



Broadcasting Decision CRTC 2007-34

Ottawa, 26 January 2007

Black Walk Corporation Across Canada

Application 2006-0793-9
Public Hearing in the National Capital Region
14 November 2006

Theatrical – Category 2 specialty service

*In this decision, the Commission **denies** an application for a broadcasting licence to operate a new Category 2 specialty programming undertaking.*

The application

1. The Commission received an application by Black Walk Corporation (Black Walk) for a broadcasting licence to operate a national, English-language Category 2¹ specialty programming undertaking to be known as Theatrical.
2. The applicant proposed to offer a service that would bring international cinema to the small screen. The service would broadcast shorts and feature films that have been screened at festivals worldwide and that have never attained theatrical distribution. It would also offer programs focusing on filmmakers and film festivals. Films would be broadcast in their original language with English subtitles.
3. All of the programming would be drawn from the following categories set out in item 6 of Schedule I to the *Specialty Services Regulations, 1990*: 2(a) Analysis and interpretation; 2(b) Long-form documentary; 3 Reporting and actualities; 5(b) Informal education/Recreation and leisure; 7(c) Specials, mini-series or made-for-TV feature films; 7(d) Theatrical feature films aired on TV; 8(b) Music video clips; 12 Interstitials; 13 Public service announcements; and 14 Infomercials, promotional and corporate videos.

Interventions

4. The Commission received a number of interventions expressing support for this application, and three in opposition, submitted by Astral Television Networks, a division of Astral Broadcasting Group Inc. (Astral), Alliance Atlantis Communications Inc. (Alliance Atlantis), and Corus Premium Television Ltd. (Corus).

¹ The Category 2 services are defined in *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000.

5. Astral submitted that the applicant's proposed service would be directly competitive with its services The Movie Network and Mpix, and that the application was not consistent with the Commission's policy with respect to Category 2 services. Specifically, Astral expressed concern that the program categories proposed by the applicant were too broad to clearly define the service as a niche service devoted to non-U.S., foreign-language feature films. Astral was of the view that the program categories proposed by the applicant could allow Theatrical to become directly competitive not only with The Movie Network and Mpix, but with other specialty networks focusing on non-Canadian theatrical movies. Astral also expressed concern that the applicant had proposed no restrictions on program categories so as to ensure that the service, if licensed, would not evolve into a service other than that proposed.
6. For these reasons, Astral recommended that the Commission deny the applicant's request.
7. Astral submitted that, should the Commission approve this application, Theatrical should be subject to the following conditions of licence:
 - All material drawn from category 7(d) shall be independent films, and shall be broadcast only after their pay television broadcast window has ended.
 - No more than 5% of all films broadcast shall be produced, financed or distributed from a major Hollywood studio.
 - No more than 10% of all foreign programming shall be produced in the United States.
8. Alliance Atlantis also opposed Black Walk's application, asserting that there would be virtually no difference between its service Independent Film Channel Canada (IFCC) and Theatrical, and that the proposed service would be directly competitive with IFCC. In Alliance Atlantis' view, Theatrical would need to limit its programming to non-English, international films without theatrical distribution, in order to avoid being directly competitive with IFCC.
9. Alliance Atlantis suggested that, should the Commission approve this application, the following condition of licence would be necessary and would reflect what the applicant proposed:
 - All programming drawn from categories 2(a), 2(b), 7(c) and 7(d), other than Canadian programming, shall be limited to programming in other than the English language, or international films shown in their original language with English subtitles.

