

## **A Terms of Trade Primer - Part 7 (Super-License Fees)**

September 9, 2011 by Bob Tarantino

This is the seventh 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](#), [Part 5](#), [Part 6](#)). This installment focuses on Section 8 (Super License Fees) of the [Terms of Trade Agreement](#). This is the seventh of an anticipated eight posts which will be posted over the course of the next little while and which will cover the Terms of Trade in detail. Once all eight posts have been published, the archived posts will be available at [this link](#).

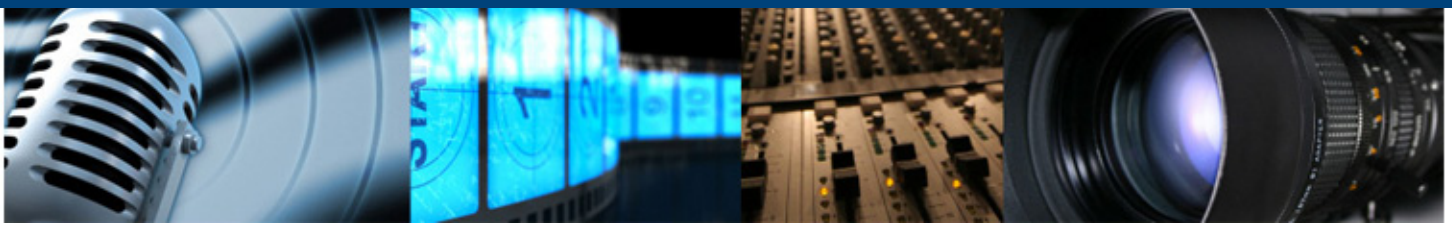
### **What do the Terms of Trade say about... "super-license fees"?**

*A super-license fee is equal to the lesser of (a) the combined CMF threshold license fee for the applicable genre (if any) plus the maximum license fee top-up for that genre, or (b) a license fee representing at least 60% of the production budget of a project. Once a super-license fee has been paid, it significantly expands the scope of the rights which a broadcaster can acquire and/or increases the share of revenue they would otherwise be able to obtain from certain forms of exploitation.*

*The payment of a super-license fee entitles the broadcaster to enter into negotiations for a higher revenue share of certain rights - but the broadcaster's share of revenue can never exceed 75%. The rights in respect of which the broadcaster can obtain a higher share of revenue are the following:*

- 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
- producer-created revenue-generating original digital content
- non-promotional games\*
- merchandising\*

With respect to the foregoing forms of exploitation, then, the payment of a super-license fee effectively opens a window for the broadcaster, allowing them to increase their participation rate from 50% to a maximum of 75%. As noted in [Part 5](#), the forms of exploitation listed above are not automatically included within the scope of a broadcaster's rights - they have to negotiate for them. In other words, the broadcaster would first have to negotiate to obtain the rights *at all* (at a 50/50 split), and then, if they pay a super-license fee, they could negotiate to increase their share of the revenue to a maximum of 75%. It should be noted that two of the forms of exploitation noted above with an asterisk (non-promotional games and merchandising) are normally reserved exclusively to the producer, but payment of a super-license fee moves those items from the reserved list to the list of items in which the broadcaster can participate.



*The payment of a super-license fee entitles the broadcaster to enter into negotiations for a share of profit participation in forms of exploitation which are otherwise exclusively reserved to the producer.* As set out in [Part 5](#), some types of exploitation are normally reserved to the producer and the broadcaster is prohibited from having any share of revenues - but upon payment of super-license fee, two things happen: first, as described above, non-promotional games and merchandising move from the "reserved" list to the "participating" list (whereby a broadcaster gets a share of revenue); second, everything that remains on the "reserved" list becomes open to a restricted form of profit participation for the broadcaster - the rights in question are:

- French-language (Canada)
- other languages (Canada)
- format
- theatrical
- music publishing
- retransmission rights
- sub-licensing and distribution
- book and e-book publishing

However, even though the broadcaster is permitted to participate in these revenues, their participation is capped by a formula: no greater than 1.5x the dollar investment of the broadcaster, expressed as a percentage of the budget, that is over and above the amounts listed in the definition of "super-license fee" (ie 60% of the total budget or the CMF threshold license fee plus the maximum license fee top-up), up to a maximum of 30%.

*If the broadcaster does negotiate profit participation, it's profit participation is triggered only once all equity investors in the project (including any tax credit investment by the producer) have recouped their investments.*

The super-license fee mechanism is therefore a means by which certain rights allocation matters can be altered - which, although complicated, seems like a relatively workable device for incentivizing higher payments by broadcasters while still reserving to producers the bulk of the benefit of ancillary exploitations.

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