



Broadcasting Decision CRTC 2007-169

Ottawa, 8 June 2007

Only Imagine Inc.
Across Canada

Application 2006-0699-9, received 5 June 2006
Public Hearing at Calgary, Alberta
12 February 2007

Proposal to sell commercial advertising and insert it into the local availabilities of U.S. programming services distributed by Canadian broadcasting distribution undertakings

*The Commission **denies** an application by Only Imagine Inc. (OI) for a broadcasting licence that would permit it to sell commercial advertising and insert this advertising into the local availabilities of U.S. programming services that are distributed across Canada by various broadcasting distribution undertakings (BDUs).*

The Commission finds that approval of OI's proposal would require the Commission to impose unduly intrusive regulatory measures, and that OI's proposal would not provide sufficient benefits to the Canadian broadcasting system to justify such a fundamental change in the current policy on local availabilities. Further, in the Commission's view, the benefits that might result from OI's proposal could be realized by other less intrusive means that would be more consistent with the Commission's usual regulatory approach.

Introduction

Local availabilities policy

1. The Commission's current policy governing the use of local availabilities¹ by Canadian broadcasting distribution undertakings (BDUs) was first articulated in Decision 95-12. In that decision, the Commission stated that it was not prepared to consider applications to use local availabilities for the broadcast of commercial messages. However, since the issuance of Decision 95-12, virtually all large Canadian BDUs have applied for, and been granted, a condition of licence that authorizes them to insert certain promotional material as a substitute for the local availabilities of non-Canadian programming services. At least 75% of local availabilities must be used to promote Canadian programming services and up to 25% may be used to promote services offered by Canadian BDUs, including certain non-programming services.

¹ The term "local availabilities" refers to the approximately two minutes per hour of air time set aside in the programming of certain U.S. satellite programming services for use by distributors. Although the programming services routinely include their own commercial or promotional messages in their satellite signals during these two minutes per hour, Canadian distributors are often permitted to strip out this material and substitute it with certain promotional messages.

2. The Commission's policy is intended to ensure that local availabilities be used for the benefit of the Canadian broadcasting system and primarily to promote Canadian programming services rather than for the direct financial benefit of any party. Although the condition of licence prescribes an authorized method of using local availabilities, it does not in itself convey or assign a right to make use of local availabilities without the consent of the affected U.S. programming service. Instead, the policy assumes that Canadian BDUs have negotiated the right to use local availabilities from U.S. programming services.

Only Imagine Inc.'s proposal

3. Only Imagine Inc. (OI) filed an application for a broadcasting licence that would permit it to sell commercial advertising and insert this advertising into the local availabilities of ten U.S. programming services that are distributed across Canada by various BDUs. While it requested to be licensed as a radiocommunication distribution undertaking, OI acknowledged that its proposed undertaking would not conform exactly to any existing category of licence and indicated its willingness to accept another type of licence that the Commission might deem appropriate.
4. OI proposed to establish its undertaking by installing equipment in selected BDU headends and uplink centres that would receive the signals of the U.S. programming services from BDUs. The applicant would then insert commercial advertisements and other promotional material into U.S. programming services and return the altered signals to the BDU. At the hearing, the applicant stated that it would be willing to allow BDUs to install and maintain this equipment and that it would reimburse smaller BDUs for the costs of purchasing equipment to permit OI to make use of local availabilities.
5. OI made commitments to contribute 50% of its revenues to a new production fund to support the production of Canadian drama and to supply some advertising inventory for the promotion of various Canadian productions and services. It also committed to insert promotional material, on behalf of the BDUs, into 25% of the local availabilities provided by its service.
6. To implement its service, OI proposed that the conditions of licence of the BDUs through which it intended to operate be amended to convey the right to use local availabilities to OI. The applicant requested that the Commission invite each of these BDUs that is less than five years into its licence term to apply for an amendment to its local availabilities condition of licence. OI also requested that the Commission amend, on its own motion, the conditions of licence of each of these BDUs that is currently more than five years into its licence term. Under the amended conditions of licence, BDUs would be obligated to provide OI with access to the U.S. services in question if the BDUs wished to avail themselves of the 25% of the local availabilities made available by OI to promote the services provided by the BDU.

