



## Broadcasting Public Notice CRTC 2008-101

Ottawa, 30 October 2008

### Notice of consultation

#### Call for comments on a proposed regulatory framework for video-on-demand undertakings

*The Commission calls for comments on a proposed regulatory framework for video-on-demand undertakings. The deadline for filing comments is **29 January 2009**. Parties may file replies to matters raised in the initial comments. The deadline for the filing of replies is **12 March 2009**.*

### Introduction

1. Video-on-demand (VOD) services allow viewers to select programs to view at the time of their own choosing. Fifteen VOD undertakings, each owned and operated by a broadcasting distribution undertaking (BDU), are currently in operation.
2. New distribution platforms that offer a variety of programming from both Canadian broadcasters and non-Canadian services are clearly playing an increasing role in providing content to consumers. As consumers become accustomed to accessing content when and where they want it, the simultaneous release of content across platforms, including on VOD services, will become possible. This could potentially pose a challenge to the conventional business model of successive windows for the distribution of programming.<sup>1</sup>
3. These cultural, economic and technological trends point to significant opportunities for the Canadian broadcasting system and for the availability of high-quality Canadian content. Therefore, the Commission considers it appropriate at this time to examine the increasingly important role of VOD services and their potential contributions to the achievement of the policy objectives set out in the *Broadcasting Act* (the Act).<sup>2</sup>
4. In light of those policy objectives, as well as current developments in broadcasting, the challenge is to adopt a regulatory framework that will accommodate innovation while ensuring an appropriate contribution by VOD undertakings to the creation and presentation of Canadian programming, as stipulated by the Act.

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<sup>1</sup> The broadcasting marketplace is currently structured according to a hierarchy of broadcast windows that are available to rights holders. For example, after release in theatres, a feature film may be made available first for broadcast by pay television services, then later by conventional television stations.

<sup>2</sup> See in particular sections 3(1)(d), 3(1)(e) and 3(1)(f).

5. Over-the-air (OTA), pay and specialty television services can be characterized as “linear services” in that they present programs at specific times as part of a program schedule. VOD services are “non-linear” since it is the consumer who selects the viewing time. The Commission recognizes the need for flexibility to ensure that the Canadian broadcasting system will be open to the new business models represented by non-linear services. At the same time, the Commission must take into account the impact that new models may have on the overall broadcasting system. The Commission is particularly mindful that linear services are currently the main providers of Canadian content, including local programming, which helps fulfil key objectives of the Act. Linear services currently have much higher requirements with respect to Canadian content and expenditures on Canadian programming than VOD services.
6. VOD services will undoubtedly become increasingly competitive with linear services for audiences and revenues. In light of this, the Commission considers that it is necessary to clarify the expected role and contributions of VOD services to the Canadian broadcasting system.
7. The current regulatory framework for VOD services is set out in Public Notice 2000-172, which accompanied decisions licensing new VOD and pay-per-view (PPV) services in December 2000. This framework was developed at a time when VOD services were perceived primarily as feature film services offering programs on a pay-per-title basis. When the Commission set out the framework in 2000, none of the five VOD services approved in 1997 had launched. In such an environment, the Commission adopted a relatively light-handed regulatory approach, based largely on its approach to existing PPV services, to ensure that VOD services had the flexibility to develop in innovative ways.
8. In establishing the framework, the Commission acknowledged a potential concern that allowing VOD services to sell programming in packages – a practice known as subscription video-on-demand (SVOD) – could lead VOD services to compete directly with pay and specialty services. Pay and specialty services have restrictions on the genres of programming they offer as well as significantly higher exhibition and expenditure requirements for Canadian programming. The Commission therefore included an expectation that VOD undertakings not offer program packages of more than one week in duration.
9. VOD undertakings have been exploring alternative program packaging models, including offering bundles of specific types or brands of programming by subscription. This raises questions about the appropriateness of VOD undertakings offering bundles consisting exclusively of programming from non-Canadian services (including programming from services not currently authorized for distribution in Canada), and also about the continued adequacy of the existing policy regarding program packaging.

10. Moreover, under the current framework, VOD undertakings are generally prohibited from broadcasting commercial messages. In recent years, several of these undertakings have sought exceptions to this limitation via conditions of licence. As VOD undertakings have explored various potential revenue streams, questions have arisen as to the appropriateness of continuing to limit the broadcast of commercial messages.
11. Therefore, in Broadcasting Notice of Public Hearing 2007-10, in which the Commission initiated a review of its regulatory frameworks for BDUs and discretionary programming services, the Commission sought comment on how BDUs and programmers could take advantage of the increasingly important VOD platform, while ensuring that VOD undertakings continue to make an appropriate contribution to the objectives of the Act.
12. As well, Broadcasting Notice of Public Hearing 2007-10 inquired as to how the Commission should provide flexibility for VOD undertakings to innovate and provide diverse, attractive program offerings, while not unduly affecting linear programming services; how the Commission could ensure that Canadian programming services, especially those that are unaffiliated to existing on-demand undertakings, have access to the on-demand platform; and how the Commission could assist in ensuring that there is sufficient and appropriate programming available for VOD undertakings.

