



Broadcasting Decision CRTC 2015-89

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Ottawa, 16 March 2015

Bell Canada
Across Canada

Application 2014-1056-3

Complaint by Bell Canada against Rogers Media Inc., formerly Rogers Broadcasting Limited, alleging violations of the Digital Media Exemption Order

The Commission dismisses a complaint by Bell Canada against Rogers Media Inc. (Rogers) concerning the way Rogers offers GamePlus.

GamePlus is an on-line service that Rogers offers to its customers in conjunction with GameCentre Live (GameCentre). GameCentre is a digital service operated by Rogers that broadcasts NHL hockey games and associated programming.

GamePlus is a related service to GameCentre that allows customers to tailor their experience. Using a second screen, such as a computer, tablet or smartphone, they can select various camera feeds and multiple-angle replays of plays during hockey games while watching the regular television broadcast on their television sets. GamePlus also includes exclusive interviews, analysis and original on-demand content. GamePlus is available only to Rogers customers who also subscribe to GameCentre.

The Commission encourages innovation in programming and considers that the way that Rogers offers GamePlus complies with the Digital Media Exemption Order.

The parties

1. Bell Canada (Bell) and Rogers Media Inc. (Rogers) are both part of large, vertically integrated multimedia companies with significant assets in telecommunications services, broadcasting distribution undertakings, digital media as well as radio, television and specialty services.

Background

GameCentre

2. GameCentre Live (GameCentre) is a digital media broadcasting undertaking (DMBU) operated by Rogers that broadcasts NHL hockey games and associated programming. Subscribers can live stream games on their computers, tablets and smartphones. During the 2014-2015 hockey season, GameCentre offers more than 1,000 regular season games, the Stanley Cup Playoffs, the Bridgestone Winter Classic and the All-Star Game.
3. The NHL French Package offers 60 Montreal Canadiens and 54 Ottawa Senators out-of-market games in French as part of the GameCentre subscription. This is only available to those that live west of Belleville, Ontario.

GamePlus

4. GamePlus is an on-line content offering within GameCentre that is available only to Rogers customers and offered at no additional charge. Rogers' Home Phone, Digital TV or wireless data plan customers can access GamePlus when they purchase a GameCentre subscription.
5. GamePlus allows customers to select various camera feeds and multiple-angle replays of plays during hockey games available on GameCentre. GamePlus also includes exclusive interviews, analysis and original on-demand content. Specifically, GamePlus offers the following content:
 - MyReplay – This feature allows users to view replays from their choice of up to six different cameras during a live hockey game.
 - New Camera Angles – These include the Ref Cam (which is attached to the referee's helmet), the Sky Cam (which Rogers has or will be installing in select arenas across Canada), POV Cam (providing content from, for example, the players' benches and the general manager's box), the Goal Line Cam (providing an overhead view of the goal crease), and the Star Cam (which continuously follows the stars of the game). The additional camera angles do not come with play-by-play audio, and there is a time delay between the linear broadcast and the material from the additional cameras.
 - Insider Extras – This feature provides information from "insiders" on aspects of the game. This content includes original video-on-demand content, in depth previews, analysis, interviews with coaches and players, injury reports, fantasy advice, and top NHL news.
 - Post-game interviews – This feature provides a post-game point of view from players.

6. The cameras used to produce GamePlus content were purchased by Rogers pursuant to an agreement with Rogers Communications Partnership (RCP).
7. Pursuant to the Services Agreement between RCP and Rogers (the Agreement), Rogers or its affiliates can incorporate a maximum aggregate of five minutes of footage from interactive cameras into the entire live broadcast of each national game.
8. In addition, the Agreement provides that Rogers will broadcast certain promotional material for GamePlus. This material includes a weekly 60 to 90 second segment on Sportsnet Central and Hockey Central, an audio and video credit with the GamePlus logo during broadcasts when a GamePlus camera angle is used, and a closing credit during each National Game.

Bell Canada's position

9. In its application, Bell alleged that the way Rogers offers GameCentre and GamePlus violates sections 3 and 5 of the *Exemption order for digital media broadcasting undertakings* (DMEO) set out in the appendix to Broadcasting Order 2012-409.
10. Section 3 of the DMEO states:

The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

11. Section 5 of the DMEO states:

... the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service.

12. The DMEO defines "television programming" as "programming designed primarily for conventional television, specialty, pay, or video-on-demand services." Bell refers to this as "traditional television programming."
13. Bell is of the view that, by making GamePlus available only to Rogers subscribers, Rogers is offering television programming on an exclusive or preferential basis, contrary to the DMEO.
14. According to Bell, GameCentre and GamePlus are inextricably linked to the traditional television hockey broadcasts offered on CityTV, Sportsnet, the Canadian Broadcasting Corporation (CBC) and NHL Centre Ice. Bell submitted that GamePlus programming is created by the same team operating the same equipment at the same time and in the same place as the traditional television programming broadcast by Rogers. The interviews and analysis available on GamePlus are also produced in

conjunction with the traditional television broadcasts to be used on those broadcasts where appropriate.

