



**CFTPA**  
Representing television, film  
and interactive production in Canada

**ACPFT**  
Porte-parole de l'industrie de la production  
cinématographique, télévisuelle et interactive au Canada

January 2, 2009

**Via CRTC comments/interventions form**

Mr. Robert A. Morin  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario K1A 0N2

Dear Mr. Morin:

Re: Broadcasting Public Notice CRTC 2008-101-1: Call for comments on a proposed regulatory framework for video-on-demand undertakings – Request for deferral of proceeding

1. The Canadian Film and Television Production Association (the "CFTPA" or the "Association") welcomes the opportunity to provide these **comments** on a request from the Canadian Broadcasting Corporation (the "CBC") that the CRTC defer for a period of 12 months the proceeding announced in *Broadcasting Public Notice CRTC 2008-101*, a review of the regulatory framework for video-on-demand (VOD) undertakings.
2. The CFTPA represents the interests of almost 400 companies engaged in the production and distribution of English-language television programs, feature films, and interactive media products in all regions of Canada. Our 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. Canadian independent productions are increasingly being made available to Canadians on an on-demand basis.
3. The Association takes no position on the CBC's request for a deferral of the proceeding announced in *Broadcasting Public Notice CRTC 2008-101*, but urges the Commission to take the following comments into account when making its decision.
4. As the CRTC is aware, the Commission's licensing policy with respect to VOD services that are integrated or affiliated with broadcasting distribution undertakings (BDUs) is set out in *Public Notice CRTC 2000-172*, the introductory statement to a number of decisions approving such VOD licences. As the CFTPA has expressed to the Commission on numerous occasions, most recently in the context of the CRTC's review of the regulatory frameworks for BDUs and discretionary programming services (*Broadcasting Notice of Public Hearing CRTC 2007-10*), since the VOD policy was issued, a number of VOD undertakings have sought and received amendments to their licences that have effectively changed the VOD policy on an ad-hoc basis. Specifically, the CRTC has permitted VOD services to air commercial messages that were already included in a program previously broadcast by a Canadian programming service and to charge a fee for such programs.

5. The nature of VOD has also changed significantly since the VOD policy was issued. When originally licensed, VOD undertakings were intended to serve primarily as additional windows for the broadcast of feature films. Today, they have become windows for a variety of programming genres, raising a number of issues and questions including those related to licensing and program rights. Subscription VOD has also emerged as a key offering.
6. It is also worth noting that all VOD undertakings operating in Canada today are essentially monopoly services owned and operated by terrestrial BDUs. As such, fair and equitable access to VOD platforms is a key issue.
7. With each application over the years from VOD licensees seeking changes to their conditions of licence, and as we've watched the introduction of foreign-based SVOD services<sup>1</sup> that effectively bypass genre protection rules and provide direct competition to existing licensed Canadian programming services, the CFTPA and others have called for a separate and comprehensive policy review to reconsider and modernize the policy framework for VOD/SVOD services. Such a policy review is long overdue.
8. In its final comments to the proceeding initiated by *Broadcasting Notice of Public Hearing CRTC 2007-10* the CFTPA expressed the view that the record of the proceeding was insufficient to make informed and important decisions regarding VOD and SVOD. We noted that important data such as current VOD usage and consumer habits were non-existent on the public file. Independent research and data on the current and potential future take-up of VOD and SVOD was also missing. We urged the Commission to not make important policy decisions with a void of information and data.
9. Fast-forward many months later and industry stakeholders still do not have essential VOD/SVOD data to make informed policy recommendations to the Commission. The CFTPA believes that current VOD/SVOD usage data and future usage estimates as well as the potential revenues to be earned from targeted advertising on the VOD platform should be made public prior to undertaking a comprehensive review of the regulatory framework for VOD undertakings.
10. VOD/SVOD may well represent the future of Canadian broadcasting. As such, we need to set the rules of the road now, and get them right, to ensure that we achieve the success and high level of support for Canadian programming in an on-demand environment that we have achieved in the linear broadcasting environment.
11. As licensed VOD undertakings have been given additional flexibility over the years, the CFTPA is disappointed that their contributions to the creation and exhibition of Canadian programming have not kept pace. The existing regulatory framework for VOD undertakings sets out relatively low requirements for Canadian programming. The following Canadian content obligations are applicable to all VOD licensees, by condition of licence:
  - not less than 5% of the English-language feature films and not less than 8% of the French-language feature films in the inventory available to subscribers must be Canadian;
  - the feature film inventory must include all new Canadian feature films that are suitable for VOD exhibition and that meet the approved *Pay television standards and practices code*; and
  - not less than 20% of all programming other than feature films in the inventory available to subscribers must be Canadian.