### **Overview of comments**

13. In response to Notice of Public Hearing 2007-10, the Commission received written submissions from 250 parties. Sixty-eight parties made presentations at the 8 April 2008 public hearing in the National Capital Region. This public process helped to shape the Commission's current thinking regarding VOD services and also suggested possible models for the future regulation of these services. The Commission has addressed most issues flowing from that proceeding in Broadcasting Public Notice 2008-100 also issued today. However, the Commission has also determined that there is a need for more detailed information concerning VOD undertakings before a final determination can be made. Based on the record of that proceeding, the Commission has made preliminary determinations on a proposed framework for VOD services, which it has set out in this Public Notice. The Commission now seeks comments relating to each of the following areas:
  - I. Packaging of video-on-demand services
  - II. Access to the video-on-demand platform
  - III. Acquisition of program rights
  - IV. Advertising on video-on-demand services
  - V. Provision of and contribution to Canadian programming
  - VI. Availability of programming in both official languages
  - VII. Buy-through requirement for video-on-demand undertakings, as provided by section 5 of the *Broadcasting Distribution Regulations*
  - VIII. Common licensing framework for pay-per-view and video-on-demand undertakings
  - IX. Possible issues related to the introduction and evolution of network personal video recorders
  - X. A possible approach for video-on-demand undertakings owned by smaller BDUs

## I. Packaging of video-on-demand services

14. The Commission has previously characterized a VOD service as one that allows individual customers “to select specific programs ... at any time of their choosing.” VOD services typically allow customers to have unlimited access to a selected program for a period of 24 hours. As noted above, VOD licensees have now begun to offer packages of programming. At present, the Commission expects VOD licensees to limit to one week the total period during which the programming in such packages may be viewed. This safeguard serves to ensure that VOD undertakings do not create program offerings that are similar to, and thus become directly competitive with, specialty services.
15. Some parties expressed concern about the current practice of VOD licensees offering programming packages that exceed one week in duration. These packages are in some cases offered for a flat monthly subscription fee, and, as indicated earlier, are known as subscription video-on-demand (SVOD). The most common SVOD packages consist of on-demand versions of selections of Canadian pay television undertakings (e.g., The Movie Network on Demand, Movie Central on Demand and Super Écran sur demande) and on-demand versions of selections of Canadian or non-Canadian specialty services (e.g., Treehouse on Demand, Anime on Demand or WWE on Demand).
16. Under the new framework, the Commission proposes to differentiate between transactional VOD (TVOD) and SVOD.

TVOD would be defined as the traditional form of on-demand programming, whereby a viewer accesses *a single program* on a transaction basis from a library or menu of options, with unlimited access to that program for a specified period of time (usually 24 hours).

SVOD would be defined as *any package of programs* offered for a specific price and period of time.

SVOD packages would consist of one of the following combinations of content:

- content that is an extension of a Canadian linear service; or
- packages assembled or acquired by a VOD undertaking, offered on a dedicated channel, consisting of:
  - a variety of Canadian and/or non-Canadian programming acquired by the Canadian VOD licensee from multiple sources; or
  - programming or selections of programming from a non-Canadian linear service.

17. These are dealt with separately below.

### **Subscription video-on-demand content that is an extension of a Canadian linear service**

18. In its comments, Astral Media Inc. (Astral) submitted that all Canadian OTA, pay and specialty undertakings should, by condition of licence, have the right to offer program packages from the service's linear programming in SVOD format, provided that:
  - the programming is obtained from the linear service;
  - the SVOD package complies with the Canadian content obligations applicable to the linear service; and
  - all revenues generated by the SVOD package are included in the annual gross revenues of the linear service.
19. In addition, Bell Canada (Bell) proposed that the seven day limit to program packages not apply for this type of SVOD package.
20. The Commission is of the preliminary view that, for the new policy framework, the most straightforward approach for clearly identifying the party responsible for the content found in SVOD packages would be to require Canadian programming undertakings offering such packages to apply for an amendment to their licences to allow them to provide SVOD versions of their program offerings. The key benefit of this approach is that it would clearly make the licensed Canadian programming undertaking responsible for the content that it provides to a VOD licensee, including obligations to offer Canadian content and the application of the appropriate industry codes in case of complaints.
21. On a preliminary basis, the Commission agrees with Astral's view that, in the case of a Canadian linear service that is authorized to provide on-demand content, the SVOD package should comply with Canadian content obligations that are comparable to those of the linear service. Further, all additional subscriber revenues, if any, generated by the SVOD package should be included in the annual gross revenues of the linear service for the purpose of calculating the Canadian programming expenditure (CPE) requirement and excluded from the gross revenues of the VOD undertaking.
22. **In light of the above, the Commission seeks comment on the following proposed approach:**
  - **Canadian OTA, pay and specialty services would apply for a licence amendment granting them the right to offer program packages from the services' linear programming in SVOD format, provided that:**
    - **the programming is obtained from the applicable OTA, pay or specialty service;**
    - **the SVOD package has Canadian content obligations that are comparable to those of the OTA, pay or specialty service;**