15. Bell argued that it would create a significant loophole in the Commission's rule if the fact that some of the GamePlus content does not appear (or appears only occasionally) on Rogers' services were interpreted to mean that it is not designed primarily for traditional television and not subject to section 5 of the DMEO and therefore not accessible to consumers who are not Rogers customers. Bell argued that this loophole, if endorsed by the Commission, would be aggressively exploited by all stakeholders.
16. Bell noted that the exception in section 5 of the DMEO applies to "the creation and delivery of programming designed for mobile and retail Internet platforms." Bell submitted that the Ref Cam, Sky Cam and player isolation cameras have and continue to be used on traditional television broadcasts in other sports as well. They therefore do not qualify as innovative new programming designed specifically for mobile and retail Internet distribution.
17. Bell noted that GamePlus is offered on an exclusive basis to Rogers customers. Bell argued that consumers who are not Rogers customers will be harmed as a result of being blocked from accessing GamePlus content. While theoretically a consumer could be a mobile and Internet customer with another provider and access GamePlus if they have a Rogers television or home phone subscription, such a situation would be unlikely to occur in practice.
18. To ensure that GamePlus complies with the DMEO, Bell submitted that the Commission should require Rogers to make GamePlus available for free to all GameCentre subscribers. Under this approach, consumers would be able to access both GameCentre and GamePlus via the mobile and Internet access provider of their choice.

Interventions

19. The Commission received interventions, all supporting Bell's application, from TELUS Communications Company (TELUS), Bragg Communications Inc., carrying on business as Eastlink (Eastlink), the Canadian Cable Systems Alliance (CCSA), the Council of Senior Citizens Organizations of British Columbia and Public Interest Advocacy Centre (COSCO-PIAC), Vaxination Informatique and Benjamin Klass. The public record for this application can be found on the Commission's website at www.crtc.gc.ca or by using the application number provided above.
20. The interveners all agreed that Rogers offering of GamePlus qualified as television programming as defined in the DMEO. They further agreed that Rogers' offering of GamePlus was contrary to the undue preference provision set out in section 3 of the DMEO.

21. Interveners also offered additional views on the implications of offering exclusive content such as GamePlus and further remedies that the Commission should impose. COSCO-PIAC raised concerns related to the Commission's telecommunications policy. These additional views are summarized below.

Implications of exclusive content

22. TELUS was of the view that allowing companies to offer exclusive content in the manner in which Rogers offers GamePlus would lead to a situation where consumers would have to subscribe to more than one network to receive the content they like. This would mean that consumers would be paying at least twice for the infrastructure costs embedded in the entry level package for the programming. Eastlink further submitted that non-Rogers customers were already paying for GamePlus content through their subscriptions to GameCentre but were being denied access to the GamePlus content.
23. TELUS, the CCSA and COSCO-PIAC were concerned that Rogers' method of offering GamePlus would set a precedent under which other vertically integrated companies would use the exclusive broadcast rights that they hold to benefit their distribution business to the detriment of non-vertically integrated distribution companies. This would reduce competition and consumer choice.

Remedies

24. In its application, Bell requested that the Commission require Rogers to make GamePlus available for free to all GameCentre subscribers. Interveners suggested additional measures that the Commission should implement.
25. COSCO-PIAC generally agreed with the thrust of Bell Canada's request but suggested that the Commission prohibit Rogers from making the availability of features of GameCentre conditional on consumers subscribing to other Rogers services.
26. COSCO-PIAC further argued that consumers who have subscribed to other Rogers services in order to receive GamePlus should be able to terminate those services without penalty and should be compensated for any termination charges incurred from competitors. Those consumers should be able to migrate back to their former service providers at no cost, if they wish to do so.
27. Vaxination Informatique argued that the correct short term regulatory solution would be to require Rogers to provide exactly the same service to anyone paying the subscription fee. If necessary the Commission should amend the DMEQ to accomplish this goal.
28. TELUS urged the Commission to adopt a rule relating to content exclusives by vertically integrated companies that would replace the definition of "television programming" in the DMEQ with a new definition for "digital media programming."

29. Benjamin Klass suggested that the Commission amend section 5 of the DME0 so that undertakings cannot offer programming on an exclusive basis. He was of the view that the distinction between “television programming” and “digital media programming,” as used in the DME0, has no meaning from the perspective of ordinary Canadians.

