



Broadcasting Regulatory Policy CRTC 2010-190

Route reference: Broadcasting Public Notice 2008-101

Additional references: Broadcasting Public Notices 2008-101-1 and 2008-101-2

Ottawa, 29 March 2010

Regulatory framework for video-on-demand undertakings

In this regulatory policy, the Commission sets out its determinations regarding its proposed regulatory framework for video-on-demand (VOD) undertakings, which was set out in Broadcasting Public Notice 2008-101. The key new mechanisms that the Commission is introducing are summarized below.

- *Subject to criteria set out in this regulatory policy, the Commission will, by condition of licence, permit VOD undertakings to advertise in certain programming. In particular, the Commission, by majority decision, considers that advertising should be permitted only in programming acquired directly from an unrelated licensed Canadian broadcaster or from a related broadcaster that has also acquired the linear rights to the program.*
- *The Commission will not require VOD undertakings to retain commercial messages that are already included in a program previously aired in Canada on a non-Canadian service authorized for distribution in Canada, and to charge a fee to subscribers for this programming.*
- *With respect to the method of calculation of the required financial support for Canadian independent production by a VOD service affiliated with a broadcasting distribution undertaking (BDU), the Commission intends to pursue amendments at the licensees' next licence renewals to eliminate the current approach whereby the gross annual broadcastings revenues are deemed to be 50% of the total retail revenues received from customers.*
- *The Commission will maintain the requirement for VOD undertakings to remit 100% of revenues from Canadian feature films to the Canadian rights holder, subject to an agreement to the contrary, but will allow those licensees to exclude the amount remitted to Canadian feature film rights holders as revenue for the purpose of calculating the contribution to a production fund.*
- *The Commission will require VOD undertakings to report in annual returns the amounts remitted to Canadian feature film rights holders.*

- *The Commission intends to impose a condition of licence on VOD undertakings at their next licence renewals prohibiting them from offering a non-Canadian subscription VOD (SVOD) package that is directly competitive with a Canadian linear discretionary service. This condition of licence will also apply to Canadian VOD packages that might compete directly with genre-protected Canadian discretionary services.*
- *The Commission intends to impose a condition of licence on VOD undertakings at their next licence renewals that will introduce an undue preference provision with a reverse onus requirement and include a prohibition on the acquisition of exclusive rights. This condition will apply instead of the current condition of licence that refers to the undue preference provision set out in section 6.1 of the Pay Television Regulations, 1990.*
- *The Commission intends to amend the condition of licence that requires VOD undertakings to adhere to the Pay Television Regulations, 1990 to exclude them from the prohibition on the distribution of programming produced by a licensee or a person related to the licensee contained in sections 3(2)(e) and (f).*
- *The Commission will initiate a further public proceeding to establish an exemption order for smaller VOD undertakings.*
- *The Commission intends to ask VOD undertakings to provide, as part of the record for their next licence renewal, aggregate data for the previous broadcast year for the items listed in paragraph 104 of this document.*

Introduction

1. In Broadcasting Public Notice 2008-101, the Commission called for comments on a proposed regulatory framework for video-on-demand (VOD) undertakings.
2. VOD services allow viewers to select programs to view at the time of their own choosing. In contrast, traditional broadcasting services such as conventional, pay and specialty television services are often referred to 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 program and the viewing time. Twenty-one VOD undertakings, each owned and operated by a broadcasting distribution undertaking (BDU), are currently in operation.
3. In Broadcasting Public Notice 2008-101, the Commission noted that VOD services will undoubtedly become increasingly competitive with linear services for audiences and revenues. In light of this, the Commission considered it necessary to clarify the expected role and contributions of VOD undertakings to the Canadian broadcasting system. In particular, while the Commission recognized the need for flexibility to ensure that the Canadian broadcasting system will be open to the new business models represented by non-linear services, it also stated that it must take into account the impact that new models may have on the overall broadcasting system.

4. In Broadcasting Public Notice 2008-101, the Commission sought comment on, among other things, advertising on VOD services, the provision of and financial contribution to Canadian programming by VOD undertakings, the packaging of VOD services, and access to the VOD platform.

General comments on VOD undertakings

5. Broadcasters, producers and cultural groups generally expressed concern about the potential for VOD services to develop into services that would no longer be complementary to linear services but would compete directly with the latter for audiences, program rights and advertising revenue. The majority of these interveners recommended that the Commission impose higher requirements on VOD undertakings with respect to Canadian content and introduce safeguards to prevent VOD services from directly competing with linear services.
6. VOD operators, Bell TV and the Canadian Cable Systems Alliance (CCSA) were of the view that there was no need to alter the existing framework for VOD undertakings except to offer them more flexibility. Many of these interveners also argued that VOD services were not, nor would likely ever become, directly competitive with linear broadcasting services.
7. Rogers Communications Inc. (Rogers) submitted that, despite the success achieved on the VOD platform to date, particularly in its ability to attract new digital subscribers, this platform is still at a nascent stage in its development and that most subscribers still use VOD services to access feature films, with much less viewing to traditional television programming. Rogers stated, "Until this changes, VOD and SVOD services remain most remarkable not for what they have achieved but for their potential."
8. VOD operators argued that they are competing with VOD services delivered over the Internet and that, consequently, imposing too many restrictions on BDU-delivered VOD will drive consumers to the unregulated system. These parties also expressed concern that some of the changes to the VOD regulatory framework suggested by parties, if implemented, would negatively impact the development of VOD services and provide a disincentive for VOD undertakings to continue expanding the platform.

