

A Terms of Trade Primer - Part 5 (Rights)

July 18, 2011 by Bob Tarantino

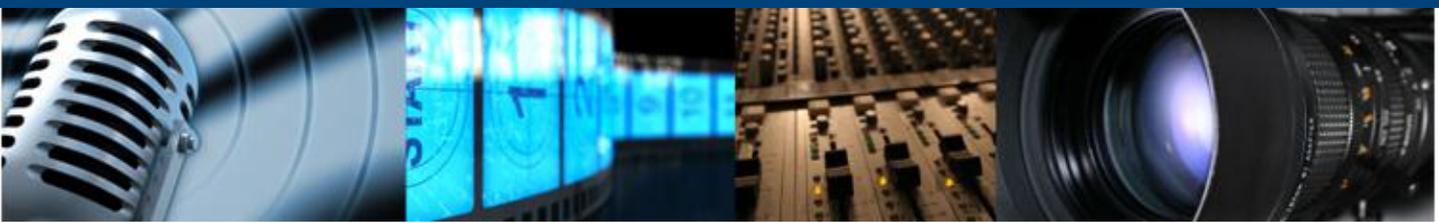
This is the fifth installment in our series about the new Terms of Trade applicable to the English-language Canadian private broadcasting industry (Part 1, Part 2, Part 3, Part 4). This installment focuses on Section 6 (Rights Allocation) of the Terms of Trade Agreement. This is the fifth of an anticipated 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... the rights granted to broadcasters and retained by producers?

Well... they say quite a lot, actually. Section 6 of the Terms of Trade Agreement starts with a paragraph which might be termed a "statement of intent" (or, less charitably, "throat clearing") which is presumably intended to guide interpretations of the language of the remainder of the Section. The paragraph states that broadcasters should "enjoy the full use of a program" on broadcast and "new digital platforms" and that "appropriate and reasonable holdbacks ... encourage maximum promotion and ... secure the value of the rights" obtained by a broadcaster. On the other hand, "certain exclusive rights ... must be retained by the Independent Producer ... to ensure the maximum exploitation of the value of the Program".

The Terms of Trade Agreement breaks the universe of rights in a program into the following categories:

- rights which broadcasters are entitled to in exchange for a license fee
- rights which broadcasters can negotiate for, subject to a 50/50 revenue split and subject to modification if the broadcaster pays a "super-license fee"
- producer-created digital-content rights which (a) for free-to-consumer applications can be acquired by an additional license fee, and (b) for revenue-generating applications can be included in the initial grant of rights given in exchange for the initial license fee (but subject to a 50/50 revenue split)
- rights which broadcasters cannot acquire
- "other rights" whose allocation among the foregoing categories is to be discussed by the CMPA and the broadcasters



A "fair market value" license fee entitles a broadcaster to the following exclusive rights in Canada in all languages in which the broadcaster is licensed to operate:

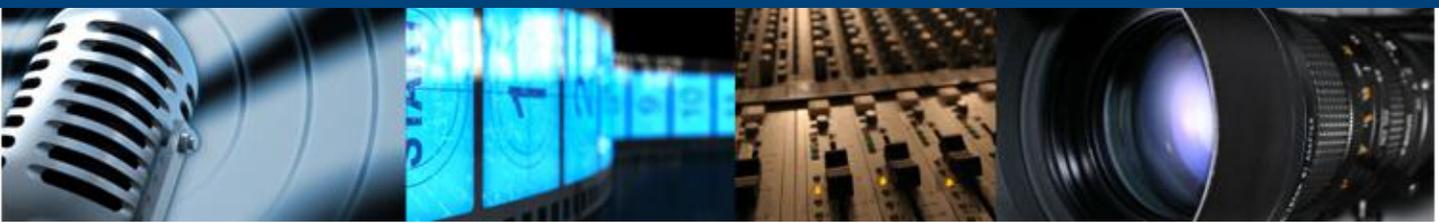
- linear broadcast
- linear streaming (whether simultaneous or not with the broadcast channel)*
- free-to-consumer non-linear on-demand exhibition on all platforms*
- subscription-based non-linear on-demand exhibition on all platforms*
- creation and operation of program website, including creation of original free-to consumer or subscription-based content for the website (a footnote in the Terms of Trade Agreement indicates that the producer of the television program has a right of first negotiation to develop and produce the original free-to consumer content - it is unclear whether that means that the producer does not have a similar ROFN over subscription-based content, or whether its exclusion from the footnote was unintentional)

A single asterisk in the list above means that the exercise of the rights must be geo-blocked to Canada.

Broadcasters have a holdback in Canada against the exploitation of the "format" for the duration of the license term. Because the Terms of Trade Agreement does not have a definition of "format", it is somewhat unclear to what this is meant to apply, and how precisely it interacts with a broadcaster's right of last refusal in "Additional Programs" (discussed [here](#)). Are "formats" categorically different from "Additional Programs" or are they a component of "Additional Programs" (the definition of "Additional Programs" contained in Section 4 of the Terms of Trade Agreement seems to indicate the latter)? If formats are just a type of "Additional Program", and a broadcaster has not elected to exercise its right of last refusal with respect to the Additional Program, does the holdback contained in Section 6 still apply? Presumably not, but the language is unclear on the point.