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<sup>1</sup> For example, Rogers Cable, Canada's largest BDU, carries the following foreign-based SVOD services: Anime On Demand, Howard (Stern) TV On Demand, WWE 24/7 On Demand, here! On Demand, and Too Much for TV On Demand.

12. VOD licensees must also ensure that not less than 25% of the titles promoted each month on their barker channels are Canadian titles. In addition, licensees must remit to the rights holders of all Canadian films 100% of revenues earned from the exhibition of these films.
13. In *Broadcasting Notice of Public Hearing CRTC 2007-10*, the Commission noted that the increasing importance of VOD undertakings in the Canadian broadcasting system raises the question of what the appropriate contributions toward Canadian programming should be for VOD.
14. Given the increasing importance of VOD undertakings in the system (and for terrestrial BDUs, in particular, in a competitive BDU environment), and given that VOD services have morphed into more than they were initially expected to be, the CFTPA believes that the time has come to increase VOD licensees' regulatory obligations with respect to Canadian content. A deferral of the proceeding initiated by *Broadcasting Public Notice CRTC 2008-101* would further delay the implementation of higher Canadian programming obligations for VOD licensees, and that would be regrettable.
15. Moreover, we note that the licences of a number of VOD undertakings expire on August 31, 2009, and these undertakings were granted administrative licence renewals in 2006 and 2008.<sup>2</sup> In the CFTPA's view, it is imperative that a new VOD policy be put in place before these undertakings file their licence renewal applications, and it would be regrettable if further administrative licence renewals were granted under existing conditions of licence that we consider to be inadequate.
16. The CBC states in its December 12, 2008 letter requesting a deferral of the proceeding initiated by *Broadcasting Public Notice CRTC 2008-101* that it sees "no reason to fast track" the VOD proceeding. The CFTPA respectfully submits that the long-overdue need for a modern and relevant regulatory framework for VOD undertakings with appropriate contributions to Canadian programming represents a compelling reason to proceed with a VOD policy review sooner rather than later.
17. The CBC notes that the VOD proceeding will deal with the issue of advertising, and it states that the advertising market for all broadcasters has become very challenging. It states that "[i]ntroducing new measures that result in increased competition for advertising revenues at this point in time would, in our view, be very reckless."
18. The CFTPA believes that in the current economic climate, the Commission must work to ensure the health and success of the system as a whole. It should not introduce changes to the system that benefit one element of the system (e.g., VOD undertakings) at the expense of another (e.g., licensed Canadian broadcasters).
19. At the same time, and as we stated during the review of the regulatory frameworks for BDUs and discretionary programming services, providing VOD undertakings with the ability to earn advertising revenue could benefit Canadian programming and the independent production sector by virtue of the fact that VOD licensees must contribute 5% of their gross revenues to an independent Canadian program production fund. We also agree that the implementation of targeted advertising solutions could result in higher advertising revenues for Canadian broadcasters from the VOD platform. But there is no guarantee that the introduction of such measures will result in a net increase in advertising revenue in the system and thus benefit the system as a whole.

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<sup>2</sup> See *Broadcasting Decision CRTC 2006-308* and *Broadcasting Decision CRTC 2008-59*.

20. These issues must be fully addressed and debated in a comprehensive review of the regulatory framework for VOD undertakings. Should the Commission decide to proceed with the process initiated by *Broadcasting Public Notice CRTC 2008-101* at this time, it can choose to defer implementation of any measures related to advertising to a later date if it believes that the advertising market is too unstable in the current economic environment to undergo changes at this time.
21. Should the Commission decide to defer the process initiated by *Broadcasting Public Notice CRTC 2008-101*, either by 12 months or by another period, the CFTPA believes that it would be appropriate for the CRTC to impose a moratorium on further amendments to conditions of licence of VOD licensees and the launch of foreign-based SVOD services until a separate proceeding can be held to better understand and debate the long-term implications and opportunities of VOD/SVOD to the Canadian broadcasting system.
22. The CFTPA appreciates the opportunity to comment on this matter.

All of which is respectfully submitted.

Sincerely,

*[Original signed by Guy Mayson]*

Guy Mayson  
President and CEO

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