Commission's determinations

9. As the Commission noted in Broadcasting Public Notice 2008-101, the challenge in this proceeding is to adopt a regulatory framework that will accommodate innovation for new services such as VOD, while ensuring their appropriate contribution to the system and taking into account their potential impact on the overall broadcasting system.
10. The Commission agrees with parties who characterized the VOD platform as still being at a nascent stage in its development. Although the first VOD undertakings launched in the early 2000s, the expeditious growth of the platform has been hindered by such factors as the relatively slow uptake of digital technology, difficulties in determining the value of and acquiring VOD programming rights and an uncertain business model for these

services. That being said, VOD revenues are growing significantly, increasing from \$2.9 million in 2003 to approximately \$145 million in 2009.¹

11. Despite recent growth, in the Commission's view, no evidence was submitted by parties to suggest that, at this time, VOD services have developed to the point that they are having a material impact on traditional broadcasters. Rather, at the moment, apart from their inventory of feature films, they appear primarily to provide a second window for television programming that has aired on linear services and can serve as a further promotional tool for linear services.
12. The Commission is also cognizant of the fact that BDU-delivered VOD services offer a competitive alternative to VOD services delivered over the Internet. The Commission considers that BDU-delivered VOD services represent an opportunity to keep Canadian subscribers in the regulated broadcasting system by offering them the same choice and convenience, with respect to content, that they will be able to find on the Internet.
13. It is for these reasons that the Commission is not undertaking significant changes to the VOD framework at this time. At the same time, the Commission is introducing mechanisms to encourage VOD undertakings and broadcasters to share in the risks and rewards of this platform.
14. The Commission will continue to monitor the development of VOD services and will review the framework at such time when there is evidence of significant impact on the broadcasting system or particular components of it.
15. The Commission therefore introduces the following changes to the regulatory framework for VOD undertakings.

Advertising on VOD undertakings

16. In Broadcasting Public Notice 2008-101, the Commission stated its 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.
17. The Commission noted that, under the proposed framework, VOD undertakings would be permitted to obtain programming from other sources, including non-Canadian content providers. However, the Commission was of the preliminary view that VOD undertakings should not be allowed to insert advertising into programming not obtained from a Canadian rights holder. They would, however, be able to charge a transactional or subscription fee for it. The Commission also raised the possibility of allowing BDUs to advertise in programming obtained directly from Canadian producers.
18. Finally, the Commission sought comment on whether there are ways that the use of new forms of advertising, specifically targeted advertising, can be encouraged in the VOD environment.

¹ CRTC Financial database

Positions of parties

19. Parties were divided on their views as to whether advertising should be permitted on the VOD platform. The Association of Canadian Advertisers and Canadian Media Directors Council (ACA/CMDC), Astral Media Inc. (Astral), Corus Entertainment Inc. (Corus), TEN Broadcasting Inc. (TEN), and the Writer's Guild of Canada (WGC), for instance, supported the Commission's proposal to allow advertising in programming obtained from a Canadian rights holder.
20. The Canadian Broadcasting Corporation (CBC), Association des producteurs de films et de télévision du Québec (APFTQ), Canwest Television Limited Partnership (Canwest), Corus, CTVglobemedia (CTV), and TV5 were of the view that advertising on the VOD platform should remain the sole responsibility of the Canadian licensees providing the programming content, and that all advertising revenues from this activity must flow back to these licensees. Corus and CBC, however, acknowledged that there would have to be a market-based negotiation between the program supplier and the platform provider.
21. The Director's Guild of Canada (DGC), the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Asian Television Network (ATN), the Independent Broadcast Group (IBG), and Stornoway Communications (Stornoway) submitted that the Commission should continue to prohibit advertising on the VOD platform, expressing concern about the impact of allowing new competitors into the advertising market given the current economic situation and the limited size of this market.
22. CTV, supported by Corus, also proposed that, to enable broadcasters to realize the greatest revenues from advertising on VOD, the Commission should require VOD providers to provide broadcasters with detailed information relating to how often their programs are viewed and by whom, disable the fast forward function, and develop reliable measurement criteria.
23. The Canadian Film and Television Production Association (CFTPA) supported the Commission's proposal provided it applied only to new forms of advertising and only if it is deferred to a later date as, in CFTPA's view, the advertising market is too unstable to undergo changes in the current economic environment. CFTPA was of the view that permitting VOD undertakings to sell only new forms of advertising would increase the chances of new advertising revenue coming into the system, rather than simply seeing existing revenue redirected from linear programming services.
24. CFTPA and TEN were of the view that VOD undertakings should be allowed to include commercial messages in programming purchased directly from Canadian producers as well as broadcasters. Canwest and Corus, however, objected to this proposal as, in their view, it would "violate the fundamental principle that advertising is the exclusive domain of broadcasters", would fragment the advertising market and would undermine licensed broadcasters.
25. VOD operators, Bell TV and CCSA supported the Commission's proposal to allow advertising in programming obtained from a Canadian rights holder. Rogers, in particular, submitted that, contrary to some views, advertisements on VOD represent untapped revenues that can be captured and monetized to the benefit of the entire

Canadian broadcasting system. Bragg Communications Inc. (Bragg), in particular, elaborated on how advertising on the VOD platform would yield benefits to the entire system including programming services, BDUs/VOD undertakings and consumers.

26. Shaw Communications Inc. (Shaw) argued that having broadcasters control the advertising inventory and retain 100 percent of the revenues is not a realistic or equitable proposal, given the substantial investments that BDUs have made to build the VOD platform. However, both Shaw and TELUS noted that allowing broadcasters to share in VOD advertising revenue will provide them with an important incentive to purchase VOD rights.
27. Bell, Bragg, and MTS Allstream (MTS) also urged the Commission not to limit advertising on the VOD platform to new forms of advertising. Both Bragg and MTS argued that new forms of advertising may be cost prohibitive for smaller VOD undertakings.

