



A Terms of Trade Primer - Part 2 (Editorial Control and Development)

July 4, 2011 by Bob Tarantino

This is the second installment in our series about the new Terms of Trade applicable to the English-language Canadian private broadcasting industry (see here for Part 1). This installment focuses on Section 2 (Editorial Control) and Section 3 (Evaluation and Development) of the Terms of Trade Agreement. This is the second of an anticipated nine posts which will be posted over the course of the next week and which will cover the Terms of Trade in detail. Once all nine posts have been published, the archived posts will be available at this link.

What do the Terms of Trade say about... editorial control?

Producers have control - subject to broadcasters' standard approvals. Subject to what is expressly set out in the Terms of Trade, "editorial and creative control of a project rest with the independent producer". However, a broadcaster's "standard creative, financial and technical approvals" apply on a project "except where the [Terms of Trade] stipulates otherwise". Broadcasters are to post their "Standard Approvals" on their websites.

Post-contract changes to creative elements result in a higher license fee. If a broadcaster requests changes to, or additional creative elements for, a program which were not contemplated when a license agreement was entered into, the broadcaster must provide an enhanced license fee proportionate to the scope of the new work required.

Broadcasters are entitled to on-screen credits. Credit placement and credit titles "shall be in conformity with industry standards". Broadcasters and their personnel are not entitled to "Producer" or "Executive Producer" credits, but can be accorded "traditional" credits, such as "Executive in Charge of Production".

What do the Terms of Trade say about... evaluation and development?

Broadcasters need to be user-friendly. Broadcasters are obliged to identify on their website all personnel "who are responsible for responding to written program proposals ... including telephone number and e-mail address".

Rights in a proposal remain with producer until a development agreement is signed. 'Nuff said.

Proposals are to be treated as confidential by a broadcaster. Producers are obliged to keep confidential a broadcaster's programming strategies. Importantly, broadcasters "will not request that the Independent Producer waive any existing rights in the Independent Producer's program proposal".



That presumably will have an impact on so-called "submission releases", which often require that submitting producers waive a number of rights to commence a lawsuit in respect of a proposal.

Written proposals must be responded to by a broadcaster within 6 weeks. The timeline can be extended by up to an additional six weeks by mutual consent. If the broadcaster does not respond within 6 weeks, the proposal is deemed withdrawn and the broadcaster will have no further rights to the proposal. Strangely, the Terms of Trade state that "it is incumbent upon the Independent Producer to advise the Broadcaster in writing that the time period has elapsed or is about to elapse". It is unclear whether that means that if the producer fails to notify the broadcaster in writing that the time period is about to elapse then the deemed withdrawal does not apply.

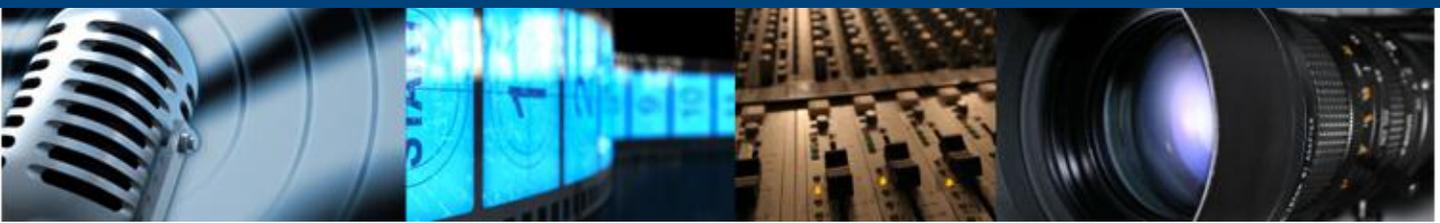
If a broadcaster expresses interest in a program proposal, the producer must submit a "business proposal" within 60 days. The "business proposal" would include elements such as a development budget, financing plan, existing contractual commitments, rights agreements, locations and key production personnel.

If the broadcaster approves of the "business proposal" the parties will use "best efforts" to enter into a development agreement within 60 days. A producer should not be expected to undertake development activities (especially expending money) without a distribution agreement in place. The development agreement must specify each phase of development and the creative and other elements to be developed by the producer. When development materials are delivered to the broadcaster, the broadcaster will have no more than 18 days (40 days for animation co-productions) (extendable by mutual agreement of the parties) to approve or disapprove of the elements (with a failure to disapprove in the timeframe deemed to constitute approval). The payment schedule for development fees must be expressly described in the development agreement, with no less than 50% payable on signing and no more than 10% tied to delivery of the final development materials.

The broadcaster's financial participation in development entitles them to certain exclusive rights. The exclusive rights are as follows:

- to request changes to delivered materials
- to participate in additional development (subject to agreement with the producer about the nature and length of such additional development)
- to negotiate a license agreement

The terms of a license agreement are not to be included in or "pre-negotiated" in the development phase or the development agreement. License terms are only to be negotiated once the project has been "fully developed" or an order for the project has been made by the broadcaster.



Once development has been completed, the broadcaster has 6 months to decide whether to license the project. Development is "completed" when a polished script has been created (where applicable) and final deliverables as set out in the development agreement have been received.

At the 6 month point, the broadcaster must either (i) order the project (subject to finalizing license terms), (ii) agree with the producer to further develop the project, or (iii) release its interest in the project in writing.

If a broadcaster releases its interest in a project, the broadcaster remains entitled to reimbursement for its cash investment in the project. Reimbursement is only payable if and when a project is greenlit by another broadcaster, and becomes due on the first day of principal photography (or key animation). No interest or other charges can be charged on the development investment (unless it is not repaid on the first day of principal/key animation). If a project is assigned from one producer to another, the assignee must assume the obligation to repay the development financing.

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