

# A Terms of Trade Primer - Part 3 (Basic Licensing Conditions)

July 11, 2011 by Bob Tarantino

This is the third installment in our series about the new Terms of Trade applicable to the English-language Canadian private broadcasting industry (see here for Part 1 and here for Part 2). This installment focuses on Section 4 (Basic Licensing Conditions) of the Terms of Trade Agreement. This is the third 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... basic licensing conditions?**

After a project is greenlit, the producer has 90 days to confirm other sources of financing for the production. The 90 day period is subject to alteration by mutual agreement (presumably meaning it can be made either shorter or longer) so as to "mesh with funding deadlines or exigencies of production". While this provision nominally seems to be included for the benefit of the producer, the fact that the 90 day period is not an absolute minimum seems to mean that it remains subject to the vagaries of differential negotiating power between producers and broadcasters.

Broadcasters must commit to broadcasting a program within 12 months of the start of the license term.

Rights of first negotiation are subject to express parameters on their exercise. The Terms of Trade stipulate that, whether contained in a development agreement or a license agreement, ROFNs must:

- be exercised by a fixed start date or in reference to a specified timeframe
- contain a maximum negotiating period of 45 days (excluding the decision to initially license (3(k)) or renew an order (4(i)) or extend a license term (5(c))

If an agreement does not expressly set out a fixed start date or timeframe, then the timing of the exercise of the ROFN is "at the sole discretion of the Independent Producer".

Rights of last refusal can be granted to a broadcaster in "limited" circumstances, and when granted are subject to strict parameters. ROLRs are not permitted in development agreements in any circumstances. In broadcast license agreements, ROLRs are only permitted to allow the broadcaster to (i) acquire exclusive exhibition rights in "Additional Programs", or (ii) extend a license term (subject to parameters set out in Section 5(c), and discussed below). "Additional Programs" means additional episodes for the same season or subsequent seasons, prequels, sequels and remakes of a program and any "spin-off" program (being a program based on, adapted from or derived from the initial program or the underlying property "including the characters and the format thereof").



Where granted, a ROLR must be exercised within the specified time period set forth in the license agreement, which period cannot exceed 45 days from the broadcaster's receipt of written notice of a third party offer. ROLRs are incredibly powerful rights which have serious distorting effects on the rights of producers and their ability to extract profits from their properties. It should be noted that while manner in which the Terms of Trade are drafted at first makes it appear that ROLRs are to be limited in scope, the language actually allows them to be instituted with respect to valuable rights: extensions of terms and subsequent productions. It appears that in exchange for that latitude, broadcasters are prevented from obtaining ROLRs at the development stage - which puts the onus on broadcasters to make binding decisions on projects at the development stage, without a "fail-safe" mechanism which would allow them to reach out and take back a project that they had previously turned down but which one of their competitors finds attractive.

Long-form broadcast license agreements must be signed by broadcasters at least two weeks prior to the commencement of principal photography/key animation, subject to the producer having submitted "reasonable agreed-upon deliverables". If a license agreement has not been signed two weeks prior to principal, the broadcaster and producer must choose one of the following options:

- the broadcaster will provide an advance against the license fee to cashflow production
- production will be deferred until a later date (provided that the producer is not financially prejudiced if the delay is caused by the broadcaster)
- not proceeding with the project

This provision raises a number of questions: what constitutes "reasonable deliverables"? If the parties elect not to proceed with a project, does that mean that the rights automatically revert to the producer? If a delay of production would financially prejudice a producer, and is the fault of the broadcaster, does that mean the broadcaster must compensate the producer, or does it mean that a delay is simply no longer an option?

When a production is delivered under budget, the broadcaster is entitled to a pro rata share of the savings.

Where a producer receives surplus funds after a financing plan has been approved by a broadcaster, the broadcaster and producer will "give good faith consideration" to whether those funds should form part of the financing or simply be shared by participants. In no circumstances can a broadcaster require a producer to agree to a reduction of the broadcaster's license fee because of the availability of surplus funds.

If a broadcaster wishes to renew a program by ordering additional episodes for a new season, the broadcaster must make that order within 6 months of the first broadcast of the last commissioned episode.



If the broadcaster does not order the new season, the broadcaster can still have a right of last refusal - meaning that the producer is able to shop the program to other broadcasters, but will, if the license agreement has a ROLR clause, need to provide the previous broadcaster with the opportunity to match any new offers. If a program does end up with a new broadcaster, then "the parties" (it is unclear precisely who is being referred to by that term) "shall in good faith consider negotiating a buy-out of the licensed rights to previous episodes held by the [original] broadcaster by any subsequent broadcaster".

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