

## Supporting independent producers - new regulation on secondary rights

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On February 3 2011 AGCOM, the communications regulator, issued a new regulation on the use of secondary rights acquired by media service providers. Article 44(5) of the Audiovisual Media Services Code(1) seeks to support independent producers by providing that where a broadcaster acquires transmission rights for audiovisual content created by an independent producer, AGCOM must limit the period during which such secondary rights may be exploited. The Secondary Rights Regulation(2) determines the maximum duration of such rights.

The need to support independent audiovisual production is recognised in EU law. Recital 71 of the EU Audiovisual Media Services Directive (2010/13/EC) addresses the question of defining "producers which are independent of broadcasters", stating that EU member states must consider criteria such as:

- the ownership of the production company;
- the quantity of programming supplied to each broadcaster; and
- the ownership of secondary rights.

In Italy, Article 2(1)(p) of the code states that 'independent producers' are EU-based producers of audiovisual content which:

- are not controlled by or affiliated to broadcasters; and
- have not sold 90% or more of their content to the same broadcaster
- over a three-year period.

The regulation defines 'primary rights' as rights for the transmission of audiovisual content in Italy on electronic communication networks. Parties that trade in such rights may determine their duration.(3) 'Secondary rights' are defined as rights other than primary rights, including rights to transmit audiovisual content abroad.(4) The regulation prohibits agreements that seek to categorise all rights in the exploitation of an audiovisual work on all platforms as primary rights, as this might reduce the scope and value of secondary rights.

The regulation applies to two forms of production:

- A 'co-production' is an audiovisual work which is co-produced by an independent producer and a broadcaster, provided that the former's contribution represents at least 10% of the total cost.(5) Thus, in some circumstances the regulation reduces the required contribution from an independent producer, which was previously set at 15% or more of the total project development cost or 8% of the total cost.

- A 'production predominantly funded by a broadcaster' is an audiovisual work which is created by an independent producer and mainly funded by a broadcaster, provided that the independent producer

undertakes certain activities and bears at least 5% of the total cost.(6) The activities that an independent producer must perform include:

- choosing the central theme of the work;
- commissioning the development of the screenplay;
- researching and assessing filming locations; and
- choosing the main members of the cast and technical crew, including leading actors and the director.

Thus, if secondary rights are to be assigned, the independent producer must have a financial as well as an artistic input; an executive production role is insufficient to secure secondary rights.

The regulation stipulates a single quota for the independent producer's contribution to the development and creation phases of the work.

Secondary rights are assigned to independent producers in proportion to their financial contribution to the work's development and creation.

For co-productions, the rights in the audiovisual work may not be licensed to the broadcaster for longer than:

- three years for documentaries;
- five years for films, fictional and cultural works, and musical, sports and entertainment programmes; and
- seven years for cartoons.

For productions that are predominantly funded by a broadcaster, the time limits are extended by one year. However, for both forms of production, the parties can agree to shorter periods.(7)

The periods in question run from the first use of the primary rights (ie, the first transmission of the work).(8) If the broadcaster does not exploit one or more of the rights in the work within two years of it becoming available, the rights can be exercised according to the terms contractually agreed between the parties.(9)

Each media service provider must adopt a self-regulation procedure, which must be communicated to AGCOM, in order to ensure that its commercial relations with independent producers are fair and non-discriminatory.(10)

If a communications operator fails to comply with the regulation, AGCOM may fine it between €10,329 and €258,228.

The regulation came into force on March 6 2011. Agreements which were signed before the Romani Decree became effective remain subject to the previous regulatory framework. Any aspect of secondary rights that is not governed by the new regulation is subject to the relevant agreement between the parties.

## Endnotes

(1) Legislative Decree 177/2005.

(2) Annex A to Resolution 30/11/CSP.

(3) Article (1)(1)(i) of the regulation.

(4) *Id*, Article (1)(1)(j).

(5) *Id*, Article 3(2).

(6) *Id*, Article 3(5).

(7) *Id*, Article 4(8).

(8) *Id*, Article 4(1).

(9) *Id*, Article 4(7).

(10) Article 44(5) of the code and Article 5 of the regulation.