Broadcasters can negotiate to acquire the following rights, subject to a 50/50 split of gross revenues* - but if they are not acquired by the broadcaster, then they are subject to a 12 month holdback on their exercise in Canada:

- transaction-based non-linear on-demand exhibition on all platforms (ie where the customer has only temporary access to content, as opposed to a permanent copy)
- electronic sell-through or download-to-own platforms
- in-flight
- DVD/home video



The asterisk above relates to the 50/50 revenue share - that split can be modified where the broadcaster contributes a "super-license fee" (found in Section 8 of the Terms of Trade Agreement, and to be discussed in a future installment of this primer).

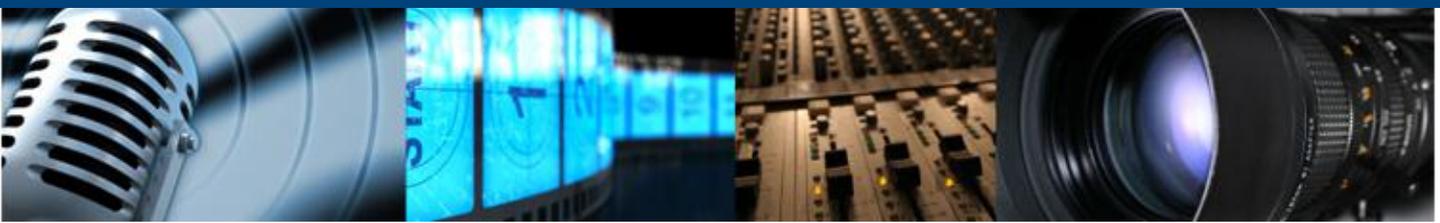
It should be noted that where a super-license fee is paid, what changes is the broadcaster's share of revenue (which can go higher, up to 75%) - it would appear that in no circumstances (excluding a breach of the Terms of Trade Agreement) can the producer ever negotiate a higher share of the revenue for themselves. If a super-license fee is paid, non-promotional games and merchandising are added to the list of items which the broadcaster can negotiate to acquire, subject to the (modified) revenue split.

Certain types of original producer-created digital content can be acquired by a broadcaster for either an additional license fee or subject to a 50/50 revenue split. The heading for Section 6(c) in the Terms of Trade Agreement uses the examples of websites, webisodes and mobisodes, so presumably this is intended to cover project-related content which is intended for initial exploitation on digital platforms (i.e., something other than the original production itself). The Terms of Trade Agreement splits producer-created digital content into two categories: free-to-consumer and revenue-generating. Free-to-consumer digital content can be acquired by a broadcaster upon payment of an additional license fee. Revenue-generating digital content can evidently be acquired by the broadcaster without the payment of an additional license fee (i.e., the initial license fee for the program would cover revenue-generating digital content), but the broadcaster must agree to a 50/50 split of gross revenues with the producer. On the face of the Terms of Trade Agreement, that 50/50 split cannot be modified (even if the broadcaster pays a "super-license fee").

If the broadcaster acquires rights to revenue-generating digital content but does not exploit those rights within 12 months, the rights automatically revert to the producer. The wording of Section 6(c) seems to indicate that only revenue-generating digital content rights are subject to the 12 month reversion, and that "free to consumer" digital content rights are not subject to any such reversion. While that may be because "free to consumer" rights must be paid for with an additional license fee, since most digital rights of this nature are going to be "free to consumer", the reversion right seems to apply to a much-less desirable set of rights (from the producer's vantage).

Certain rights cannot be acquired by a broadcaster. The "unacquireable" rights (subject to payment of a super-license fee, as noted above and below) are:

- French-language (Canada) [assuming the broadcaster does not itself broadcast in French]
- other languages (Canada) [assuming the broadcaster does not itself broadcast in the other language]
- format [as noted above, it is not entirely clear what this means]



- theatrical [subject to a negotiated holdback which cannot last longer than the term of the broadcast license]
- music publishing
- games and merchandising [producer "will consult in good faith" with broadcaster prior to exploitation of these rights][if broadcaster pays a super-license fee, these rights can be acquired by the broadcaster, subject to a revenue split arrangement]
- all other non-theatrical
- Canadian and international retransmission rights
- Canadian and international sub-licensing and/or distribution*
- publishing of books, e-books or other similar materials

The asterisk above (on Canadian and international sub-licensing and/or distribution) is meant to indicate that broadcasters can acquire and exercise these rights (a) within their corporate broadcast group, (b) (if the broadcaster operates a CRTC licensed conventional television service) to unaffiliated conventional television services operating in markets in Canada where the broadcaster does not have a local station or its signal is not receivable over-the-air, and (c) for the purposes of exploiting the rights to which a broadcaster is entitled or for which it negotiates.

The treatment of "other rights" will be discussed by the CMPA and the broadcasters. There appears to be an inconsistency in Sections 6(d) and (e) of the Terms of Trade Agreement. Section 6(d) says that broadcasters "may not acquire or have revenue share/profit participation in any other rights ... including the following" (the list which follows in Section 6(d) is reproduced in the preceding section). But Section 6(e) contradicts that and says that "any other rights not enumerated in this Agreement ... shall ... be the subject of discussions". Thus, while 6(d) seems intended to be a catch-all which covers all non-enumerated rights, it seems that it is in fact limited to the rights expressly listed in Section 6(d), with all "other" rights being subject to future discussions. It will remain to be seen how this inconsistency will be handled in practice, and whose interests will be served by making non-enumerated rights subject to future discussions.

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