



27 April 2015

Mr. John Traversy
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Mr. Traversy:

Re: Broadcasting Notice of Consultation CRTC 2015-87: Call for comments on proposed amendments to the exemption order for video-on-demand undertakings and to the standard conditions of licence for video-on-demand undertakings

1. The Canadian Media Production Association (the CMPA)¹ opposes the Commission's proposal, as set out in the above-noted Notice of Consultation (the Notice), to amend the exemption order for video-on-demand (VOD) undertakings which would permit such undertakings to offer their service on a closed broadcasting distribution undertaking (BDU) network without having to meet the Canadian programming support requirements normally imposed on those traditional VOD services.

Let's Talk TV and the Notice

2. In Broadcasting Regulatory Policy CRTC 2015-86, the Commission announced its intention to exempt a new, "hybrid" category of VOD service² and proposed that such new services will benefit from the following "incentives":
 - the ability to offer exclusive programming in the same manner as services operating under the Digital Media Exemption Order (DMEO); and

¹ The CMPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. The CMPA's member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

² VOD services offered both through a BDU and online, provided the online service is offered to all Canadians without authentication to a BDU subscription.

- the ability to offer their service on a closed BDU network in the same manner as traditional VOD services without the regulatory requirements relating to financial contributions to and shelf space for Canadian programming that would normally be imposed on those traditional VOD services.
3. In the Notice, the CRTC seeks comments on proposed amendments to the Exemption Order for Small Video-on-Demand Undertakings which would give effect to these proposed “incentives”.
 4. The CMPA opposes the establishment of the second “incentive” which is based on the removal of Canadian programming support obligations; we have no comment on the first which is related to exclusive programming.

No Justification for Removing Existing Canadian Programming Support Obligations

5. The CMPA submits that the Commission has not justified the need for or appropriateness of the second “incentive” and that, therefore, it should be abandoned.

The Commission’s Objectives

6. As set out in BRP 2015-86, the Commission “considers it important to ensure the following in order to continue to meet the [*Broadcasting*] Act’s objectives in the new environment of the future:
 - Canadians throughout the country have access to programming, including original Canadian programming, on an on-demand basis, whether through traditional BDUs or online.
 - VOD services are able to compete on an equitable regulatory footing with online video services.
 - The rules and expectations that apply to each service are clear.”³
7. The Commission does not explain, however, how removing Canadian content obligations for BDU-delivered services will serve to achieve these objectives.

Objective 1: Access to Original Canadian Programming On-Demand

8. The Commission does not explain how removing Canadian content obligations for BDU-delivered services will actually ensure Canadians have access to original Canadian programming on such services; it seems, absent evidence to the contrary, that the

³ Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV - The way forward - Creating compelling and diverse Canadian programming*, <http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm>, at par. 98.

exact opposite would result as such services would have no regulatory obligation to invest in or stock their libraries with original Canadian shows.

Objective 2: Competing with Online Video Services

9. In Broadcasting Public Notice 2008-101⁴, the Commission announced its intent to adopt a regulatory framework that would accommodate innovation for new services such as VOD, while ensuring their appropriate contribution to the Canadian broadcasting system and taking into account their potential impact on the overall system. In that notice, it sought comment on whether the long-standing requirement for BDU-delivered VOD services to contribute 5% of gross annual revenues to an existing Canadian independent program production fund was still appropriate.
10. Subsequently, in Broadcasting Regulatory Policy CRTC 2010-190⁵, the Commission decided to maintain both the 5% spending obligation and the Canadian content obligations for BDU-delivered VOD services. In doing, the Commission specifically acknowledged the fact that BDU-delivered VOD services offered a competitive alternative to VOD services delivered over the Internet. In other words, the Commission considered that Canadian programming support obligations would not lessen the ability of BDU-delivered VOD services to compete with unregulated online offerings. Instead, the Commission stated that “BDU-delivered VOD services [with the spending and content obligations] 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.”⁶
11. The Commission established the spending and content obligations as standard requirements for BDU-delivered VOD undertakings in Broadcasting Regulatory Policy CRTC 2011-59.⁷
12. Later that same year, the Commission launched a public process to seek input with respect to the nature and implications of growing over-the-top (OTT) broadcasting activity for the achievement of the policy objectives of the *Broadcasting Act* (the Act)

⁴ Broadcasting Public Notice CRTC 2008-101, *Notice of Consultation - Call for comments on a proposed regulatory framework for video-on-demand undertakings*, <http://www.crtc.gc.ca/eng/archive/2008/pb2008-101.htm>.