7. The Commission received 20 interventions in support of this application by producers and advertisers, 16 interventions in opposition by a broad cross section of Canadian distributors and Canadian and U.S. programming services, as well as two comments by organizations representing members of the production industry and one comment by a private citizen.
8. The Commission considers that the primary issues arising from this application are:
 - whether OI's proposed service would provide sufficient benefits to the Canadian broadcasting system to justify a change from the Commission's current policy on local availabilities; and
 - if so, whether the applicant's proposed method for implementing the service would be feasible.

Would the proposed service provide sufficient benefits to justify a change from the Commission's current policy on local availabilities?

9. OI questioned the value of the Commission's policy that local availabilities be used primarily for promoting Canadian programming. According to OI, Canadian programming services do not fully utilize the promotional time that is currently made available to them in local availabilities. OI maintained that its proposal to use 70% of local availabilities for commercial advertising would constitute a better use of those availabilities since it would provide significant benefits to the Canadian broadcasting system by generating substantial new revenues for the production of Canadian programming. Specifically, OI projected that its service would generate \$340 million in revenues over seven years, of which half, or \$170 million, would be allocated to a new fund for the production of Canadian drama.
10. The Commission acknowledges that substantial revenues could be generated through the use of local availabilities for commercial advertising and that those revenues could provide additional funding for the production of Canadian programming. The Commission nevertheless has serious concerns with OI's application.
11. First, in contrast to OI's claim that Canadian programming services do not use all of the promotional time that is available to them, each of the BDUs appearing at the hearing confirmed that all of its local availabilities – both the portion used for promoting Canadian programming and that for promoting services offered by BDUs – are entirely utilized. Furthermore, in their interventions, Canadian programming services maintained that the promotional time made available to them in local availabilities is valuable.
12. Second, the Commission is not persuaded by OI's arguments concerning the limited value of local availabilities to affiliation agreements between BDUs and programming services. According to OI, the right to use local availabilities is not a material element in the negotiations of affiliation agreements between U.S. programming services and BDUs, or in the fees paid by BDUs to those programming services. OI contended that

the provisions of the affiliation agreements regarding local availabilities are standard formulations that appear in all comparable contracts. It further maintained that it did not need to seek the consent of U.S. programming services or enter into contracts with them for the use of local availabilities nor did it need to make any arrangements with BDUs regarding its proposal to insert commercial advertising in the local availabilities that are distributed by their facilities. The applicant did indicate that it would abide by any limitations set out in the affiliation agreements concerning the type or content of advertising material that could be inserted into the local availabilities.

13. In its review of the various affiliation agreements provided by the applicant and BDUs, the Commission found a considerable variety in the contractual terms related to local availabilities and the privileges and limitations conveyed in those terms. The affiliation agreements frequently included terms explicitly precluding BDUs from reassigning the rights set out in the agreements, including those associated with local availabilities, to other parties, without the express consent of the originating U.S. programming service. Often, these affiliation agreements also included provisions requiring that their terms, including the specific privileges and limitations related to local availabilities, be held in confidence by BDUs.
14. The Commission allows and encourages BDUs to enter into affiliation agreements with programming services to address terms of their distribution that are not part of BDUs' regulatory requirements. As noted by BDUs, prior to obtaining the Commission's authorization to use local availabilities, BDUs commonly acquire the right to use local availabilities through commercial negotiation with U.S. programming services as set out in these affiliation agreements. The Commission finds that this right is a material component of the affiliation agreements and, moreover, is often supplemented by a number of other provisions of the agreements. Further, the right to use local availabilities contributes to the negotiation of affiliation fees paid by BDUs. As indicated by BDUs, in some cases, affiliation fees have been reduced in recognition that the Commission's policy does not permit BDUs to sell commercial advertisements in local availabilities.
15. These affiliation agreements convey rights to the BDUs to use local availabilities without conveying ownership of them. Approval of this application would take away the right to use local availabilities from BDUs and assign this right – along with the rights to alter and delete U.S. programming services and to make use of BDU facilities for this purpose – to a third party without the consent of either the programming services or the BDUs in question. In the Commission's view, there is a substantial difference between prescribing a use for local availabilities, as is the case under the current policy, and taking away the current contractual right to their use and reassigning this right to a third party through regulatory action, as proposed by OI. Accordingly, the Commission finds that approval of OI's application would require the Commission to impose, and involve itself, in unduly intrusive regulatory measures.