- **all additional subscriber revenues generated by the SVOD package are included in the annual gross revenues of the applicable OTA, pay or specialty service for the purpose of calculating CPE; and**
- **the applicable OTA, pay or specialty service remains responsible for the programming (e.g. adherence to relevant industry codes).**

**The Commission also proposes that:**

- **such SVOD offerings would have to negotiate distribution with VOD operators;**
- **a BDU distribution agreement would not be required before the Commission approves the licence amendment; and**
- **no time limits or similar restrictions would apply.**

23. **The Commission also seeks comment on how Canadian content should be measured for an SVOD package.**

24. There may be some concern that Canadian broadcasters might choose to provide some BDUs with access to SVOD packages that are an extension of their own Canadian linear services and not to others, or that BDUs might favour some broadcasters over others.

25. **Therefore, the Commission seeks comment on whether undue preference/disadvantage provisions of the Commission’s regulations, including a reverse onus provision<sup>3</sup> as announced in Broadcasting Public Notice 2008-100 issued today, are sufficient to govern the relationship between linear services and VOD licensees.**

**Subscription video-on-demand packages assembled or acquired by a video-on-demand undertaking**

26. As indicated above, VOD licensees are currently expected to limit programming packages to no longer than one week in duration in order to prevent them from becoming similar to and unduly competitive with linear services, which have more demanding obligations. The current practice of certain BDUs of offering monthly SVOD packages is inconsistent with this expectation. This practice is of particular concern for some parties when the SVOD offering consists entirely of content from an unauthorized non-Canadian service, resulting in what they consider to be “back-door entry” to the Canadian broadcasting system.

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<sup>3</sup> “Reverse onus” refers to an amendment to the relevant regulations under which onus would be placed on the licensee to demonstrate that any preference conferred by it or any disadvantage to which it has subjected a third party is not “undue.”

27. Parties suggested different approaches to address this practice. Pelmorex Communications Inc. (Pelmorex) proposed a prohibition on offering a package of programs on a weekly basis that is billed on a monthly basis. Several parties proposed that VOD undertakings only be permitted to offer SVOD packages if the content is acquired from a licensed Canadian service. The Canadian Association of Broadcasters (CAB) and Pelmorex suggested that content could also come from non-Canadian services provided that those services have already been authorized for distribution in Canada.
28. Finally, Allarco Entertainment Inc. (Allarco) proposed a six-step test to determine whether VOD or SVOD packages should be offered or not. In Allarco's view, the Commission should require the removal of any VOD or SVOD package that does not pass this test.<sup>4</sup>
29. The Commission is of the preliminary view that it would be counterproductive to prohibit SVOD packages of more than one week in duration, since SVOD is an innovation that is attractive and convenient for consumers. However, measures may be needed to ensure that non-Canadian SVOD offerings are not being used inappropriately as a form of back-door entry to the Canadian broadcasting system.
30. Given that SVOD packages could become increasingly competitive with linear services, which make significant contributions to Canadian programming, it is also important that VOD undertakings offering SVOD packages make appropriate contributions and remain fully responsible for the content included in those packages.
31. In order to strike a balance between providing sufficient flexibility for VOD undertakings and ensuring an appropriate level of contribution to Canadian programming, the Commission seeks comment on the following:
  - **Should the Commission establish criteria with respect to SVOD packages to ensure that they do not provide an inappropriate “back-door” entry to the Canadian broadcasting system for unauthorized non-Canadian services? If so, what should those criteria be?**

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- 1) Is the VOD/SVOD package being used as a means to import an unauthorized non-Canadian service?
- 2) Is a significant portion of the programs offered on the VOD/SVOD package provided as a subscription service in the U.S. or in another country?
- 3) Does the rights holder of the non-Canadian programming offered on the VOD/SVOD package also own or operate a subscription programming service in other jurisdictions? Does the rights holder exercise exclusive or preferential rights over the programming in Canada?
- 4) Are trademarks or other intellectual property controlled by a non-Canadian entity being used by the VOD/SVOD service?
- 5) Does the non-Canadian service provider maintain a website presence or undertake any marketing activities for the service, directly or indirectly in Canada?
- 6) Does the Canadian VOD/SVOD operator effectively delegate scheduling decisions to the non-Canadian service provider?

