



Broadcasting Decision CRTC 2007-273

Ottawa, 2 August 2007

Shaw Communications Inc., on behalf of Videon CableSystems Inc.
Across Canada

Application 2007-0005-6, received 3 January 2007
Broadcasting Public Notice CRTC 2007-14
9 February 2007

Shaw on Demand – Licence amendments

*The Commission **approves in part** an application by Shaw Communications Inc. (Shaw), on behalf of Videon CableSystems Inc. (Videon), to amend Videon’s broadcasting licence for the national video-on-demand programming undertaking currently referred to as Shaw on Demand, as it pertains to the distribution of programming containing commercial messages. Specifically:*

- The Commission **approves** the applicant’s request to amend the broadcasting licence for Shaw on Demand in order to authorize the licensee, by condition of licence, to distribute programming that contains commercial messages where those messages are already included in a program previously aired in Canada by a Canadian programming service.*
- The Commission **denies** the applicant’s request to amend the broadcasting licence for Shaw on Demand in order to authorize the licensee, by condition of licence, to distribute programming that contains commercial messages where those messages are already included in a program previously aired in Canada by a non-Canadian service included on the lists of eligible satellite services.*
- The Commission **approves** the applicant’s request to authorize the licensee to charge a fee to subscribers for programming containing commercial messages.*

The application

1. The Commission received an application by Shaw Communications Inc. (Shaw), on behalf of its wholly-owned subsidiary Videon CableSystems Inc. (Videon), to amend Videon’s broadcasting licence for the national video-on-demand (VOD) programming undertaking known as Shaw On Demand. Shaw requested that the Commission amend the current condition of licence requiring Videon to adhere to the *Pay Television Regulations, 1990* (the Regulations), with the exception of section 4 (logs and records), in order to exempt the licensee from the requirement to adhere to section 3(2)(d) of the Regulations, which states that no licensee of a pay television programming undertaking or of a pay television network “shall distribute programming that contains any commercial messages.”

2. Specifically, Shaw requested that the Commission:
 - authorize the licensee, by condition of licence, to distribute programming that contains commercial messages where those messages are already included in a program previously aired in Canada by a Canadian programming service;
 - authorize the licensee, by condition of licence, to distribute programming that contains commercial messages where those messages are already included in a program previously aired in Canada by a non-Canadian service included in the lists of eligible satellite services;
 - authorize the licensee, by condition of licence, to distribute the two types of programming described above only where the inclusion of a program as part of the VOD offering is in accordance with the terms of a written agreement entered into with the operator of the programming service that broadcast the program; and
 - authorize the licensee to charge a fee to subscribers for such Canadian and non-Canadian programming.
3. Shaw stated that the proposed amendments to Shaw On Demand's conditions of licence would allow Videon to obtain maximum flexibility to develop its on-demand service, thereby increasing the variety of programming that it could offer to its customers.
4. The Canadian Film and Television Production Association (CFTPA) and the Canadian Association of Broadcasters (CAB) filed interventions in opposition to this application. These interventions, as well as Shaw's replies, may be found at the Commission's Web site at www.crtc.gc.ca under "Public Proceedings."

Commission's analysis and determinations

5. The Commission has recently approved a number of applications for amendments to the broadcasting licences of certain VOD and pay per view programming undertakings to permit them to offer programming that includes commercial messages. These commercial messages are restricted to those contained in programs previously broadcast by other Canadian programming services, under the terms of written agreements with the licensees of those Canadian programming services, and offered on an on-demand basis at no charge to subscribers. The Commission considered that approval of those applications "would not represent a significant departure from the Commission's framework for the licensing of VOD undertakings."
6. As such, and in consideration of the positions of the parties to this proceeding, the Commission finds that the relevant issues arising from this application are the following:

- Would permitting Shaw On Demand to distribute programming that contains commercial messages included in a program previously aired in Canada by a non-Canadian service included on the lists of eligible satellite services be consistent with the Commission's framework for licensing VOD undertakings?
- Would permitting Shaw On Demand to charge a fee to subscribers for programming that contains commercial messages included in a program previously aired in Canada either by a Canadian service or a by non-Canadian service included on the lists of eligible satellite services be consistent with the Commission's framework for licensing VOD undertakings?