Commission's analysis and determinations

28. The Commission considers that advertising should be permitted on the VOD platform in order to offset the costs of acquiring VOD rights to programming and to help create a viable business model for VOD. A model similar to that proposed in Broadcasting Public Notice 2008-101 will allow both VOD undertakings and other broadcasters to share in the new revenue opportunities offered by VOD, thus limiting any potential revenue impact on linear broadcasters.
29. In light of the concerns expressed above by broadcasters, however, the Commission, by majority decision, concludes that it would not be appropriate to allow VOD undertakings to advertise in programming purchased directly from Canadian producers. In particular, a majority of the Commission considers that it should not introduce a policy that might encourage VOD undertakings to by-pass broadcasters to obtain programming directly from producers at a time when some broadcasters are facing significant financial challenges.
30. Allowing advertising in programming obtained from Canadian broadcasters also potentially reduces incidences of bidding wars for VOD programming between VOD undertakings and linear broadcasters by making it less attractive for VOD undertakings to acquire VOD rights from non-Canadian rights holders.
31. The Commission therefore will allow VOD undertakings, by condition of licence, to advertise in programming only if it is acquired directly from licensed Canadian broadcasters.²
32. It is possible that a programming undertaking that is related to a VOD undertaking would acquire the VOD rights to programming on behalf of the VOD undertaking. In the Commission's view, this would not be in keeping with the spirit of encouraging cooperation between VOD undertakings and Canadian linear programming undertakings.

² See also Broadcasting Regulatory Policy 2010-167.

33. Accordingly, the Commission will generally prohibit a VOD undertaking from advertising in programming obtained from a related Canadian programming undertaking. A related undertaking would be defined as a programming undertaking of which the licensee or an affiliate, or both, controls more than 10% of the total shares issued and outstanding. The general prohibition outlined above will be subject to the following exception. A VOD undertaking will be authorised to advertise in programming obtained from a related programming undertaking that has also acquired the linear rights to the programming. It is clear in such instances that, in acquiring the VOD rights, the programming undertaking would not be acting solely on behalf of the VOD undertaking. As a result, the VOD undertaking should be permitted to advertise in this programming in this circumstance.
34. Programming undertakings that are permitted to advertise must adhere to the Canadian Association of Broadcasters' *Broadcast Code for Advertising to Children*. VOD undertakings, when permitted to advertise, will be subject to this code, which the Commission intends to impose by condition of licence.
35. With respect to CTV's proposal that broadcasters be given access to detailed information relating to how often their programs are viewed and by whom, the Commission is of the view that these matters should be left to negotiation between the VOD undertaking and the linear service that is providing the programming. Nevertheless, the Commission encourages VOD undertakings to share aggregate information on viewing to VOD programs with broadcasters if such information is available. The Commission, however, reminds both VOD undertakings and linear broadcasters of the applicability of the *Personal Information Protection and Electronic Documents Act* in regard to the use and sharing of personal information.
36. CFTPA was the only party that expressed the view that advertising on the VOD platform should be restricted to new forms of advertising, such as targeted advertising. In the Commission's view, imposing such a restriction at this time could unduly delay the development of the VOD platform since it is not known when targeted advertising will be fully operational in Canada. The Commission, therefore, will not restrict advertising on the VOD platform to new forms of advertising.
37. The Commission notes that, in Broadcasting Public Notice 2008-100, it proposed that "it may be appropriate to convene an industry working group that would be responsible for developing best practices to guide arrangements between broadcasters and BDUs regarding various matters." While the Commission sees no immediate need to convene such a working group, it reiterates its expectation, expressed in Broadcasting Public Notice 2008-100, that all parties and the Canadian broadcasting system in general should benefit from the new revenue opportunities afforded by advertising on the VOD platform and encourages parties to work together to that end. Further, parties can approach the Commission if the need for Commission sponsorship of or participation in a working group arises.

Requirement to strip out existing advertising from non-Canadian programming acquired from non-Canadian sources

Positions of parties

38. Bragg, MTS, Shaw, and Rogers disagreed with the Commission's preliminary view that VOD undertakings should continue to be required to strip out existing advertising from non-Canadian programming acquired from non-Canadian sources. These parties regarded this as an inefficient and costly regulatory requirement (particularly for small VOD undertakings) that is of little real benefit. Rogers pointed out that such embedded commercial messages have a limited shelf life, promote products or services that are sometimes not even available in Canada and represent little or no threat to the viability of Canadian linear broadcasting undertakings. In its reply comments, the DGC agreed with Rogers, stating, "... it is not clear to the DGC that ordering that non-Canadian ads aired on such services be stripped would result in benefits that outweigh the costs of doing so."

Commission's analysis and determination

39. The Commission has already approved conditions of licence for VOD undertakings authorizing them to distribute programming that contains commercial messages where those messages are already included in the program when previously aired by a Canadian programming undertaking.
40. The Commission notes that there was no additional evidence presented in the current proceeding regarding the impact of these commercial messages on linear broadcasters. In the Commission's view, however, VOD operators did make valid arguments with regard to the costliness of this requirement in relation to its benefit. Therefore, the Commission will not require VOD undertakings to strip out commercial messages where those messages are already included in a program previously aired in Canada on a non-Canadian service authorized for distribution in Canada.
41. The Commission clarifies, however, that this is not an authorization to insert new advertising into this programming.

Canadian programming expenditures

42. In Broadcasting Notice of Consultation 2009-411, as amended by Broadcasting Notice of Consultation 2009-411-3, the Commission initiated a policy proceeding to develop a new group-based regulatory framework for television services. In that proceeding, the Commission stated that it would consider how a single, group-based Canadian programming expenditure requirement (CPE) would be applied holistically and with flexibility to count expenditures across all platforms of integrated corporate undertakings, including VOD, where appropriate. In Broadcasting Regulatory Policy 2010-167, however, the Commission concluded that subscription VOD (SVOD) services that offer linear television programming in alternative ways are still nascent, and various business models and products are being offered through a variety of corporate partnerships. The outlook for the final form of these offerings is uncertain. To date, these services have little revenue. Accordingly, the Commission considered that the inclusion

of VOD and SVOD undertakings in the new group framework would be premature and would not contribute significantly to the policy objectives of the *Broadcasting Act*. Therefore, the Commission will continue to assess financial contributions from VOD undertakings on an individual licensee basis.