- **Should additional conditions apply to fully non-Canadian SVOD packages? If so, what should those conditions be?**
- **What would be the appropriate contribution to Canadian programming for VOD undertakings offering SVOD packages that are not received from licensed Canadian linear services?**

## **II. Access to the video-on-demand platform**

32. In Public Notice 2000-172, the Commission noted that, although one of the five original VOD undertakings licensed in 1997 was affiliated with a distributor (the Alliance/Shaw VOD undertaking), the policy adopted at that time assumed that VOD undertakings would compete with one another for distribution. In Public Notice 2000-172, the Commission explained that it had decided to authorize VOD undertakings that are affiliated with BDUs as a means of ensuring that VOD undertakings would launch in Canada, since no VOD undertakings were yet operational.
33. The Commission notes that there are no specific provisions that guarantee programming services a right of access to the VOD platform. However, VOD licensees are subject to a condition of licence stating that the licensee shall adhere to the *Pay Television Regulations, 1990* (the Pay Television Regulations), which includes an undue preference provision.
34. Distributors were generally of the view that access to the VOD platform by programming services was not an issue. BDUs submitted that, given the abundance of server capacity available on VOD platforms, there is no incentive for a VOD undertaking to limit the amount of Canadian programming in its inventory – the more programming choices available to consumers on VOD services, the less likely viewers are to turn to alternative platforms.
35. Distributors were more concerned about the ability of VOD licensees to obtain programming from Canadian broadcasters for the VOD platform. They noted that Canadian programming services are reluctant to offer content for VOD distribution since it is difficult to monetize the content once it has already aired on a linear service. BDUs argued that this is one reason why VOD licensees are seeking the ability to advertise on the VOD platform.
36. In contrast to distributors, some broadcasters raised concerns regarding access to the VOD platform, noting that a programmer seeking access to a BDU-operated VOD undertaking has little, if any, bargaining power. A few broadcasters proposed that:
- VOD licensees be required to approach Canadian broadcasters or rights holders first to obtain VOD programming; and/or
  - existing restrictions on the amount of programming produced by the licensee or a person related to the licensee should continue to apply to VOD licensees offering programming from related companies.



37. Broadcasters such as Corus Entertainment Inc. and the Canadian Broadcasting Corporation (CBC) were of the view that the existing undue preference provision, combined with a reverse onus provision, would be adequate to address the issue of access by unaffiliated services to VOD platforms.
38. As noted, it would appear that VOD operators are willing, at this time, to offer whatever Canadian programming is available for VOD and that broadcasters are not currently having trouble accessing the platform. However, some broadcasters are concerned that this could change in the future and are seeking rules to ensure access to VOD services that are owned and controlled by BDUs.
39. Generally, the Commission is concerned about creating overly restrictive rules for a platform that is still in an early stage of development. Further, server capacity is continually growing and the shelf space of VOD services is abundant. In the Commission's view, this abundance, perhaps combined with increased Canadian content requirements for programming made available via VOD, should go a long way to ensuring that there is a meaningful Canadian presence and ready access by Canadian broadcasters to the VOD platform.
40. **In light of the above, the Commission seeks comment on its preliminary view that the undue preference provision in the Pay Television Regulations combined with the reverse onus provision would be sufficient to address issues that may arise regarding access to VOD platforms.**
41. As a related matter, the Commission notes that the Pay Television Regulations prohibit VOD licensees from broadcasting programming, other than filler programming, that is produced by the licensee or a person related to the licensee. Several licensees have sought exceptions to this rule by condition of licence.
42. While some broadcasters favoured the approval of a limited percentage of such programming (e.g. 5% or 10%), the Documentary Organization of Canada strongly opposed the suggestion that VOD undertakings could produce programs "in house." It was of the view that the independent production industry would suffer greatly as a result.
43. **Given the range of views submitted, the Commission seeks comment on the appropriateness of allowing VOD undertakings to offer programming produced by the licensee or a person related to the licensee, specifically:**
- **Should the Commission continue to apply the prohibition on the distribution of programming produced by a licensee or a person related to the licensee contained in section 3(2)(e) and (f) of the Pay Television Regulations to VOD undertakings?**

- **Alternatively, should the Commission allow VOD undertakings to distribute a certain amount of programming that is produced by the licensee or a person related to the licensee of the undertaking? If so, what threshold, if any, should the Commission apply?**