16. The Commission further finds that OI's proposal would not provide sufficient benefits to the Canadian broadcasting system to justify such a fundamental change in the Commission's current policy on local availabilities. While approval of OI's application could potentially result in additional funding for the production of Canadian programming, the Commission considers that a similar benefit could be realized through other methods that would be more consistent with the Commission's regulatory approach.

Would the applicant's proposed method for implementing the service be feasible?

17. The implementation of OI's proposed service would require an amendment to the condition of licence of each of the BDUs through which the applicant wished to operate. The Commission makes the following observations in this regard.
- Given BDUs' strong opposition to this application, it is unlikely that those less than five years into their licence term would respond to an invitation to amend their conditions of licence voluntarily.
 - While the Commission could, on its own motion, amend the conditions of licence of BDUs that are more than five years into their licence term, any such licence amendment would be subject to a public process to allow interested parties to comment, which would delay implementation of the proposed service even if the condition of licence were ultimately approved.
 - As other BDUs pass the five year mark in their licence terms, additional public processes would need to be followed to amend their conditions of licence.
 - At a minimum, these processes would entail substantial delays in implementing OI's service as well as considerable on-going administrative effort by the Commission and BDUs on behalf of OI's proposed service.
18. Based on the foregoing, the Commission estimates that OI would be unable to provide its service to between 33% and 63% of its potential viewers for at least the first few years of its operation. Moreover, the Commission considers that some BDUs could elect not to use local availabilities rather than turning them over to OI, which could effectively frustrate the applicant's ability to provide its proposed service.
19. In addition, the successful implementation of the proposed undertaking would be dependent either upon BDUs providing OI with access to their headends and uplink centres to install and maintain its equipment, or upon BDUs installing and maintaining the equipment themselves. In their opposing interventions, BDUs raised concerns that the collocation and maintenance of this additional equipment would be an unnecessary complication to their distribution facilities that would only increase the risk of problems.

20. While the Commission considers OI's proposed service to be technically feasible, it would be necessary for the applicant to secure the active involvement of BDUs in implementing and operating that service. Absent willing involvement on the part of BDUs, the Commission finds that OI's proposed method for implementing the service may not be feasible without the Commission's supervision on an on-going basis.

Conclusion

21. Based on all of the foregoing, the Commission **denies** the application by Only Imagine Inc. for a broadcasting licence that would permit it to sell commercial advertising and insert this advertising into the local availabilities of ten U.S. programming services that are distributed across Canada by various broadcasting distribution undertakings.

Secretary General

Related documents

- *Promotion of non-programming services using local availabilities*, Broadcasting Public Notice CRTC 2006-69, 2 June 2006
- *Determinations on a request by the Canadian Cable Telecommunications Association for an amendment to the Commission's policy regarding the use by cable broadcasting distribution undertakings of local availabilities contained in the signals of U.S. satellite programming services*, Broadcasting Public Notice CRTC 2005-88, 9 September 2005
- *Proposal to insert certain promotional material in the local availabilities of U.S. satellite services*, Decision CRTC 95-12, 18 January 1995

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