



Broadcasting Decision CRTC 2013-422

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Astral Broadcasting Group Inc.
Québec, Quebec

Application 2013-0388-3

Complaint by Astral Broadcasting Group Inc., on behalf of the pay television service Super Écran, against Illico sur demande, Videotron G.P.'s video-on-demand service

In this decision, the Commission dismisses the complaint by Astral Broadcasting Group Inc., on behalf of its pay television service Super Écran, against Illico sur demande (Illico), Videotron G.P.'s video-on-demand service. The Commission finds that Illico is not directly competitive with Super Écran and consequently is not in non-compliance with standard condition of licence 7 set out in Broadcasting Regulatory Policy 2011-59-1.

The complaint

1. On 27 February 2013, the Commission received a complaint from Astral Broadcasting Group Inc. (Astral), on behalf of its pay television service Super Écran, against Illico sur demande (Illico), the video-on-demand (VOD) service of Videotron G.P. (Videotron).¹ Since the complaint was filed, the effective control of certain Astral broadcasting undertakings, including Super Écran, were transferred to BCE Inc. (BCE). This transaction was approved by the Commission, subject to certain changes, in Broadcasting Decision 2013-310.

Positions of parties

Astral

2. Astral argued that Videotron was operating Illico in a manner contrary to the regulatory framework for VOD undertakings set out in Broadcasting Regulatory Policy 2011-59-1 (the VOD policy). Specifically, Astral submitted that Illico was in non-compliance with standard condition of licence 7 set out in the appendix to that policy. The condition reads as follows:

¹ Videotron Ltd. and 9227-2590 Québec inc., partners in a general partnership carrying on business as Videotron G.P.

The licensee is prohibited from offering: (a) a non-Canadian subscription video-on-demand (SVOD) package that is directly competitive with a Canadian linear pay or specialty service or (b) a Canadian SVOD package that is directly competitive with a genre-protected Canadian linear pay or specialty service, unless the package is an on-demand extension of this Canadian linear pay or specialty service.

3. Astral maintained that the subscription video-on-demand (SVOD)² service Illico Club à volonté (Illico Club), available on the access channel for Videotron's licensed VOD service Illico, was directly competitive with Super Écran. Accordingly, Astral requested that the Commission order Videotron to cease offering Illico Club.
4. Astral also noted that Quebecor Media Inc. (owner of Videotron) had in the past asked the Commission to open up the French-language general interest pay television genre to competition. In Broadcasting Regulatory Policy 2010-861, the Commission refused to do so.
5. Astral also noted that Videotron and other undertakings operating VOD services had asked the Commission to relieve them of standard condition of licence 7 set out in Broadcasting Regulatory Policy 2011-59-1, once again unsuccessfully. The Commission's decision in this regard is set out in Broadcasting Decision 2012-292, in which standard condition of licence 7 is maintained in its entirety.

Videotron

6. Videotron argued that Astral did not demonstrate in its complaint that the programming offered on Illico Club was directly competitive with the programming of Super Écran. It added that the content offered to Illico Club subscribers was not competitive with any other specialty Category A services, which benefit from genre protection.
7. Videotron also indicated that it offered movies and series during a broadcast window that followed that of Super Écran and that these included "archive films", thus of older inventories, also offered by Category B services, such as Cinépop and Prise 2. According to Videotron, the fact that Category B services offer archive films demonstrates that this genre is not protected.
8. In support of its position, Videotron filed a complete list of the films and series offered by Illico Club, specifying the end date of the broadcast window for each title by Super Écran, where applicable. Videotron maintained that Illico Club was not directly competitive with Super Écran as it does not offer any content in the same broadcast window as Super Écran and as such is not in breach of standard condition of licence 7.

² As opposed to transactional VOD services, where subscribers access the content of a single program or feature film separately, SVOD provides access to a programming package for a given price and period of time.

Interventions

9. As part of this proceeding, the Commission received and examined interventions from a number of parties either supporting or opposing Astral's complaint. The public record for this proceeding can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Parties supporting Astral's complaint

10. Corus Entertainment Inc., Bell Media Inc., Blue Ant Media Inc. and the Directors Guild of Canada generally considered that by offering a wide inventory of French-language television series and films, Illico Club was competing directly with Super Écran.
11. These interveners also submitted that allowing Videotron to continue offering the SVOD service Illico Club would undermine the Commission's genre protection policy. These parties reminded the Commission that Category A services such as Super Écran have Canadian programming exhibition or expenditure requirements that are much higher than those for SVOD services. According to them, allowing SVOD services to compete directly with Category A services would sap the life from these Category A services and inevitably have a negative impact on the broadcasting system as a whole.
12. Some interveners submitted that Videotron had even acknowledged this competitive nature by describing its service as essential for film and television lovers.

Parties opposed to Astral's complaint

13. Rogers Communications Inc. (Rogers) argued that Astral had not demonstrated that Illico Club was directly competitive with Super Écran. Rogers submitted that the simple fact that programming and SVOD services offer dramatic series and films did not necessarily put these services in direct competition with a general interest pay television Category A service such as Super Écran.
14. To support its claims, Rogers noted that the Commission had over the years issued licences to a variety of Category A and B services devoting a significant portion of their programming schedule to dramatic series and films. Rogers also noted that many authorized non-Canadian services offer this type of programming. Rogers counted a total of 46 Canadian and non-Canadian services offered in Canada that operate in this niche.
15. Rogers submitted that these 46 services were not in direct competition with Super Écran or other Category A pay services because they did not acquire broadcasting rights in the same broadcast window as Super Écran and there was no overlap between the titles offered by these services and those offered by Super Écran. Rogers argued that the same logic applied to Illico Club.