43. In Broadcasting Public Notice 2008-101, the Commission sought comment on whether the current requirement for VOD undertakings to contribute 5% of gross annual revenues to an existing Canadian program production fund administered independently of the undertaking is still appropriate.
44. The Commission also noted that, 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. The Commission sought further comment on whether this method of calculation is still appropriate.

Positions of parties

45. ACTRA, CFTPA and WGC submitted that a 5% contribution from VOD undertakings is no longer appropriate and recommended that the Commission increase the contribution to 10%.
46. VOD operators and CCSA were of the view that the current 5% contribution requirement remains appropriate, including the current method of calculating this contribution. Saskatchewan Telecommunications suggested that it is inappropriate to create new "customer charges and taxes" in the current economic environment. Rogers was of the view that no party to the proceeding provided a compelling argument to support enhanced financial contributions by VOD undertakings.
47. TELUS objected to the views of parties who compared the 5% of gross revenues contributed by VOD undertakings to Canadian programming expenditures by linear services, noting that "payment of contribution by VOD operators goes to the Canadian Television Fund and/or other independent production funds and provides no direct benefit to the VOD service."
48. Shaw noted that, as VOD revenues grow, the financial contribution of VOD to Canadian production funds will also grow.
49. Bell TV objected to the method of calculation of the 5% contribution whereby the VOD undertaking's gross annual revenues are deemed to be 50% of the total retail revenues received from customers. Bell TV noted that the same method of calculation does not apply to pay-per-view (PPV) undertakings, which are required to contribute the full 5%, submitting that "there appears no policy rationale to grant the cable BDUs this advantage."

Commission's analysis and determinations

50. As noted, VOD undertakings are currently required to contribute 5% of their gross annual revenues to an independent Canadian production fund. However, for BDU-affiliated VOD undertakings, which are the only kind in operation, the VOD undertaking's gross annual revenues are deemed to be 50% of the total retail revenues received from customers. As a result, these VOD undertakings are actually making a contribution to a production fund of 2.5% of their gross annual revenues.
51. The rationale offered in Public Notice 2000-172 by the Commission for this method of calculation was that, when a VOD undertaking offers programming through a distributor to a customer, a portion of the price paid by the customer goes to a BDU who distributes the VOD service and the breakdown of revenue between the distributor and the VOD undertaking is set out in an agreement between the two parties. At the 2000 hearing, the Commission explored with applicants how it could fairly determine the gross revenue of a VOD undertaking in cases where the VOD undertaking is affiliated to or integrated with the distributor carrying the service. Specifically, each VOD applicant was asked if it would accept an approach under which the gross revenue of the VOD undertaking for transactions between it and affiliated or integrated distributors would be deemed to be 50% of the total retail revenues received from customers.
52. The Commission notes that the general principle regarding contribution by BDUs and VOD undertakings is that it be paid on gross broadcasting revenues. In other words, the Commission does not generally permit reductions to contribution payable based on the fact that amounts have been paid to other entities for services rendered, including entities that are also subject to contribution requirements. For example, the Commission does not permit BDUs to deduct amounts that might be paid to satellite relay distribution undertakings for signals received from such undertakings.
53. In addition to the above, the adjusted calculation applies only to VOD undertakings affiliated with a BDU, and there would appear to be little justification for singling out BDU-affiliated VOD undertakings for this favourable treatment.
54. Accordingly, the Commission considers it appropriate to eliminate the current approach whereby the gross broadcasting revenues of a VOD service affiliated with a BDU are deemed to be 50% of the total retail revenues received from customers. The Commission intends to pursue the necessary amendments to the VOD licences at their next renewals.

Revenues from Canadian feature films

55. In Broadcasting Public Notice 2008-101, the Commission sought comment on whether the current requirement to remit 100% of revenues earned from the exhibition of Canadian feature films to the rights holders of those films is still appropriate.

Positions of parties

56. WGC and The Canadian Association of Film Distributors and Exporters (CAFDE) were of the view that this requirement is still appropriate. CAFDE noted that VOD revenue has now become critical and can, on certain films, represent over one third of the revenue from all broadcast sources.
57. TEN and ACTRA, however, considered that this requirement can actually serve as an impediment to the sale and promotion of Canadian films. VOD operators also generally objected to the retention of this requirement, noting that it prevents VOD undertakings from recovering their costs for the exhibition of these films, results in a financial loss to the VOD undertaking, and may create a disincentive to exhibit Canadian feature films beyond the minimum requirements.
58. ACTRA and Bragg submitted that the current requirement should be amended to exclude revenues earned from the exhibition of Canadian films from the calculation of the 5% contribution requirement. Bragg added that VOD undertakings should be permitted to deduct from the revenues remitted to the Canadian rights holders specific, direct expenses incurred in acquiring the rights to the content and distributing the content (e.g., copyright fees).

Commission's analysis and determination

59. Based on the comments of CAFDE, it would appear that revenues from VOD remitted to Canadian feature film rights holders can be a significant source of revenue for these films. For this reason, the Commission is reluctant to eliminate this requirement.
60. That being said, the Commission acknowledges the comments of parties who argued that this requirement could serve as a disincentive to sell and promote Canadian films and that it results in a financial loss to VOD undertakings. Unfortunately, no evidence was provided by VOD undertakings to indicate how much money was involved or to indicate the magnitude of this loss.
61. In order to maintain the flow of revenues to Canadian feature film rights holders, the Commission will maintain the requirement for VOD undertakings to remit 100% of revenues from Canadian feature films to the Canadian rights holder. However, to offset the losses to VOD undertakings and to ensure that there is no disincentive for the offering or promotion of Canadian feature films, the Commission will allow VOD undertakings to exclude the amount remitted to Canadian feature film rights holders as revenue for the purpose of calculating the contribution to a production fund. The Commission will require VOD undertakings to report in annual returns the amounts remitted to Canadian feature film rights holders.
62. The Commission notes that, in some cases, VOD undertakings and rights holders of Canadian feature films may wish to negotiate a revenue-sharing arrangement for the exhibition of Canadian feature films that may differ from the requirement to remit 100% of revenues from Canadian feature films to the rights holders. The Commission would consider this permissible provided such an agreement is acceptable to the rights

holder of the Canadian feature film. However, any revenues retained by the VOD undertaking should be included as gross broadcasting revenues for the purposes of calculating contribution.

