

Blakes Bulletin

Communications

Overview of Licensing Process for Specialty Channels in Canada

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Consistent with similar experiences around the world, cultural diversity and rapidly-evolving consumer trends have spawned a proliferation of applications for specialty programming services in Canada. However, as this brief overview illustrates, there are a number of complex considerations which must be taken into account before deciding to pursue a specialty programming services licence from Canada's broadcasting regulator, the Canadian Radio-television and Telecommunications Commission (CRTC). Moreover, the CRTC has recently held an extensive hearing which addressed in part the policy and regulations surrounding specialty channels in Canada. At the time of writing, the CRTC's decision has not yet been released.

Canadian specialty programming services are television services which are delivered only by a broadcasting distribution undertaking (BDU) licensee (e.g., a cable television operator). They are generally included as part of various optional packages or channel line-ups offered to television viewers by the BDU, although some were licensed by the CRTC for distribution at a regulated wholesale rate on the basic service of cable BDUs, and are received by subscribers for the price of BDU cable access.

Specialty services licensed by the CRTC for analog distribution first appeared in the mid-80s. They are required to be carried by all large BDUs. Since 2000, generally, only specialty services for digital distribution have been licensed. Fifteen Category 1 digital specialties, with mandated BDU access, and dozens of Category 2 digital specialties for distribution at the option of any BDU, have been licensed.

As a matter of policy, the CRTC will only license one analog or Category 1 digital specialty channel in each genre (e.g., live sports, history, animation, classic movies). Category 2 digital specialties can be competitive with each other in a genre, although not with an analog or Category 1 digital service.

An open-entry licensing approach has been used by the CRTC for Category 2 digital specialties. Such services have low Canadian content exhibition requirements and no Canadian expenditure requirement. There are currently over 580 Category 2 digital services authorized. A large number offer ethnic or third-language programming and are subject to specific rules.

A Category 2 digital licence is only issued by the CRTC when an authorized service has satisfied the Commission, with supporting documentation, that it has entered into a distribution agreement with at least one licensed BDU and is prepared to commence operations. A Category 2 licensee must be in operation no later than 36 months after the CRTC decision granting approval, after which the approval lapses unless an extension is granted. Carriage terms, such as tiering or packaging, channel placement and the wholesale rate per subscriber paid by the BDU are negotiated between a Category 2 licensee and a BDU. There are currently only some 30 Category 2 specialty services launched and remaining in operation in Canada.

An applicant for a Category 2 digital specialty service must file evidence that it will meet three requirements:

- 1) its proposed ownership structure will satisfy the Canadian ownership criteria imposed by Cabinet directive
- 2) it will meet an annual minimum of 15% Canadian content in Year 1 of operation, 25% in Year 2 and 35% in Year 3, and
- 3) it will not be directly competitive with an existing analog or Category 1 specialty service.

With regard to the third test, each applicant is required to identify existing analog and Category 1 digital services which could be considered similar to its proposal and therefore partially competitive – generally those having at least 10% of the programming falling within the same or similar genre – and explain why its proposed service would not be directly competitive with any service thus listed. A series of written clarifying questions by the CRTC may follow the filing of an application.

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Once an application for a Category 2 digital licence is made public by the CRTC and interventions are invited, opposing interventions are often submitted by other licensees, largely on the ground that the proposal is, in part or in whole, competitive with one of their services, contrary to the policy.

Since the *Broadcasting Act* expressly requires a public hearing before the issuance of any broadcasting licence, any application for a Category 2 licence must be published as an item on a hearing agenda. The application can, however, be heard as a non-appearing item if the Commission decides, based on its absence of concern and/or the absence of opposing interventions, that appearance of the applicant is unnecessary.

The decision to apply for a specialty broadcasting licence in Canada involves careful preparation to ensure success. Blakes offers unparalleled knowledge and experience in guiding potential applicants through this process.

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