16. For its part, MTS Inc. submitted that accepting Astral's interpretation of standard condition of licence 7 would amount to making Astral the sole arbiter in determining how to respond to consumer demand for this type of programming in Canada. Faced with this reality, distributors wishing to compete with foreign entities such as Netflix would have no other choice but to rely solely on Astral for their content and to offer only content belonging to Astral or to limit their offer to non-television platforms.

Astral's reply

17. Astral argued that the Commission's policy aimed for genre exclusivity, not program exclusivity, as Videotron and Rogers appeared to maintain. As such, according to Astral, the programming offered by Illico Club is of the same genre as that of Super Écran and is therefore directly competitive.

18. Astral acknowledged that some Category A and B services offer dramatic series and films. However, it argued that these services were subject to natures of service, conditions of licence and other requirements that ensured the exclusivity of the Super Écran genre. Astral cited two examples of specialty Category B services:

- Cinépop, of which the nature of service limits the service to the broadcast of "repertory movies," defined as films that are at least five years old;
- Prise 2, which is subject to a condition of licence that limits the broadcast of programming drawn from program category 7 [Drama and comedy] to titles that are at least 10 years old and from category 7(d) [Theatrical feature films aired on TV] to that are at least 15 years old.

19. Astral stated that unlike Category A and B services, SVOD services such as Illico Club have no restrictions on the programming that can be broadcast to prevent them from competing with a protected genre. Astral submitted that as such nothing prevented Videotron's SVOD service from broadcasting more recent series and feature films if it chose to do so.

20. In addition, Astral submitted that Videotron's intention, supported by Rogers, was simply to negate the effect of standard condition of licence 7 for VOD undertakings. As such, according to Astral, a denial of the complaint would undermine genre protection for all genres.

Commission's analysis and determination

21. After having reviewed the application, the interventions and Astral's reply, the Commission considers that the issue it must address relates to the possibility that Illico Club is directly competitive with Super Écran and as such is in breach of standard condition of licence 7 for VOD services set out in Broadcasting Regulatory Policy 2011-59-1.

22. Super Écran is a general interest pay television Category A service. Its nature of service reads as follows:

The licensee shall provide a national French-language general interest pay television Category A service with programming intended for all audiences.

23. In accordance with the conditions of its licence and its nature of service, Super Écran may draw its programming from all program categories, except for categories 1 News, 4 Religion, 5(a) Formal education and preschool, 5(b) Informal education/recreation and leisure and 14 Infomercials, promotional and corporate videos. In addition, at least 50% of its schedule must be devoted to programs drawn from category 7 Drama and comedy.
24. The Commission notes that there are several services in operation authorized to offer a significant level of feature films and dramatic series. The Commission imposes requirements on Category A and B services through their nature of service or conditions of licence, limiting the possibility of their entering into direct competition with Super Écran or other pay television Category A services. The Commission notes however that for some services these requirements have taken the form of limits regarding the broadcast window for the films and series that may be offered.
25. The Commission considers that by allowing other services to offer older films and series, the Commission has recognized the fact that a service presenting films and series in another broadcast window is not directly competitive with a pay television service such as Super Écran.
26. Further, the Commission has previously recognized in Broadcasting Regulatory Policy 2010-861 and Broadcasting Notice of Consultation 2010-860 that “there exists a significant repertoire of quality content that is not currently broadcast by Super Écran and that could allow a second general interest pay television service to support itself and add diversity for the consumer,” provided that it was complementary rather than directly competitive with Super Écran.
27. In doing so, the Commission took the position that a pay television service providing programming outside of Super Écran’s broadcast window could be considered as not directly competitive. Even if the current programming does not guarantee future programming, the Commission notes that there is currently no overlap between the programming offered by Super Écran and Illico Club.
28. Accordingly, the Commission considers that Illico Club is not directly competitive with Super Écran and as such is not in breach of standard condition of licence 7 set out in Broadcasting Regulatory Policy 2011-59-1.

Conclusion

29. In light of all of the above, the Commission dismisses the complaint by Astral Broadcasting Group Inc., on behalf of its pay television service Super Écran, against Illico sur demande, Videotron G.P.’s VOD service.

Secretary General

Related documents

- *Astral broadcasting undertakings – Change of effective control*, Broadcasting Decision CRTC 2013-310, 27 June 2013
- *Various national and regional video-on-demand programming undertakings – Licence renewals and amendments*, Broadcasting Decision CRTC 2012-292, 17 May 2012
- *Standard requirements for video-on-demand undertakings – Provision of an outlet for local expression, measures to control the loudness of commercial messages and annual filing of aggregate statistical data*, Broadcasting Regulatory Policy CRTC 2011-59-1, 8 May 2012
- *Refusal to open up the French-language general interest pay television services genre to competition*, Broadcasting Regulatory Policy CRTC 2010-861, 19 November 2012
- *Call for applications for licences to operate a French-language general interest pay television service*, Broadcasting Notice of Consultation CRTC 2010-860, 19 November 2010