Subscription VOD packages assembled or acquired by a VOD undertaking from non-Canadian services

63. In addition to offering programming on a transactional basis, VOD undertakings now offer packages of programming on a subscription basis. At present, the Commission expects VOD undertakings to limit to one week the total period during which the programming in such packages may be viewed. This safeguard is intended to prevent VOD undertakings from creating program offerings that are similar to, and thus directly competitive with, specialty services.
64. In Broadcasting Public Notice 2008-101, the Commission stated its 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. The Commission sought comment, however, on whether it should establish criteria with respect to non-Canadian SVOD packages to ensure that they are not being used inappropriately to introduce foreign services into the Canadian broadcasting system.

Positions of parties

65. The majority of broadcasters, producers and cultural organizations expressed concern about VOD undertakings offering packages of programming consisting exclusively of programming obtained from non-Canadian services, particularly services not authorized for distribution in Canada. Many considered that these packages could be used as a form of entry into Canada for services that the Commission might not otherwise be willing to authorize on a linear basis on the grounds that they would be competitive with licensed Canadian programming services.
66. Some of these parties were of the view that Canadian linear programming services should be the only services allowed to offer SVOD services. They submitted that VOD undertakings should be restricted to offering programs solely on a transactional, rather than a subscription, basis. DGC added that the Commission should not permit VOD undertakings to offer SVOD packages at dedicated channel positions.
67. Other parties proposed that the Commission only allow VOD undertakings to assemble packages of programming obtained from non-Canadian services already authorized for distribution in Canada.
68. VOD operators, Bell TV and CCSA were generally of the view that the Commission should not impose any additional or specific rules for SVOD packages assembled or acquired by VOD undertakings, including SVOD packages made up entirely of non-Canadian programming. They also supported the Commission's preliminary proposal to remove the expectation prohibiting SVOD packages of more than one week in duration.

69. Rogers submitted that there is no evidence to support claims by parties that SVOD packages are being used as a way to achieve back-door entry for popular foreign linear services. Rogers noted that the programming it offers in these packages is intended for an ultra-niche audience, typically consists of programs that are not being offered by Canadian programming services and garners very small audiences, attracting on average less than 5,000 subscribers.
70. Shaw, CCSA and Cogeco Inc. (Cogeco) also submitted that BDU-delivered VOD offerings are competing directly with programming available through the Internet and therefore require flexibility to offer a broad array of programming.

Commission's analysis and determination

71. In Public Notice 2000-172, which set out the current regulatory framework for VOD, the Commission determined that VOD undertakings should have the flexibility to offer packages of programming to their customers subject to the safeguard discussed above that VOD undertakings limit programming packages to no longer than one week in duration.
72. In the Commission's view, however, the current practice of VOD undertakings is not in keeping with this expectation. Some VOD undertakings claim to offer "weekly", on-going subscriptions³ to a themed package of programming, which they indicate are only billed on a monthly basis.
73. Further, the Commission notes that, when the "one week" rule was introduced, the type of SVOD packages envisioned were more modest in scope than those currently offered, and therefore unlikely to be competitive with linear services. At that time, it was not anticipated that there would be on-going subscriptions to SVOD packages, with recognizable brands, that are positioned on dedicated channels and contain as many as 40 titles or hours of programming. In the Commission's view, SVOD packages offered in this manner do appear to be very similar to linear specialty channels.
74. That being said, given the limited number of non-Canadian SVOD packages offered by BDUs, the niche nature of the content offered in these SVOD packages and the apparently small number of subscribers to these services, the Commission is of the view that these packages are not having a significant impact on linear specialty services at this time.
75. In addition, as the Commission stated in Broadcasting Public Notice 2008-101, SVOD is an innovation that is attractive and convenient for consumers. In that respect, the Commission does not agree with the views of parties who advocated prohibiting VOD undertakings from offering SVOD packages or limiting SVOD packages to content derived from a linear Canadian service or a non-Canadian service already authorized for distribution in Canada.

³ An ongoing subscription would be one where the customer does not have to keep re-ordering the package each week.

76. Nevertheless, the Commission considers it appropriate to introduce a safeguard to address the potential for SVOD packages to directly compete with Canadian linear discretionary services as the business model for VOD develops. Therefore, the Commission intends to pursue the introduction of a condition of licence at the upcoming licence renewals prohibiting VOD undertakings from offering an SVOD package, on a dedicated channel, that is directly competitive with a Canadian linear discretionary service. This condition of licence would not apply to on-demand versions of Canadian linear discretionary services. To assess whether a non-Canadian SVOD package might be competitive with a Canadian linear specialty service, the same criteria that are used to determine a service's eligibility to be included on the Commission's eligible satellite lists would apply.
77. This condition of licence would also apply to Canadian SVOD packages that might compete directly with genre-protected Canadian pay and specialty services (i.e., Category A services) - for instance, if a VOD undertaking decided to assemble and offer a Canadian SVOD history package that would compete directly with The History Channel.

Access to the VOD platform

78. The Commission notes that there are no specific provisions that guarantee programming services a right to place their programming on the VOD platform. However, VOD undertakings are subject to a condition of licence stating that the licensee shall adhere to the *Pay Television Regulations, 1990* (the Pay Television Regulations), which include an undue preference provision.
79. The Commission sought comment on its preliminary view that the undue preference provision in the Pay Television Regulations combined with a reverse onus provision would be sufficient to address issues that may arise regarding access to VOD platforms.
80. The Commission also sought comment on the appropriateness of allowing VOD undertakings to offer programming produced by the licensee or a person related to the licensee.