10. Corus expressed the opinion that the nature of service for Theatrical is loosely defined. It stated that there are a vast number of film festivals around the world at which increasing numbers of mainstream films are exhibited. This means that the proposed service would have significant opportunity to overlap with Movie Central, particularly Movie Central's Metro programming block, which is dedicated to alternative features and includes independents, shorts, documentaries, festival original programming, and foreign and subtitled films.
11. In Corus' opinion, the application as filed should be denied because Theatrical would be directly competitive with Movie Central, Encore Avenue, and several other analog or Category 1 specialty services.
12. Alternatively, should the Commission approve this application, Corus proposed that conditions of licence be imposed that would ensure that Theatrical would not be directly competitive with Movie Central and other analog or Category 1 specialty services. In this regard, Corus noted that several conditions of licence were imposed on IFCC, in order to address the issue of competitiveness with existing pay television and specialty services.
13. Corus recommended that the following conditions of licence be imposed on Theatrical:
 - Programming drawn from Category 7(d) shall consist entirely of independent films, and shall be broadcast only after their pay television broadcast window has ended.
 - Not more than 5% of all films broadcast shall be produced, financed or distributed by a major Hollywood studio.
 - Not more than 10% of all non-Canadian films broadcast shall be produced in the United States.
 - Not more than 10% of the primetime schedule shall consist of films financed or distributed by a major Hollywood studio or a foreign film produced in the United States.
 - Not less than 80% of the films broadcast shall be in languages other than English or French.
 - Not more than 15% of all programming broadcast shall be drawn from category 7(c).

Applicant's response

14. In response to Astral's concerns, Black Walk submitted that Astral had misunderstood the proposed nature of Theatrical's service. It stated that Theatrical would be an alternative for Canadians who wish to see films in their original language with English subtitles. Black Walk expressed the view that The Movie Network and Mpix do not generally offer foreign-language films, and that Theatrical would therefore not be directly competitive.
15. Black Walk argued that few highly successful French-language Canadian films are broadcast by The Movie Network, and that such films are prime examples of the type of films that Theatrical would offer. Theatrical would concentrate on award-winning films from Canada and other countries, which have slipped through the mainstream.
16. In response to Alliance Atlantis' concerns, the applicant indicated that the proposed service is based on the idea of non-English domestic or foreign-language feature films with subtitles, which would bring French-language films with subtitles to the rest of Canada, along with international feature films.
17. Black Walk also submitted that all of the titles mentioned in the intervention from Alliance Atlantis are high profile international films with Oscar nominations, or those featured at the Cannes film festival. The films that Theatrical proposed to offer are of the same quality, but not of common knowledge to Canadian audiences.
18. In response to Corus, Black Walk stated that there is a difference between competition for content in a free and open market, and direct competition between two or more services. Many of the titles that Movie Central and Encore Avenue have acquired, or are in negotiation for, are also wanted by other Category 1 and Category 2 services.
19. Black Walk argued that both Movie Central and Encore Avenue primarily broadcast award-winning and nominated films that in many cases are distributed by American companies and are familiar to the general public. Theatrical would offer foreign-language films of the same quality, but that have not been in the public eye.

Commission's analysis and determinations

20. In *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000, the Commission implemented a competitive, open-entry approach to licensing Category 2 services. While the Commission does not consider the impact that a new Category 2 service might have on an existing Category 2 service, it does seek to ensure that newly licensed Category 2 services do not compete directly with any existing pay or specialty television service, including any Category 1 service.

21. In *Introductory statement - Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000, the Commission adopted a case-by-case approach in determining whether a proposed Category 2 service should be considered directly competitive with an existing pay, specialty or Category 1 service. The Commission examines each application in detail, taking into consideration the proposed nature of service and the unique circumstances of the genre in question. The Commission also takes into account the potential impact on conventional television services.
22. In the present case, the Commission considers that the applicant's proposed definition of Theatrical's nature of service is very broad. Given the programming flexibility that the proposed definition would allow, the Commission considers that the applicant has not established sufficient safeguards via suggested conditions of licence to prevent the proposed service from becoming directly competitive with the pay movie services and in particular with the Category 1 service IFCC. For example, the applicant stated that programming would not be offered in the English language, but did not propose a specific condition of licence that would guarantee a minimum percentage of French- and third-language programming. Similarly, Black Walk stated that it would broadcast only those films that had not been theatrically released or distributed by U.S. companies, and that were not commonly known to Canadians, but the applicant did not suggest conditions of licence that would serve to ensure this proposal. As a result, the Commission is not persuaded that Theatrical would not be directly competitive with existing services.
23. Accordingly, the Commission **denies** the application by Black Walk Corporation for a broadcasting licence to operate the national, English-language Category 2 specialty programming undertaking Theatrical.

Secretary General

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