⁵ Broadcasting Regulatory Policy CRTC 2010-190, *Regulatory framework for video-on-demand undertakings*, <http://www.crtc.gc.ca/eng/archive/2010/2010-190.htm>.

⁶ *Ibid.*, at par. 12.

⁷ Broadcasting Regulatory Policy CRTC 2011-59, *Standard requirements for video-on-demand undertakings*, <http://www.crtc.gc.ca/eng/archive/2011/2011-59.htm>. These standard conditions, etc., are also set out in Broadcasting Regulatory Policy CRTC 2014-444, *Amendments to various regulations, the standard conditions of licence for video-on-demand undertakings and certain exemption orders - Provisions requiring the mandatory distribution of emergency alert messages*, <http://www.crtc.gc.ca/eng/archive/2014/2014-444.htm>, at Appendix 6.

and the policies adopted under that Act.⁸ Following that process, the Commission determined among other things, that it would not consider “a review of potential policy changes to increase the regulated players’ flexibility to respond to the activities of OTT providers.”⁹

13. Importantly, in 2012, the Commission rejected arguments by some of the largest BDU-delivered VOD undertakings that the VOD standard conditions of licence would make it difficult for them to compete with OTT services.¹⁰
14. In the current proceeding, the Commission has not provided any explanation for apparently reversing this previous position.

Objective 3: Clarity

15. The CMPA submits that the rules and expectations that apply to each service are already clear and that there is no need to remove the Canadian programming support obligations from BDU-delivered VOD services to promote clarity.

16. As the Commission states in BRP 2015-86,

The BDU-specific services operate under clear rules... Similarly, there are different but equally clear rules that apply to online video services under the DMEQ.¹¹

17. At least one of the current providers of both a BDU-delivered and an online VOD service has confirmed that clarity is not an issue. While Rogers has argued for the same rules for BDU-delivered and online VOD services, its FAQs for its online service, shomi, demonstrate that it has no difficulty understanding or operating under the two sets of rules that exist now.¹²

⁸ Broadcasting and Telecom Notice of Consultation CRTC 2011-344, *Fact-finding exercise on the over-the-top programming services in the Canadian broadcasting system*, <http://www.crtc.gc.ca/eng/archive/2011/2011-344.htm>.

⁹ *Results of the fact-finding exercise on the over-the-top programming services*, CRTC – Convergence Policy, Policy Development and Research, October 2011, <http://www.crtc.gc.ca/eng/publications/reports/rp1110.htm>.

¹⁰ Broadcasting Decision CRTC 2012-292, *Various national and regional video-on-demand programming undertakings – Licence renewals and amendments*, <http://www.crtc.gc.ca/eng/archive/2012/2012-292.htm>. See par. 37.

¹¹ *Ibid.*, above note 3, at par. 100.

¹² From Rogers’ shomi FAQs:

Does shomi comply with Canadian Radio-television Telecommunications Commission (CRTC) requirements?

shomi will launch as an Subscription Video On Demand (SVOD) extension under our Video On Demand (VOD) license and our VOD service will continue to comply with all applicable CRTC requirements. Most of our

18. Given that the only operational difference between the “hybrid” VOD model the Commission contemplates and what Rogers offers now (with its BDU-delivered and shomi services) is the “authenticated” nature of the shomi online service, the CMPA is unable to see how removing the Canadian programming support obligations from BDU-delivered VOD services will contribute to achieving any of the Commission’s objectives for VOD.

The Commission’s Rationale

19. Similarly, the CMPA is unable to see how the Commission’s apparent rationale for removing the Canadian programming support obligations from BDU-delivered VOD services actually justifies the action proposed.
20. The Commission’s rationale for proposing both “incentives” for hybrid VOD services appears to be based on the following two considerations:
- A concern that the different regulatory rules that apply to BDU-delivered and online VOD services would preclude the possibility of offering an identical service over both the Internet and closed BDU platform¹³; and
 - Sections 3(1)(k) and 3(1)(s)(ii) of the Act.

