Entertainment & Media Law Signal

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A Terms of Trade Primer - Part 1 (Introduction)

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The Canadian Media Production Association (CMPA) recently announced that it had successfully concluded negotiations and entered into Terms of Trade Agreements with five of Canada's largest broadcasters (Astral Television Networks, Bell Media, Rogers Broadcasting, Shaw Media and Corus Entertainment). Because the Terms of Trade Agreements are a significant development for the Canadian television industry, we have put together this lengthy primer which sets out some basic elements of the Terms of Trade. This is the first 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 are "Terms of Trade" generally?

"Terms of Trade" is a phrase used to describe an agreement entered into between, on the one hand, television broadcasters and, on the other hand, independent producers of television programs. The "Terms of Trade" essentially function like a code of conduct or "rules of the road" for participants in the television production and broadcasting industry. They are an attempt to lay out the basic framework which will guide negotiations of individual program license agreements between broadcasters and individual independent producers. Terms of Trade are of particular interest to independent producers because they stipulate that, in exchange for a base license fee, broadcasters will only be entitled to obtain a particular suite of rights - obtaining additional rights requires payment of an enhanced purchase price.

What are these specific "Terms of Trade"?

The CMPA (Canadian Media Production Association) recently entered into a Terms of Trade Agreement with the major private English-language Canadian broadcasters, being Astral Television Networks, Bell Media, Rogers Broadcasting, Shaw Media and Corus Entertainment (technically, Corus has entered into its own separate agreement, but according to the CMPA the Corus agreement "contains no substantive differences from the agreement signed with the other broadcasters". The CMPA is still in negotiations with the CBC for a separate terms of trade agreement. The full text of the main Terms of Trade Agreement is available here. The full text of the Corus Terms of Trade Agreement is available here.

When do the Terms of Trade come into effect? How long do they last for?

Most of the Terms of Trade came into effect on June 1, 2011; sections 7 (Equity Investments), 9 (Producer Fees and Overhead) and 10 (Retention of Producer Tax Credits) come into effect on August 1, 2011. The Terms of Trade Agreement will remain in effect with respect to each signatory broadcaster until "the expiry of the longest of the next issued license terms of the Broadcasters (excluding Astral...)".

In other words, the Agreement will be binding on the broadcasters who have signed it until the expiration of the next (i.e., issued after June 1, 2011) CRTC license issued to Bell, Rogers or Shaw, whichever is latest.

Why do we have these Terms of Trade?

The simple answer is that the CRTC made it very clear to broadcasters that they had to put in place Terms of Trade or else the CRTC would not even consider license-renewal applications from the broadcasters ("[the Commission will] only consider [licence] renewal applications [from the private corporate broadcast groups] for seven years with finalized terms of trade agreements in place." (Broadcasting Regulatory Policy CRTC 2009-406, Policy determinations resulting from the 27 April 2009 public hearing, July 6, 2009, paragraph 84).

The longer answer, and the motivation for the CRTC's position, was that, to quote from the CMPA's website,"broadcaster consolidation in the English-language market has created an imbalance in negotiating power between independent producers and giant media conglomerates". The independent production community felt that structural changes in the television industry had resulted in broadcasters being able to leverage their dominant market positions to extract unfair deals from producers, which could jeopardize the long-term health of the industry.

Who is subject to the Terms of Trade?

The existing Terms of Trade cover the five major private English-language Canadian broadcasters: Astral, Bell, Rogers, Shaw and Corus. The Terms of Trade apply to "all independent productions produced by English-language Canadian independent television producers". To full under the Terms of Trade, the Canadian producer must satisfy the five indicators enumerated in Section 4.10 of CAVCO's Canadian Film or Video Production Tax Credit Guidelines (March 31, 2010) - the five indicators are: control of development; control of all creative and financial elements; control over all aspects of production financing; control over negotiation of initial exploitation agreements; and "reasonable and demonstrable monetary participation in terms of budgeted fees and overhead, and participation in revenues of exploitation".

The Terms of Trade do not apply to the following:

- programs acquired by a broadcaster for which the broadcaster does not have "industry standard commissioning broadcaster creative and financial approval rights"
- broadcaster-affiliated/in-house production
- service production (i.e., one where "the idea or concept originates from, and all or substantially all of the development in the project is undertaken by the broadcaster or its affiliate; or the format rights were exclusively acquired by the broadcaster and were assigned to the independent producer")
- digital production that is unrelated to a television program

How are the Terms of Trade enforced? What happens if someone breaches them?

Disputes relating to the Terms of Trade Agreement itself (but excluding disputes relating to the confidentiality provisions in Section 3(c)) are to be resolved by a dispute resolution mechanism (the DRM) set out in Appendix "A" of the Terms of Trade Agreement. The DRM involves an initial 30-day mediation stage, followed by, if necessary, an arbitration stage conducted in accordance with the Arbitration Act, 1991 (Ontario).

It is important to note that the DRM applies only to disputes relating to the Terms of Trade Agreement itself, and not to contractual disputes relating to a particular license agreement between a broadcaster and producer entered into within the framework of the Terms of Trade Agreement.

What do the Terms of Trade cover?

Although only 20 pages long, the Terms of Trade cover a large number of matters, each of which is the subject of a separate question and answer, below. The areas covered are the following:

- editorial control (i.e., what approval rights broadcasters have)
- evaluation and development (i.e., of potential television programs)
- basic licensing conditions
- license duration
- rights allocation
- broadcaster equity investments
- "super license fees"
- producer fees and overhead
- retention of tax credits
- audit rights

The next eight installments in this Terms of Trade Primer will cover each of the foregoing areas in detail. As the installments are published, the table above will be updated with hyperlinks to the relevant post.