Positions of parties

81. Canwest, Corus, CTV and WGC were of the view that the undue preference provision in the Pay Television Regulations combined with a reverse onus provision would be sufficient to address issues that may arise regarding access to VOD platforms.
82. Other broadcasters, such as Astral, IBG, Stornoway, and TEN were of the view that the undue preference provision was not sufficient to ensure access by broadcasters to the VOD platform. These parties recommended that the Commission establish a right of access and clear rules to guarantee broadcasters access to the VOD platform.

83. VOD operators, Bell TV and CCSA were generally of the view that the undue preference provision in the Pay Television Regulations, combined with a reverse onus provision, would be sufficient to address issues that may arise regarding access to VOD platforms. They submitted that, not only was there no problem with broadcasters gaining access to the VOD platform, but, in fact, the real problem was a shortage of content for this platform.
84. TELUS noted that, while shelf-space may appear unlimited on VOD platforms, there are significant encoding costs associated with VOD content. TELUS added that all programming made available on the VOD platform should meet a certain cost-benefit analysis and that access would have to be accompanied by minimum compensation requirements.
85. Only CFTPA, DGC, TEN and Corus commented on the appropriateness of allowing VOD undertakings to offer programming produced by the licensee or a person related to the licensee. While TEN advocated maintaining the current prohibition, CFTPA and DGC recommended that VOD undertakings should be permitted to offer a total of 15% and 25%, respectively, of programming produced by the licensee or a person related to the licensee. Corus was the only broadcaster who recommended eliminating any prohibition or limit on the offering of programming produced by the licensee or a related party.
86. Those VOD operators who commented generally recommended removal of the prohibition on VOD undertakings offering programming produced by the licensee or a person related to the licensee.

Commission's analysis and determination

87. The Commission notes that parties provided no evidence or persuasive argument to support their claims that access to the VOD platform is an issue. Further, VOD operators continue to emphasize that server capacity is constantly growing and that there is ample shelf space to accommodate all broadcasters. In light of this, the Commission is of the view that it should not create overly restrictive access rules for a platform that is still in a nascent stage of development.
88. That being said, while server capacity is not generally an issue, the Commission considers that issues of undue preference or discrimination might arise in the VOD environment. In Broadcasting Public Notice 2008-100, where the Commission announced its intention to introduce a reverse onus provision into the *Broadcasting Distribution Regulations* (BDU Regulations), the Commission noted that, in most cases, BDUs are in sole possession of key information without which complainants (usually programming undertakings) cannot fully argue their cases. The Commission noted that a reverse onus provision would specify that a complainant must demonstrate that a preference and/or disadvantage exists, at which point the BDU would then be required to demonstrate that its actions are not undue. The Commission considers that VOD undertakings are in a similar position to BDUs in that they control access to the VOD platform, including information on why some program suppliers might gain access and others might not. In that respect, they are potentially in a position to serve as

gatekeepers and, therefore, the Commission considers that a reverse onus provision would be appropriate.

89. Accordingly, the Commission intends to pursue the introduction of an undue preference provision with a reverse onus requirement by way of a condition of licence on VOD undertakings as their licences are renewed. This condition of licence would replace the current condition of licence that refers to the undue preference provision in section 6.1(1) of the Pay Television Regulations, to which VOD undertakings are now subject.
90. The Commission notes that section 6.1(2) of the Pay Television Regulations prohibits VOD undertakings from acquiring exclusive or preferential rights to programming. Parties in this proceeding expressed concern that this section does not make specific reference to acquiring exclusive rights to a VOD program, but rather a PPV program.⁴ According to those concerned, this has raised the question as to whether this section of the undue preference provision applies to VOD undertakings. In order to alleviate this uncertainty, the Commission intends to include a prohibition on the acquisition of exclusive rights in the above-noted condition of licence that will apply specifically to VOD undertakings.
91. Finally, with respect to whether the Commission should continue to apply the prohibition on the distribution of programming produced by a licensee or a related party, the Commission considers that, since server capacity is generally not an issue, there is no reason to impose limits on the availability of any type of programming on the VOD platform. Any issues that may arise from the removal of this prohibition can be dealt with through the undue preference provision.
92. In light of the above, the Commission intends to amend the condition of licence that requires VOD undertakings to adhere to the Pay Television Regulations to exclude them from the prohibition on the distribution of programming produced by a licensee or a person related to the licensee contained in sections 3(2)(e) and (f).

An approach for VOD undertakings owned by smaller BDUs

93. VOD undertakings are, for the most part, owned by BDUs. All of the larger BDUs already operate VOD undertakings, and now smaller BDUs, including exempt BDUs, are filing applications to offer VOD services. Broadcasting Public Notice 2008-100 stated that broadcasting regulation should be as targeted as possible and impose the least burdensome constraints. In light of that objective, in Broadcasting Public Notice 2008-101, the Commission stated its preliminary view that it may also be appropriate to consider exempting VOD undertakings owned by exempt BDUs. The Commission sought comment on this view and on what the terms of such an exemption should be.

⁴ Section 6.1 of the Pay Television Regulations reads as follows:

6.1 (1) No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

(2) For the purposes of subsection (1), a licensee shall be considered to have given itself an undue preference if the licensee distributes a pay-per-view program for which the licensee has acquired exclusive or other preferential rights.

Positions of parties

94. The majority of parties agreed with the Commission's preliminary view that VOD undertakings owned by exempt BDUs should also be exempted. CCSA, in particular, submitted that smaller VOD undertakings should not be subject to any restrictions regarding carriage of affiliate-produced programming, quotas relating to minimum Canadian programming and barker channel content.
95. Cogeco, Corus and DGC opposed the Commission's proposal to exempt VOD undertakings owned by exempt BDUs. Corus opposed all measures proposed by CCSA on the grounds that the latter had not justified the need for such special treatment.
96. DGC was of the view that any exemption of VOD undertakings should be based on the size of the VOD undertaking, not the size of the BDU distributing the service. DGC proposed that BDU-affiliated VOD undertakings whose collective Canadian VOD revenues, combined across all such affiliates, are below \$500,000 should be exempted from regulation. In its reply comments, however, DGC proposed that the Commission exempt transactional programming services with fewer than 20,000 subscribers. DGC submitted that, for any given month, a subscriber to a VOD service should be defined as someone who elected to use the service to view at least one program over the course of that month.