### **III. Acquisition of program rights**

44. Astral suggested that VOD licensees should be able to acquire rights to Canadian or non-Canadian programs not broadcast by a Canadian linear service and offer these programs individually. Some parties proposed that VOD undertakings only be permitted to acquire content from Canadian programming undertakings as a means of ensuring that Canadian services do not suffer from undue competition and have access to the VOD platform.
45. On the other hand, BDUs generally opposed the suggestion that VOD licensees only be permitted to acquire content from Canadian programming undertakings. They were of the view that there is no evidence that VOD or SVOD offerings are in any way threatening the competitiveness or viability of licensed linear services.
46. The Commission is of the view that prohibiting VOD undertakings from acquiring programming at source if a Canadian broadcaster does not hold the VOD rights to the specific program would be inconsistent with their status as programming undertakings. If VOD is to grow into a valuable platform for the Canadian broadcasting system, its program sources should not be unduly limited.
47. There is insufficient information on the record regarding this topic to determine what the Commission's role should be going forward with respect to the acquisition of programming by VOD undertakings. The Commission therefore seeks comment on how best to ensure that Canadian linear programming undertakings are not unduly affected by the VOD licensees' ability to acquire program rights without hindering VOD undertakings' ability to acquire content from a wide range of sources.
48. **Specifically, the Commission seeks comment on its preliminary view that VOD undertakings should not be obliged to acquire programs only from Canadian rights holders.**

### **IV. Advertising on video-on-demand services**

49. Section 3(2)(d) of the Pay Television Regulations stipulates that "no licensee shall distribute programming that contains any commercial message."
50. Notwithstanding this general prohibition, the Commission has approved a number of applications by VOD undertakings seeking a condition of licence authorizing them, as an exception to conditions of licence that require them to adhere to the Pay Television Regulations, to offer programming that includes advertising subject to specific conditions.

51. Many parties, mainly broadcasters and distributors, supported allowing commercial messages on VOD services. They argued that the inclusion of advertising in VOD programming is necessary in order to have a viable business model going forward.
52. Generally, distributors were of the view that revenue splits with regard to new forms of advertising (and subscription revenues) should be subject to negotiation amongst the parties involved.
53. In its final submission, Rogers Cable Communications Inc. (Rogers) stated that most of the new revenue generated from the insertion of advertising on its VOD platform would go to the broadcasters from which it received the programming, and that it would anticipate charging a fee to broadcasters to recover its costs. Rogers further noted that the revenues associated with targeted advertising<sup>5</sup> in linear programming would be split. Typically broadcasters would get all the money they would have received for regular advertising and the incremental value in targeted advertising would be shared with the BDU.
54. TELUS Corporation (TELUS) proposed that advertising on VOD services be limited to advertising in programming obtained from a Canadian broadcaster or producer. TELUS noted that the need for broadcaster consent for such new advertising opportunities would ensure that broadcasters can turn down any sharing proposal that is not in their interest, without the Commission resorting to regulation. Cogeco Inc. supported TELUS's proposal in its final submission.
55. While some broadcasters supported the idea of negotiations on revenue splits, other broadcasters were of the view they should be the sole parties allowed to sell advertising in programs carried by VOD services.
56. The Commission is of the preliminary view that it would be appropriate to eliminate all limits on advertising on the VOD platform, provided that the programming is obtained from a Canadian rights holder.
57. The Commission notes that, under the framework proposed in this Public Notice, VOD licensees would be permitted to obtain programming from other sources, including non-Canadian content providers. However, the Commission is of the preliminary view that VOD services should not be allowed to insert advertising in this programming. They would, however, be able to charge a transactional or subscription fee for it. VOD licensees would also continue to be required to strip out existing advertising from non-Canadian programming acquired from non-Canadian sources.

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<sup>5</sup> "Targeted advertising" refers to a practice by which a VOD undertaking would send different advertising messages to different audience segments.

58. The Commission is of the view that this model would allow both BDUs and broadcasters to benefit from the new revenue opportunities offered by VOD while limiting the potential impact on the advertising market for linear broadcasters.
59. One potential issue with this model arises from the possibility of allowing BDUs to advertise in programming obtained directly from Canadian producers. Broadcasters may be concerned that BDUs could begin to approach Canadian producers directly for programming, thereby competing for programming rights and advertising with linear broadcasters.
60. The Commission is of the view, however, that for the time being, the impact from such a scenario is likely to be minimal since Canadian producers will still want to achieve maximum exposure for their programs through OTA, pay and specialty broadcasters.
61. An advantage of allowing VOD licensees to advertise in programming purchased directly from Canadian producers is that it might provide an incentive for VOD licensees to open their platform to Canadian programming that might not otherwise be aired on a linear broadcasting service.
62. In Broadcasting Public Notice 2008-102, also issued today, the Commission has raised questions about encouraging new forms of advertising content, including targeted advertising. In that public notice, the Commission has sought comment on the relevant definitions of new forms of advertising, the technological developments required to implement them, the likely business models and the appropriate sharing of revenues to ensure a net benefit to the Canadian broadcasting system. In the present proceeding, the Commission seeks comment on how new forms of advertising, including targeted advertising, can be encouraged on VOD undertakings and under what terms.
63. **In consideration of the above, the Commission seeks comment on the following:**
- **Should VOD licensees be allowed to include commercial messages in programming purchased directly from Canadian producers, as well as in programming acquired from Canadian broadcasters?**
  - **Are there ways that the use of new forms of advertising, specifically targeted advertising, can be encouraged in the VOD environment?**
  - **Recognizing that BDUs and Canadian rights holders will have to work out terms for the sharing of costs and revenues associated with implementing new forms of advertising, what role, if any, should the Commission play in assisting parties to come to an agreement on such terms?**