Rationale 1: Offering Identical Services

21. As the Commission identifies in BRP 2015-86, its concern about an inability to offer identical services is particularly tied to rules regarding exclusivity.¹⁴ The Commission does not identify anywhere how the Canadian programming support obligations for BDU-delivered VOD services precludes the offering of an identical online VOD service. Specifically, the CMPA questions how the current *spending obligation* for BDU-delivered VOD services would have any impact whatsoever on the content of an affiliated online VOD service.

customers will access **shomi** through the set top box and then online through username/password authentication.

For our customers who subscribe to Rogers Hi Speed Internet only, **shomi** will operate under the digital media exemption order and is therefore exempt from regulation. The CRTC has encouraged the industry to offer new and innovative multi-platform digital services like **shomi** that provide a Canadian alternative to existing Over The Top (OTT) content services available to consumers.

More generally, we believe that any OTT services that operate in Canada should operate under the same rules. We participated in the Talk TV proceedings in 2014 and argued for regulatory parity between OTT services that are affiliated with a broadcasting licensee and other OTT services. We expect a decision early in the new year.

¹³ *Ibid.*, above note 3, at par. 101.

¹⁴ *Ibid.*

22. Moreover, maintaining the Canadian content obligations for BDU-delivered VOD services would mean *more* programming options for subscribers to the affiliated online VOD service: the content obligation would in no way reduce or limit what the affiliated online VOD service could offer.

Rationale 2: Sections 3(1)(k) and 3(1)(s)(ii) of the Act

23. In attempting to justify the second “incentive” on broadcasting policy grounds, the Commission references only two of the many broadcasting policy objectives set out in the Act. The first, s. 3(1)(k), states that “a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available”.
24. The CMPA acknowledges the link between this policy objective and the Commission’s proposed “hybrid” VOD services which would have to be offered on the Internet to all Canadians without authentication. However, the Commission does not provide any explanation as to how removing the Canadian programming support obligations from BDU-delivered VOD services would be consistent with this policy objective. To the contrary, the Commission’s proposal, if adopted, could serve to narrow rather than expand the number of *Canadian* BDU-delivered VOD services (i.e., those which contribute to the creation and presentation of Canadian programming) available to Canadians.
25. The only other broadcasting policy objective on which the Commission relies, s. 3(1)(s)(ii), states that “private networks and programming undertakings should to the extent consistent with the financial and other resources available to them...be responsive to the evolving demands of the public.”
26. Once again, the Commission does not provide any explanation as to how removing the Canadian programming support obligations from BDU-delivered VOD services would be consistent with this objective. The CMPA submits that requiring *more* Canadian shows to be made available to Canadians on-demand would respond more to their evolving demands than reducing (or eliminating) that choice, as the Commission proposes to do.
27. Moreover, it important to recognize that the preceding sub-paragraph of s. 3(1)(s) – sub-paragraph (i) – provides that “private networks and programming undertakings should...*contribute significantly to the creation and presentation of Canadian programming* [emphasis added]. Further, s. 3(1)(s) connects sub-paragraphs (i) and (ii) with the word “and”, meaning that the two identified objectives are to be read together; in other words, the Commission cannot introduce a new policy solely on the basis that it is “responsive to the evolving demands of the public” if the policy could at the same time serve to dramatically reduce rather than “contribute significantly” to the creation and presentation of Canadian programming.

Conclusion

28. The CMPA submits that the Commission has not justified its proposal to remove the Canadian programming support obligations from BDU-delivered VOD services and that there is no evidence demonstrating that the proposal would serve to further the objectives of the Act or that it is necessary to achieve CRTC's specific objectives for VOD. Finally, the CMPA submits that it is neither necessary nor appropriate for the Commission to remove current, long-standing Canadian programming support regulatory requirements in order to incent Canadian broadcasters to pursue new, unregulated, online business opportunities.

Sincerely,

original signed by

Jay Thomson, LL.B, LL.M
Vice President, Broadcasting Policy & Regulatory Affairs

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