7. It was argued in the interventions that the distribution of programming containing commercial messages that are included in a program previously aired in Canada by a non-Canadian service included on the lists of eligible satellite services would constitute a significant departure from the original licensing framework for VOD services. Specifically, the interveners expressed concerns that such distribution would:

- facilitate the increased distribution on the licensee's VOD platform of programming obtained directly from non-Canadian sources with potentially significant implications with respect to Canadian broadcasters;
- create a potential disincentive for a broadcasting distribution undertaking to negotiate with a Canadian service for the carriage of a non-Canadian program if this program can be supplied by a non-Canadian service;
- possibly result in U.S. studios withholding VOD rights from Canadian programmers where the same program airs on both a Canadian and a non-Canadian service; and
- provide an additional vehicle by which multinational advertisers could reach Canadian viewers as an alternative to buying time on Canadian programming services.

8. The interveners also submitted that approval of the applicant's request to charge customers for VOD selections would be premature and would also constitute a significant departure from the original licensing framework for VOD services. It was further argued that the combination of subscription fees with advertising revenues could lead to the creation of new de facto foreign specialty services that would be in direct competition with licensed Canadian services.

9. In regard to the above-mentioned concerns, the interveners called upon the Commission to review its overall VOD licensing framework and policy prior to considering requests such as those made by Shaw in its application.

10. In its response, Shaw argued that it did not anticipate offering a large number of on-demand titles from non-Canadian programming services that would include commercial messages, and that broadcasting distribution undertakings can already negotiate with non-Canadian services for VOD rights. Shaw also stated that there would be no impact on the advertising market.
11. The Commission is not fully convinced by Shaw's arguments regarding the impact of the broadcast of programs that contain commercial messages aired in Canada by non-Canadian services included on the lists of eligible satellite services. Furthermore the Commission is of the opinion that it requires more information to make a reasonable determination on the issues presented by all parties and that it would be more appropriate to consider these issues in a broader context, specifically, in the context of the Commission's forthcoming review of the regulatory framework for discretionary services initiated by Broadcasting Notice of Public Hearing 2007-10.
12. In regard to the issue of subscriber fees, the Commission is not convinced that allowing VOD services to charge subscription fees for programs that contain commercial messages aired in Canada would result in the creation of de facto foreign specialty services and considers that, in light of the nature of VOD services, it is appropriate for Canadian VOD services to be permitted to charge a fee for programming with commercial messages.

Conclusion

13. In light of the above, the Commission **approves in part** the application by Shaw Communications Inc., on behalf of Videon CableSystems Inc., to amend Videon's broadcasting licence for the national video-on-demand programming undertaking currently referred to as Shaw on Demand, as it pertains to the distribution of programming containing commercial messages. Specifically:
 - The Commission **approves** Shaw's request to amend the broadcasting licence for Shaw on Demand, in order to add a condition of licence authorizing Videon to distribute programming that contains commercial messages where those messages are already included in a program previously aired by a Canadian programming undertaking.
 - The Commission **denies** Shaw's request to authorize the licensee to distribute programming that contains commercial messages where those messages are already included in a program previously aired in Canada by a non-Canadian programming undertaking included on the lists of eligible satellite services.
 - The Commission **approves** Shaw's request to authorize the licensee to charge a fee to subscribers for programming containing commercial messages.

14. Accordingly, the licence will continue to be subject to the **conditions** set out in Decisions 2000-733 to 2000-736, with the exception of condition of licence no. 1, which is replaced by the following **condition of licence**:
- The licensee shall adhere to the *Pay Television Regulations, 1990*, with the exception of section 3(2)(d) (commercial messages) and section 4 (logs and records).
15. In regard to the distribution of programming containing commercial messages, the licence will be subject to the following **condition of licence**:
- The licensee shall not include as part of its video-on-demand offering any program containing a commercial message except where:
 - a) the commercial message was already included in a program previously broadcast by a Canadian programming service; and
 - b) the program's inclusion as part of the video-on-demand offering is in accordance with the terms of a written agreement entered into with the operator of the Canadian programming service that broadcast the program.

Secretary General

Related documents

- *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Notice of Public Hearing CRTC 2007-10, 5 July 2007.
- *New video-on-demand services*, Decisions CRTC 2000-733 to CRTC 2000-736, 14 December 2000

This decision is to be appended to the licence. It is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>