Commission's analysis and determination

97. The Commission notes that, while several parties generally supported the principle of exempting the VOD undertakings of smaller BDUs, there were very few practical suggestions as to how to define the class to be exempted or what the terms of an exemption might be.
98. The DGC's proposal to exempt VOD undertakings based on the size of the VOD undertaking, rather than the size of the BDU distributing the service, raises some issues. Specifically, factors such as revenues and/or "subscribers" attributed to VOD, as the DGC proposed, are likely to vary from year to year much more radically than BDU subscribers. The result could be that a VOD undertaking might move in and out of exempt status from year to year, causing more inconvenience to some small VOD undertakings than being licensed.
99. The Commission acknowledges, however, that an approach based on whether the BDU distributing the VOD service is exempt may also be difficult to implement. In particular, the Commission notes that many VOD undertakings in operation are owned by entities that also operate a combination of exempt and non-exempt cable systems. These parties do not hold separate VOD licences to correspond with each cable system but possess a single VOD licence. This presents the challenge as to how to exempt VOD activities for the exempt cable systems but not the licensed cable systems, while avoiding having to issue multiple VOD licences.

100. The Commission considers that it may be appropriate to define an exempt VOD undertaking as one owned by a party that does not hold a BDU licence and is not affiliated with a party that holds a BDU licence. In addition, the exempt VOD undertaking could only provide VOD services using the facilities of exempt BDUs. In this way, the VOD undertakings in most need of regulatory relief would be captured, while those belonging to the largest cable undertakings would still fall under a single licence.
101. The Commission will initiate a further process to establish an exemption order for VOD undertakings as described above.

Availability of data on VOD

102. Some parties in this proceeding expressed concerns that the absence of data on VOD makes it difficult to make recommendations regarding issues identified in the public notice, particularly the appropriate contribution by VOD undertakings to Canadian programming.
103. The Commission notes that VOD undertakings are currently required to 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, identifying each program by programming category and by country of origin, and indicating the period of time that each program was on the server and available to subscribers. Typically, the Commission would request such information if a complaint had been filed against the service or at the time of licence renewal if there were questions concerning compliance. These logs, however, contain numerous titles, making it very difficult, if not impossible, for the Commission to analyze the logs of all VOD undertakings and identify programming and usage trends.
104. Due to the growing importance of VOD, the Commission considers that it would be extremely valuable in future to have access to aggregate data from each licensee as follows:
 - current and projected capacity of video servers;
 - total number of titles on the servers;
 - total number of Canadian titles on the servers;
 - total number of feature films on the servers;
 - total number of Canadian feature films on the servers;
 - breakdown of titles in both official languages;
 - total number of orders of Canadian programs;
 - total numbers of orders of Canadian feature films; and
 - amount of revenue remitted to Canadian feature film rights holders.

105. Therefore, the Commission intends to ask VOD undertakings to provide such information, to the extent available, for the previous broadcast year as part of the record for their next licence renewal proceedings.

Other issues

106. The Commission raised a number of other issues in Broadcasting Public Notice 2008-101 related to the current regulatory framework for VOD. The following are areas in which the Commission will not be making changes to the VOD framework.

Provision of Canadian programming

107. In Broadcasting Public Notice 2008-101, the Commission sought comment on what would be the most appropriate minimum level of Canadian programming for VOD undertakings. It also asked parties whether the current obligation to ensure that 25% of the titles promoted each month on a VOD undertaking's barker channel are Canadian remains appropriate.
108. The Commission is of the view that the record of this proceeding does not provide sufficient support for changing the current requirements for Canadian programming for VOD undertakings. Moreover, broadcasters and VOD undertakings offered differing but unsubstantiated views on the availability of Canadian programming for the VOD platform. The Commission also considers that, since Canadian content requirements for VOD undertakings are expressed as a percentage of total available programming, the number of hours of Canadian programming available will increase over time as VOD undertakings appear to be building up server capacity in order to add more programming.
109. Therefore, Canadian content requirements for VOD undertakings will remain as set out in Public Notice 1997-83 and reiterated in Public Notice 2000-172 as well as in existing conditions of licence. The requirements are as follows:
- 5% of the English-language feature films must be Canadian;
 - 20% of programs other than feature films must be Canadian;
 - 8% of the French-language feature films must be Canadian; and
 - the feature film inventory of VOD licensees must include all new Canadian feature films that are suitable for VOD exhibition and which meet the approved *Pay television standards and practices code*.
110. VOD undertakings will also continue to be required to ensure that a minimum of 25% of the titles promoted each month on the VOD barker channel are Canadian.

Regulatory responsibility for SVOD services that are an extension of a Canadian linear service

111. Some Canadian pay and specialty services, through arrangements with VOD undertakings, offer on-demand versions of their linear services. The services referred to here are offered on dedicated channels and are made up of programming that has already aired on the linear service.

112. Regulatory responsibility for these services has not always been clearly established. For example, Astral, owner of TMN On Demand and Super Écran sur demande, views the latter on-demand services as simply adding enhanced functionality to its linear services, and asserts that it is fully responsible for the programming on these services. In contrast, Canwest, owner of HGTV, Food Network and National Geographic Channel, noted in its submission, with respect to its corresponding on-demand services that, "...these are 'extensions of Canadian linear services,' but not actually tied to the linear service in any regulatory sense."
113. In Broadcasting Public Notice 2008-101, the Commission stated its preliminary view that the most straightforward approach for clearly identifying the party responsible for the content found in these 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.
114. The Commission notes, however, that the record of the proceeding revealed that Canadian linear licensees do not generally control the on-demand versions of their linear services. Therefore, the Commission considers that proceeding with the proposal to allow licensees to apply for a licence amendment would not be appropriate. The Commission is also of the view that interveners raised valid points concerning the potential pitfalls of the licence amendment approach.
115. The Commission notes that there is nothing to prevent a licensee of a linear service from applying for a VOD licence if it wishes to offer and exercise responsibility for an on-demand version of its linear service. Absent such a licence, however, the Commission will hold VOD undertakings responsible for the content on SVOD channels that are an extension of a Canadian linear service.
116. Some parties were of the view that the Commission should require VOD undertakings to provide each linear service with its own on-demand service on a dedicated channel. The Commission considers, however, that such decisions should be left to negotiations between VOD undertakings and linear services and that undue preference/disadvantage provisions are sufficient to address any concerns that might arise in this regard.

