

Broadcasters and producers agree changes to terms of trade



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THE TELEVISION PRODUCTION SUPPLY MARKET HAS always operated within a regulated framework. The establishment of Channel 4 in the early 1980s as a 'publisher broadcaster' encouraged the development of an independent production industry. Although the Broadcasting Act 1990 provided preferential terms for those dealing directly with ITV, under most commissioning agreements the broadcaster took a complete assignment of copyright in the programme (in exchange for cashflowing most or all of the budget), with producers being left with a small share in net revenues, and no real influence on the distribution of their programmes.

During the course of the Communications Bill, the Independent Television Commission (Ofcom's predecessor) undertook a review of the programme supply market, and (to nobody's surprise) concluded that it was highly anti-competitive. As a result, under the Communications Act 2003 Ofcom required all the public service broadcasters (PSBs) (BBC1 and BBC2, ITV, Channel 4 and Five) to issue new codes of practice and terms of trade.

The new codes and terms of trade radically changed the way in which the PSBs contracted with the independent production sector. From 6 January 2004, agreements between PSBs and independent producers were required to be on a licence basis, with broadcasters obtaining a five-year licence (with the option to extend for a further two years) in a defined set of 'primary rights', and producers retaining ownership and control of distribution of all other rights. This mirrored the terms upon which ITV Network Centre contracted with the independent sector, but since the BBC and Channel 4 in particular represent a significant proportion of commissions in the UK, this has radically changed the television landscape, and the fortunes of the independent sector.

NEW MEDIA RIGHTS

Although the new terms of trade have been very successful in establishing a much stronger and more resilient independent production sector, the rush to get codes of practice and terms of trade approved (at a time when Ofcom, having only just been established, had many more issues to deal with), as well as changes in technology and delivery systems, meant that the new terms of trade were still not working properly. In particular, the terms of trade for each of the PSBs differed in their definition and treatment of so called 'new media rights', and there was considerable confusion over the extent to which broadcasters could transmit programming on other platforms as part of their primary rights. In addition, although PSBs were

now only securing a licence in the primary rights, it still meant that for five (or in many cases seven) years potentially valuable secondary television rights in the UK market were effectively locked away.

KEY PRINCIPLES OF THE NEW ARRANGEMENTS

The Producers Alliance for Cinema and Television (Pact) was successful in persuading Ofcom to review the situation. Ofcom concluded that further changes were needed, and gave PACT and the PSBs a period of time to come to a mutual agreement, failing which it would intervene. Since that time Pact has been engaged in negotiations with each of the PSBs, and has now concluded new agreements with the BBC and Channel 4, and is close to concluding new arrangements with ITV and Channel 5.

Although the arrangements with each of the PSBs differ slightly (and are outlined on Pact's website, www.pact.co.uk) the principles are the same:

- 1) The 'primary rights' package secured by PSBs for the licence fee would include a short (between 7 and 30 days) video-on-demand (VOD) window, in which broadcasters would be able to make the programme available on their own services for either commercial VOD or as part of a 'catch up' service.
- 2) The broadcasters would agree a 'release policy' whereby, subject to certain conditions, producers would be able to licence single programmes to the UK secondary market six months after the initial broadcast by the PSB. In the case of returning series, the release policy would allow series to be released to the secondary market after a longer period (generally after transmission of the third series).
- 3) Producers would share in any VOD revenues obtained by broadcasters as part of their primary rights (generally on a 50/50 basis) and the PSB would share in revenues secured by the producer from exploitation of UK secondary television rights during the PSB's licence period (again generally 50/50).
- 4) Producers would be able to offer programmes on a 'download-to-own' service (ie a service that allowed subscribers to download a programme for retention as a permanent copy) within a short period of initial transmission for single programmes (between 8 and 30 days after first transmission) and within a slightly longer period for returning series.

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COMMENT

The revised terms of trade, once fully implemented by all PSBs, should have significant benefits for both parties. So far as broadcasters are concerned, it will enable them to launch a range of new services to catch a dwindling television audience that is increasingly resistant to traditionally 'scheduled services'. Viewers are now choosing to watch what they want, when they want.

From a production company's perspective, although the primary value of programmes might be in the UK market, it will be possible to exploit them on

different services when they are still 'fresh', thereby increasing the already valuable rights retained by independent producers.

In addition, the availability of programming in the UK within a reasonable short period after initial transmission by the PSB should also encourage the development of new secondary services.

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