope of the Broadcasting Act. Accordingly, the remainder of this section contemplates internet content that consists only of audio, video, a combination of audio and video, or other visual images including still images that do not consist predominantly of alphanumeric text.
36. It was submitted, among other things, that information displayed on the internet can be considered to be solely for display in a public place and therefore excluded from the definition of "broadcasting". Certainly, the Canadian public expressed its view that the internet has a unique ability to foster citizen engagement and public discourse. While the Commission agrees, it considers that the internet is not in and of itself a "public place" in the sense intended by the Act. Programs are not transmitted to cyberspace, but through it, and are received in a physical place, e.g. in an office or home.
37. The Commission considers, however, that the exception to the definition of "broadcasting" for programs transmitted for display in a public place would apply, as suggested by one participant, to a particular service delivered via the internet that is accessible by end-users only in a terminal or kiosk located in a public place, such as a public library.

Technological neutrality of "broadcasting"

38. The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, the mere fact that a program is delivered by means of the internet, rather than by means of the airwaves or by a cable company, does not exclude it from the definition of "broadcasting".

39. Some parties argued that there is no "transmission" of content over the internet, and therefore, there is no "broadcasting". The fact that an end-user activates the delivery of a program is not, in the Commission's view, determinative. As discussed below, on-demand delivery is included in the definition of "broadcasting". Further, the Commission considers that the particular technology used for the delivery of signals over the internet cannot be determinative. Based on a plain meaning of the word, and recognizing the intent that the definition be technologically neutral, the Commission considers that the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user's apparatus) by means of the internet involves the "transmission" of the content.

40. Some parties submitted that the definition of "broadcasting receiving apparatus" was not intended to capture devices such as personal computers or Web TV boxes when used to access the internet. The Commission notes that the definition of "broadcasting receiving apparatus" includes a "device, or combination of devices, intended for or capable of being used for the reception of broadcasting". The Commission considers that an interpretation of this definition that includes only conventional televisions and radios is not supported by the plain meaning of the definition and would undermine the technological neutrality of the definition of "broadcasting". In the Commission's view, devices such as personal computers, or televisions equipped with Web TV boxes, fall within the definition of "broadcasting receiving apparatus" to the extent that they are or are capable of being used to receive broadcasting.

Transmission of programs for reception by the public

41. It is therefore necessary to consider whether the transmission of sounds or visual images (or a combination of sounds and visual images) that do not consist predominantly of alphanumeric text by means of the internet can be said to involve the transmission of programs for reception by the public.

42. A number of parties submitted that content that is "customizable" does not constitute "broadcasting". The Commission notes that parties have used the term "customizable" to mean different things. For example, some parties cited the non-simultaneous characteristic of internet services as a basis for which such services cannot be considered to be "broadcasting".

43. The Commission considers it important to distinguish between the ability to obtain internet content "on-demand" - the non-simultaneous characteristic of internet services - and the ability of the end-user

to "customize", or interact with, the content itself to suit his or her own needs and interests.

44. In the Commission's view, there is no explicit or implicit statutory requirement that broadcasting involve scheduled or simultaneous transmissions of programs. The Commission notes that the legislator could have, but did not, expressly exclude on-demand programs from the Act. As noted by one party, the mere ability of an end-user to select content on-demand does not by itself remove such content from the definition of broadcasting. The Commission considers that programs that are transmitted to members of the public on-demand are transmitted "for reception by the public".

45. The Commission considers, however, that some internet services involve a high degree of "customizable" content. This allows end-users to have an individual one-on-one experience through the creation of their own uniquely tailored content. In the Commission's view, this content, created by the end-user, would not be transmitted for reception by the public. The Commission therefore considers that content that is "customizable" to a significant degree does not properly fall within the definition of "broadcasting" set out in the Broadcasting Act.

46. By contrast, the ability to select, for example, camera angles or background lighting would not by itself remove programs transmitted by means of the internet from the definition of "broadcasting". The Commission notes that digital television can be expected to allow this more limited degree of customization. In these circumstances, where the experience of end-users with the program in question would be similar, if not the same, there is nonetheless a transmission of the program for reception by the public, and, therefore, such content would be "broadcasting". These types of programs would include, for example, those that consist of digital audio and video services.

Appendix D - McCarthy Tétrault Analysis, 19.1

Analysis/Commentary — Canada Tax Service — McCarthy Tétrault Analysis, 19.1 -- Limitations re Advertising Expense, published by Thomson Reuter Canada (Taxnet Pro (c))

Advertising on Foreign Broadcasts

Last Updated: 2016-01-12

Overview

Section 19.1, proclaimed in force from September 22, 1976, prohibits the deduction of expenses for advertising directed primarily to the Canadian market by foreign radio and television broadcasters. This provision applies only to advertising expense incurred on or after September 22, 1976, subject to certain transitional relief relevant to advertising contracts already entered into on that date.

Application

In terms similar to those in section 19, section 19.1 extends the ban on foreign advertising directed primarily at Canadian consumers by Canadian taxpayers to advertisements appearing on foreign radio and television broadcasts. The cost of any such commercials on or after September 22, 1976 will not be deductible as advertising expense by Canadian taxpayers (subsection 19.1(1)). Excepted, however, are outlays or expenses made or incurred before September 22, 1977 in respect of commercials aired pursuant to a written contract dated prior to January 24, 1975, or to certain short-term written agreements entered into after January 23, 1975 and before September 22, 1976 (subsection 19.1(2)).

In Ontario Craftmatic Ltd v MNR, [1989] 2 C.T.C. 2342, Canadian dealers of Craftmatic products attempted to deduct payments made as their share of costs in connection with the broadcasting of certain advertisements by US television stations, contending that such expenses were not for “advertising” but for purchase of customer “leads” resulting from responses to the toll-free number displayed in the ads for Canadian residents. Alternatively, the taxpayers maintained that the expenses were not directed primarily to a market in Canada. Even though neither the name of the Canadian dealer nor its telephone number appeared in the ads, the Tax Court of Canada ruled that the costs incurred constituted expenses for advertisement which, because of the Canadian telephone number, were directed specifically at the Canadian market. Accordingly, the expenses were held to be non-deductible by virtue of subsection 19.1(1).