Availability of programming in both official languages

117. In Broadcasting Public Notice 2008-101, the Commission sought comment on whether the current expectation that, to the maximum extent possible, each VOD undertaking make its on-demand program offering available to customers in both official languages, remains appropriate.
118. The Commission is of the view that it is premature to impose new specific requirements for programming in both official languages until more is known about the availability of such programming to VOD undertakings and what they are currently offering. The Commission intends to request such information at their next licence renewals.

Acquisition of program rights

119. In Broadcasting Public Notice 2008-100, the Commission sought comment on its preliminary view that VOD undertakings should not be obliged to acquire programs from Canadian rights holders only. Currently, there are no restrictions on where VOD undertakings can acquire programming rights.
120. The Commission considers that restricting VOD undertakings to acquiring programming only from Canadian rights holders would not only be inconsistent with their status as programming undertakings, but could also have a significant impact on the nature and development of the VOD platform and could ultimately limit programming choices for Canadians.
121. The policy established by the Commission with respect to advertising, whereby VOD undertakings can only advertise in non-Canadian programming purchased directly from Canadian broadcasters will serve as a more appropriate means to assuage concerns expressed by parties regarding competition and the possibility of bidding wars or cost inflation.

Buy-through requirement for VOD undertakings, as provided by section 5 of the *BDU Regulations*

122. Section 5 of the 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). In Broadcasting Public Notice 2008-101, the Commission stated its 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.
123. It is worth noting that BDUs appear not to promote the option of VOD as a stand-alone service on their websites and it is the Commission’s understanding that none of them offer it in this manner. In the Commission’s view, there is not a strong business case for BDUs to offer VOD services without a basic buy-through when they can earn higher revenues by offering VOD as an added feature to packages of linear digital services. Further, promoting the purchase of VOD without a basic buy-through might make it difficult for BDUs to recover costs of their capital investments through the basic service. In light of this, the Commission sees no strong policy rationale for removing the exception to the buy-through requirement.

Common licensing framework for PPV and VOD undertakings

124. In Broadcasting Public Notice 2008-101, the Commission noted that VOD and PPV undertakings, particularly "near VOD" services⁵ operated by PPV undertakings, operate in similar regulatory environments in a number of key ways. The Commission set out a preliminary view that, despite their particularities, these undertakings can be approached

⁵ "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.

from the point of view that they are collectively on-demand services and therefore could be treated as one class of service going forward. The Commission therefore sought comment on whether the framework proposed for VOD undertakings should also apply, in whole or in part, to PPV undertakings.

125. The record of the proceeding indicated, however, that, despite some similarities, PPV and VOD services appear to be further diverging, both in terms of function and programming content. For example, parties noted that PPV is a linear service that is pre-scheduled, subject to capacity constraints and broadcasts mainly feature films and live sporting events whereas VOD is a non-linear service with no capacity issues, offering a broad range of content.
126. The fact that VOD has moved away from a solely feature film-based service and its potential to compete with linear services lead the Commission to conclude that it may not be practical to introduce a common licensing framework for PPV and VOD undertakings. In fact, some of changes to the VOD framework announced in this regulatory policy (e.g., with respect to packaging, advertising and programming produced by the licensee or a related party) will only further differentiate the two regulatory frameworks. For these reasons, the Commission will maintain separate licensing frameworks for PPV and VOD undertakings.

Possible issues related to the introduction and evolution of network personal video recorders

127. Issues related to the role of network personal video recorders (N-PVRs) were raised in the proceeding leading to Broadcasting Public Notice 2008-100.⁶ In particular, parties expressed concern regarding the potential for N-PVRs to provide a service that is in many aspects effectively the same as VOD in that N-PVRs offer a catalogue of previously broadcast programming for playback by subscribers over a specific period of time.
128. The Commission sought comment from BDU licensees concerning their specific plans to roll out N-PVRs and to what extent N-PVRs would provide a service that is substantially similar to VOD.
129. The record of the proceeding indicated that N-PVRs are only in the conceptual stage of development in Canada, with no parties expressing plans to bring this service to market in the near future. Parties acknowledged that, until there is greater legal certainty around their use in Canada and a clear business model, parties will be reluctant to invest.
130. Based on these comments, the Commission concludes that it is premature to make any determination with respect to N-PVRs.

⁶ An N-PVR is a PVR where the personal recordings made by the customer are stored on the network of the BDU or other provider (e.g., Tivo), rather than in the hard drive of a set-top box in the customer's home.

Accessibility

131. In Broadcasting and Telecom Regulatory Policy 2009-430, the Commission stated its intention to impose on broadcasting services, at the time of their licence renewals, conditions of licence relating to accessibility provisions. The Commission intends to explore accessibility issues further with VOD undertakings at the time of licence renewals.

Secretary General

Related documents

- *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010
- *Accessibility of telecommunications and broadcasting services*, Broadcasting and Telecom Regulatory Policy CRTC 2009-430, 21 July 2009
- Broadcasting Notice of Consultation CRTC 2009-411, 6 July 2009
- *Call for comments on a proposed regulatory framework for video-on-demand undertakings* – Notice of Consultation, Broadcasting Public Notice CRTC 2008-101, 30 October 2008
- Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory Policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Introductory statement to Decisions CRTC 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 CRTC 97-283 to 97-287*, Public Notice CRTC 1997-83, 2 July 1997

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