## V. Provision of and contribution to Canadian programming

64. In terms of the provision of Canadian programming, VOD undertakings are currently required to ensure that, at all times:
- not less than 5% of the English-language feature films available in their inventory are Canadian;
  - not less than 8% of the French-language feature films available in their inventory are Canadian;
  - the feature films inventory includes all new Canadian feature films that are suitable for VOD exhibition and meet the approved *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*; and
  - not less than 20% of all programming other than feature films available in the inventory is Canadian.
65. VOD undertakings are also required to ensure that not less than 25% of the titles promoted each month on the barker channel are Canadian.
66. In addition, VOD undertakings have obligations to make financial contributions to the independent production sector via the following conditions of licence:
- The licensee shall contribute 5% of its gross annual revenues to an existing Canadian program production fund administered independently of its undertaking.
  - The licensee shall remit to the rights holders of all Canadian feature films 100% of revenues earned from the exhibition of these films.
67. Broadcasters generally suggested that the Canadian content levels and financial contributions of VOD undertakings, and SVOD packages in particular, be increased to levels comparable to those of other types of programming services, such as specialty services. On the other hand, the CBC suggested that the Commission consider increasing Canadian content obligations if and when VOD assumes a greater role in the system.
68. The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) and the Coalition of Canadian Audio-visual Unions (CCAU) proposed an increase in financial contributions from 5% to 10% for VOD undertakings. Further, the CCAU submitted that 80% of the 10% should be spent on Canadian dramatic productions.
69. In contrast, distributors proposed to maintain the current Canadian content levels and financial contributions for VOD services.

70. As noted earlier, VOD licensees are also required to remit 100% of the revenues earned from the exhibition of Canadian films to the rights holders of those films. Quebecor Media Inc. proposed that the Commission progressively remove this requirement. Similarly, MTS Allstream was of the view that this requirement, in addition to the obligation to contribute 5% of gross annual revenues to an independent production fund, is resulting in a financial loss to VOD licensees. As a result, there is no incentive to provide additional Canadian feature films. Accordingly, MTS Allstream proposed that, at a minimum, VOD licensees no longer be required to include revenues from the exhibition of Canadian films in calculating the 5% of gross revenues that they must contribute to an independent Canadian production fund.
71. In relation to the promotion of Canadian content on the VOD platform, Telefilm Canada (Telefilm) proposed the addition of a section called “Canadian Films in Theatres” to VOD inventories. This section would include trailers of all new Canadian feature films playing at theatres during the film’s entire theatrical run. Telefilm submitted that this initiative would be a valuable promotional tool for Canadian theatrical feature films.
72. The record leads to no clear conclusion regarding the appropriate level of Canadian content obligations for VOD undertakings. Parties that have proposed in a general way that these requirements be increased to levels that, in their view, would be equitable with specialty services did not provide concrete explanations of exactly what those levels should be with rationale or analysis to support their positions.
73. In light of the above, the Commission seeks comment on the following questions in relation to requirements related to the provision of and expenditures on Canadian programming by VOD undertakings.

#### **Requirements for the provision of Canadian programming**

- **What would be the most appropriate methods of measuring the level of Canadian programming broadcast by VOD undertakings? For example, should the Commission apply one type of measure to all programming offered by VOD (TVOD and authorized SVOD packages)?**
- **What is the most appropriate minimum level of Canadian programming for VOD undertakings?**
- **Does the current obligation to ensure that 25% of the titles promoted each month on a VOD undertaking’s barker channel are Canadian remain appropriate? If not, what level would be appropriate and why?**

#### **Expenditure requirements**

- **Is the current requirement to contribute 5% of gross annual revenues to an existing Canadian program production fund administered independently of the undertaking still appropriate? If not, what contribution level(s) would be appropriate and why?**

- **In order to calculate financial support for Canadian independent production in the case of a VOD service that is affiliated with a BDU, the VOD service's gross annual revenues are deemed to be 50% of the total retail revenues received from customers. Is this method of calculation still appropriate? If not, what would be an appropriate method of calculation?**
- **Is the current requirement to remit 100% of revenues earned from the exhibition of Canadian feature films to the rights holders of those films still appropriate? If not, what level, if any, would be appropriate and why?**

## **VI. Availability of programming in both official languages**

74. In Public Notice 2000-172, the Commission emphasized the importance of making VOD programming in both official languages available, stating:

The Commission considers it important that subscribers be able to select programming in the official language of their choice, especially since distributors will likely carry only one VOD service in the near-term. Accordingly, the Commission expects that, to the maximum extent possible, each VOD service make its on-demand program offering available to customers in both official languages. It also expects licensees to adhere to their commitments with respect to French-language programming.