Telecommunications policy

30. COSCO-PIAC submitted that Rogers is forcing consumers to accept an inferior version of GameCentre if they wish to retain the services they purchase from a competitor. This confers an undue preference on Rogers’ mobile wireless, wireline telephony, Internet access as well as on its broadcasting distribution undertaking (BDU) businesses to the detriment of competitors in violation of section 27(2) of the *Telecommunications Act*. It further submitted that Rogers’ practice was inconsistent with several objectives of the *Telecommunications Act*.

Rogers’ response

31. Rogers argued that the GamePlus offering within GameCentre is not “television programming” as defined in the DME0 but an inherently interactive experience designed specifically for mobile and Internet platforms. It argued that GamePlus brings users a new and innovative way to experience a hockey game, which is what the Commission intended to encourage by not issuing a blanket restriction on exclusive content in the DME0.
32. Rogers argued that while some of the new camera angles are featured in the linear broadcasts, they are not used seamlessly and extensively during the traditional television broadcasts as Bell contends. They are specifically prohibited from being used in this manner pursuant to the Agreement. While the staff used to create GamePlus content work within Rogers’ broader NHL team, they are not part of Sportsnet’s regular production team. In addition, the technical and operational resources used to create the GamePlus content represent an additional cost that would not otherwise be incurred as part of regular broadcast operations.
33. Rogers stated that RCP had commissioned Rogers to produce and make available ancillary digital content for its sole and exclusive distribution on GamePlus. Much, if not all, of this content would not otherwise be available to consumers.
34. Rogers submitted that since the Commission has specifically authorized DMBUs to offer their customers exclusive content that is primarily designed for mobile and Internet platforms, the undue preference provision set out in section 3 of the DME0 would also not apply to the GamePlus offering. According to Rogers, it would be a perverse form of regulation for the Commission to expressly allow DMBUs to offer exclusive content as a means to encourage them to innovate on mobile and retail Internet platforms, but then to find that such an exclusive offering constitutes an undue preference or disadvantage.

Bell's reply

35. Bell argued that the camera feeds said by Rogers to be specifically designed for GamePlus are commonly seen on linear NHL broadcasts and have been available on linear television broadcasts for some time. It was of the view that the positioning of the cameras, their operation by the same camera technicians, and their direction by the producers of the linear telecasts within the Rogers NHL broadcast team is overwhelming evidence that this is content that is primarily intended for linear broadcasts and not specifically designed for the GamePlus service.
36. Bell argued that nothing about the video feeds shot by these various cameras is tailored specifically to digital distribution platforms, since at any given time, any of these camera feeds may be included in these NHL television broadcasts, either live or as a replay.
37. Bell further submitted that other broadcasters have long been able to make the same kinds of investments as Rogers has made in GamePlus while complying with Commission rules and not restricting access for Canadians.
38. Bell argued that Rogers' claim that compliance with section 5 of the DMEO somehow exempts it from the application of section 3 is unfounded. Bell submitted that section 5 and section 3 are each drafted as separate, stand alone requirements, and argued that each section must be met in order for a DMBU to qualify for the an exemption under the DMEO.
39. With respect to section 3 of the DMEO, Bell argued that there is both a preference and a disadvantage. Rogers prefers its own subscribers by making GamePlus available solely to GameCentre subscribers who also subscribe to Rogers' own wireless or Internet services. Rogers subjects GameCentre subscribers who subscribe to competing wireless and Internet services to a disadvantage by denying GamePlus to them.

Commission's analysis and decisions

40. After examining the record of this proceeding, the Commission considers that the issues to be addressed are as follows:
 - Does Rogers's method of offering of GamePlus contravene section 3 of the DMEO?
 - Does Rogers's method of offering of GamePlus contravene section 5 of the DMEO?
41. In light of the nature of this application, the Commission considers that it is appropriate to deal with section 5 of the DMEO first.

Section 5 of the DMEO

42. As indicated above section 5 of the DMEO states:

... the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service.

43. The DMEO defines “television programming” as “programming designed primary for conventional television, specialty, pay, or video-on-demand services.”

44. The rationale for limiting exclusive distribution of television programming was set out in Broadcasting Regulatory Policy 2011-601, where the Commission stated:

... permitting VI entities to exercise exclusivity with respect to the distribution on new media platforms of programming designed primarily for conventional television, specialty, pay and VOD services would result in harm to consumers and the competitiveness of the industry. The Commission further considers that the same harm would result if industry players that are not VI entities exercised such exclusivity.

45. However, the Commission stated that “...to encourage innovation in programming, the Commission finds that exclusivity may be offered for programs that are created specifically for new media platforms.”

46. This policy was implemented in Broadcasting Order 2012-409 where, the Commission stated that:

... digital media broadcasting undertakings can exercise exclusive rights to programming designed primarily for conventional television, specialty, pay or VOD services without having to make such programming available to competing digital media broadcasting undertakings, provided that they do not restrict access to that programming on the basis of a consumer’s specific mobile or retail Internet access service, as the case may be.