75. **Given that subscribers generally have access to only one VOD service, the Commission seeks comment on whether the expectation set out in Public Notice 2000-172 remains an appropriate mechanism for ensuring that minority language communities in both official languages are served. If not, explain and provide alternatives with supporting rationale. In addition, the Commission seeks comment on its preliminary view that the proposed VOD framework is appropriate for both linguistic markets.**

## **VII. Buy-through requirement for video-on-demand undertakings, as provided by section 5 of the *Broadcasting Distribution Regulations***

76. Section 5 of the *Broadcasting Distribution Regulations* (BDU Regulations) states that “... no licensee shall provide a subscriber with any programming services, other than pay-per-view services, video-on-demand services or the programming services of exempt programming undertakings, without also providing the basic service of the licensee” (the buy-through requirement).
77. Generally, parties representing BDUs argued that the exception to the buy-through requirement for VOD undertakings, exempt and PPV undertakings should remain in the BDU Regulations. They submitted that it gives BDUs the flexibility to offer PPV, VOD and exempt programming without first having to provide basic service, thereby reducing incentives for customers to seek out on-demand content from other sources.

78. The CAB was of the view that the exception for VOD services should be revisited. The CAB argued that, as VOD services continue to evolve away from their original emphasis on feature films towards the provision of a wide range of content similar to that currently provided by OTA, pay and specialty broadcasters, they could have a detrimental impact on the services carried on basic.
79. While acknowledging the CAB's submission, the Commission is of the preliminary view that, given the lack of any real evidence of a problem, there are few concerns with retaining the exception to the buy-through requirement for VOD undertakings at this time.
80. **In light of the above, the Commission seeks comment on whether the exception to the buy-through requirement contained in section 5 of the BDU Regulations remains appropriate for VOD undertakings.**

#### **VIII. Common licensing framework for pay-per-view and video-on-demand undertakings**

81. VOD and PPV undertakings, particularly "near VOD" services operated by PPV undertakings,<sup>6</sup> already operate in similar regulatory environments in a number of key ways. The Commission is of the preliminary view that, despite their particularities, these undertakings can be approached from the point of view that they are collectively on-demand services and therefore could be treated as one class of service going forward.
82. **The Commission therefore seeks comment on whether the framework proposed for VOD undertakings should also apply, in whole or in part, to PPV undertakings.**
83. **Similarly, the Commission also seeks comment on a proposal to align the programming reporting requirements of VOD and PPV undertakings by imposing the following condition of licence on each VOD licensee:**

**The licensee shall maintain for a period of one year and submit to the Commission upon request a detailed list of the inventory available on each file server. The list must identify each program broadcast, its key figure, its programming category, the language of the program, if it is Canadian or non-Canadian, if captioning and/or video description is available, and if it is produced by the licensee.**

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<sup>6</sup> "Near VOD" refers to a practice by PPV undertakings to schedule the same program on a number of different channels at different times. Subscribers therefore have many choices as to when they can view the program.



## **IX. Possible issues related to the introduction and evolution of network personal video recorders**

84. New services are currently being marketed in other jurisdictions under the name of network personal video recorders (Network PVRs). These services range from offerings that closely resemble VOD, in that they offer a catalogue of previously broadcast programming for playback by subscribers over a specific period to time, to services that function in essentially the same manner as existing standalone recording devices. Parties to the proceeding announced in Broadcasting Notice of Public Hearing 2007-10 raised questions regarding the future capacity of Network PVRs to act as virtual VOD services.
85. **The Commission invites parties to address the questions set out below. In particular, the Commission seeks comment from BDU licensees concerning their specific plans to roll out Network PVRs.**
- **What is the current state of technological and market development of Network PVRs in Canada? Are there technical or business issues impeding the rollout of Network PVRs? If so, what are they?**
  - **To what extent will Network PVRs provide a service that is substantially similar to VOD?**
  - **Should BDUs be permitted to include all of their programming offerings on their Network PVRs, or should such matters be the subject of negotiations between BDUs and rights holders?**
  - **Should the framework proposed for VOD apply, in whole or in part, to Network PVRs to ensure that their use is consistent with the objectives set out in this Public Notice?**

## **X. A possible approach for video-on-demand undertakings owned by smaller BDUs**

86. The Commission notes that VOD undertakings are, for the most part, owned by BDUs. All of the larger BDUs already operate VOD undertakings, but now smaller BDUs, including exempt BDUs are filing applications to offer VOD services. Broadcasting Public Notice 2008-100 stated that regulation should be as targeted as possible and impose the least burdensome constraints. In light of that objective, as well as the Commission's determination to expand the exemption order respecting smaller BDUs, the Commission is of the preliminary view that it may also be appropriate to consider exempting VOD undertakings owned by exempt BDUs. The Commission therefore invites parties to comment on the following:
- **Should the Commission consider exempting VOD undertakings owned by exempt BDUs? If so, what should the terms of the exemption be?**

## Call for comments

87. The Commission calls for comments on the issues and questions set out in this public notice. The deadline for filing written comments is **29 January 2009**. Parties may file replies to any of the comments submitted during the first stage by **12 March 2009**.

## Procedures for filing comments

88. Interested parties can file their comments to the Secretary General of the Commission:

- **by using the**  
[Broadcasting Intervention/Comments Form](#)

OR

- **by mail to**  
CRTC, Ottawa, Ontario K1A 0N2

OR

- **by fax at**  
819-994-0218

89. Submissions longer than five pages should include a summary.
90. Please number each paragraph of your submission. In addition, please enter the line \*\*\*End of document\*\*\* following the last paragraph. This will help the Commission verify that the document has not been damaged during transmission.

## Important notice

91. Note that all information that you provide as part of this public process, except information granted confidentiality, whether sent by postal mail, facsimile, e-mail or through the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca), becomes part of a publicly accessible file and will be posted on the Commission's website. This information includes your personal information, such as your full name, e-mail address, postal/street address, telephone and facsimile number(s), and any other personal information you provide.
92. The personal information you provide will be used and may be disclosed for the purpose for which the information was obtained or compiled by the Commission, or for a use consistent with that purpose.
93. Documents received electronically or otherwise will be put on the Commission's website in their entirety exactly as you send them, including any personal information contained therein, in the official language and format in which they are received. Documents not received electronically will be available in PDF format.

94. Please note that the information you provide to the Commission as part of this public process is entered into an unsearchable database dedicated to this specific public process. This database is accessible only from the webpage of this particular public process. As a result, a general search of our website with the help of either our own search engine or a third-party search engine will not provide access to the information which was provided as part of this public process.
95. The Commission encourages interested parties to monitor the public examination file and the Commission's website for additional information that they may find useful when preparing their comments.

**Examination of public comments and related documents at the following Commission offices during normal business hours**

Toll-free telephone: 1-877-249-2782  
Toll-free TDD: 1-877-909-2782

Central Building  
Les Terrasses de la Chaudière  
1 Promenade du Portage, Room 206  
Gatineau, Quebec K1A 0N2  
Tel.: 819-997-2429  
Fax: 819-994-0218

Metropolitan Place  
99 Wyse Road  
Suite 1410  
Dartmouth, Nova Scotia B3A 4S5  
Tel.: 902-426-7997  
Fax: 902-426-2721

205 Viger Avenue West  
Suite 504  
Montréal, Quebec H2Z 1G2  
Tel.: 514-283-6607

55 St. Clair Avenue East  
Suite 624  
Toronto, Ontario M4T 1M2  
Tel.: 416-952-9096

Kensington Building  
275 Portage Avenue  
Suite 1810  
Winnipeg, Manitoba R3B 2B3  
Tel.: 204-983-6306  
TDD: 204-983-8274  
Fax: 204-983-6317

Cornwall Professional Building  
2125 - 11<sup>th</sup> Avenue  
Room 103  
Regina, Saskatchewan S4P 3X3  
Tel.: 306-780-3422  
10405 Jasper Avenue  
Suite 520  
Edmonton, Alberta T5J 3N4  
Tel.: 780-495-3224

530-580 Hornby Street  
Vancouver, British Columbia V6C 3B6  
Tel.: 604-666-2111  
TDD: 604-666-0778  
Fax: 604-666-8322

Secretary General

#### **Related documents**

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Call for comments on a proposed framework for the sale of commercial advertising in the local availabilities of non-Canadian services*, Broadcasting Public Notice CRTC 2008-102, 30 October 2008
- *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Notice of Public Hearing CRTC 2007-10, 5 July 2007

- *Introductory statement to Decisions 2000-733 to 2000-738: Licensing of new video-on-demand and pay-per-view services*, Public Notice CRTC 2000-172, 14 December 2000
- *Licensing of New Video-on-Demand Programming Undertakings – Introduction to Decisions 97-283 to 97-287*, Broadcasting Public Notice CRTC 1997-83, 2 July 1997

*This document 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>.*