47. The Commission also stated that:

...the distinction between programming designed primarily for conventional television, specialty, pay or VOD services and programming primarily designed for other platforms is one that will be constantly evolving. For this reason, it considers that providing a strict definition of these terms could undermine its intent of encouraging innovation in the creation and delivery of programming designed for mobile and retail Internet platforms.

48. All parties agree that GamePlus is offered only to Rogers subscribers. Accordingly the issue to be decided is whether GamePlus qualifies as television programming as defined in the DMEO.

49. In this regard, the Commission considers that GamePlus is different from a linear broadcast of a game in that it provides users with control over how they view a hockey game. While each viewer of a linear television hockey broadcast receives the same edited program, GamePlus users are able to select and continue to view certain camera angles as long as they want. They are also able to replay programming as they wish. GamePlus viewers can also choose, at their convenience to view programming created for this service, including previews, analysis, and interviews with coaches and players. As a result, GamePlus offers an experience that is tailored by the viewer.
50. As well, GamePlus does not include any advertising and is, in effect, a raw feed of what is occurring in the arena throughout the game, including time-outs and intermissions.
51. GamePlus is also unique in that it allows viewers to view programming on their computer, tablet or smartphone at the same time as they watch the regular broadcast on their television sets. As a result subscribers can watch the live action on their television sets while, at the same time, following specific aspects of the game or viewing replays of particular plays on a second screen. Accordingly, the content distributed on GamePlus appears to be complementary to the linear broadcast. The additional camera angles do not come with play-by-play audio and there is a time delay between the linear broadcast and these feeds.
52. The Commission further notes that the Agreement between RCP and Rogers significantly limits the amount of GamePlus programming that can be used in Rogers' linear broadcasts. If the GamePlus programming were created primarily for linear television, the Commission considers that Rogers would have allowed this programming to be used much more extensively in its regular NHL broadcasts. In the Commission's view, a maximum of five minutes of programming from all GamePlus sources over the course of an entire hockey game, which lasts approximately two and half hours, is a reasonable use of this material and does not in and of itself, characterize the GamePlus material as television programming as defined in the DMEQ.
53. The Commission further considers that the 60 to 90 second segments of GamePlus programming that are used during Sportsnet Central and Hockey Central are for promotional purposes. This is not programming designed for Sportsnet but a way of promoting the GamePlus service to potential subscribers.
54. In light of the above, the Commission finds that GamePlus is not designed primarily for television and is thus not "television programming" within the meaning of section 5 of the DMEQ. Accordingly, the Commission concludes that Rogers is not in violation of section 5 of the DMEQ by offering GamePlus on an exclusive basis on Internet and mobile platforms.

Section 3 of the DMEO

55. Section 3 of the DMEO states:

The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

56. In the previous section of this decision, the Commission has concluded that Rogers is not prohibited under section 5 of the DMEO from offering GamePlus on an exclusive basis to customers. Broadcasting Order 2012-409, stated "... to encourage innovation in programming, the Commission finds that exclusivity may be offered for programs that are created specifically for new media platforms." Section 5 of the DMEO, which prohibits the exclusive distribution to a specific mobile or retail Internet access service only for television programming as defined in the DMEO, was designed to implement this approach.

57. The Commission notes that, at an appearance before the Commission at the 1 February 2011 hearing to consider an application by BCE Inc. (BCE), on behalf of CTVglobemedia Inc. (CTVgm) and its licensed broadcasting subsidiaries, for authority to change the effective control of CTVgm's broadcasting entities to BCE, BCE considered making certain ancillary content, such as different camera angles, isolations of certain players, and out takes available to wireless subscribers. At that time, BCE considered that such a practice would not represent an undue preference and would allow for innovation and creativity.

58. In light of the Commission's intent to encourage innovative programming by permitting its exclusive distribution on mobile or retail Internet services, the Commission finds that any preference or disadvantage extended by Rogers by distributing GamePlus only to its customers is not undue or unreasonable.

59. In light of the above, the Commission concludes that Rogers' distribution of GamePlus is not in violation of section 3 of the DMEO.

60. Accordingly, the Commission **dismisses** Bell Canada's complaint.

Other matters

Telecommunications Act

61. COSCO-PIAC submitted that Rogers' practices are in violation of the undue preference prohibition in section 27(2) of the *Telecommunications Act*. The Commission notes that the application was filed solely with respect to the *Broadcasting Act*. The Commission is of the view that COSCO-PIAC has failed to demonstrate how the *Telecommunications Act* applies to the facts of this case, which involves a question of exclusive distribution of broadcasting.

62. Accordingly, the Commission does not accept the arguments made by COSCO-PIAC with respect to the *Telecommunications Act*.

Secretary General

Related documents

- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011