

MEDIA: TV AND FILM INDUSTRY OVERVIEW

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This note provides an overview of TV and film for those new to the industry.

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RESOURCE INFORMATION

RESOURCE ID

w-021-8620

RESOURCE TYPE

Sector note

PUBLISHED ON

24 September 2019

JURISDICTION

United Kingdom

SCOPE OF THIS NOTE

This note provides an overview of the TV and film industry, noting particularly how it has been affected by the internet and the emergence of streaming services. It also covers some key legal and regulatory issues, as well as the prevalence and impact of piracy.

The note takes a broadly chronological view of the process of making a film or TV programme.

KEY CONTRACTS

Feature films, and to a lesser degree TV programmes, usually require a complex suite of underlying contractual arrangements.

Development

If a TV or film project is based on an underlying literary (or other) work, the first stage in the development process is usually to obtain an exclusive option to develop the project. These options are typically granted for a period of between 18 months and three years. If the producer manages to raise finance and to get a TV programme or film commissioned, then, upon payment of a rights fee to the original author of the underlying work, the rights to make an audiovisual production are formally granted to the producer. If the producer does not succeed in raising money or getting a programme commissioned, the option will lapse and the author of the work will be free to grant the rights elsewhere.

As well as obtaining an option for the work that forms the underlying material for an audiovisual project, a number of other key agreements are required including:

- Writer's agreement(s) for the writer of a television script or film screenplay (see [Standard document, Screenplay writer's agreement](#)).
- Development finance arrangements.
- Engagement of casting director to source talent.

Production

Once a producer has raised finance for a film or has a broadcast commission for a TV programme, the pre-production phase can begin. This will be a very labour-intensive phase contractually, as myriad agreements are required and, depending on where the project is to be filmed, the agreements will have to be tailored or adapted to accord with the rules and regulations of relevant industry bodies (see [Tax incentives](#)).

These include:

- Finance/funding agreements (see [Standard document, Film equity investment agreement](#)).
- Production services agreement.
- Co-production agreement where there are two producers, often in different jurisdictions.
- Producer and director agreements (see [Standard documents, Film producer's agreement](#) and [Film director's agreement](#)).
- Lead actors' agreements.
- Cast and crew agreements (see [Standard documents, Film actor's agreement](#) and [Film crew member's agreement](#)).
- Composer's agreement (see [Standard document, Short-form film music commissioning agreement](#)).
- Location agreement (see [Standard document, Location agreement](#)).

Distribution

Distribution may also be considered at the production or pre-production stage, particularly in the case of big-budget films. Sometimes, the distributor is the same entity as the producer. For example, online distributors such as Netflix have started to produce their own programmes and a TV channel may commission a programme.

For more on distribution, see [Pre-sale advances on distribution](#) and [Distribution](#).

INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights are at the heart of most TV and film agreements, in particular, copyright. Format rights are also key to some genres of TV programme.

Copyright

Copyright is the legal protection for original literary, **dramatic**, musical or artistic works, sound recordings, films, broadcasts or cable programmes under [section 1](#) of the Copyright, Designs and Patents Act 1988. Films and broadcasts fall within the definition of dramatic work and can therefore be protected by copyright.

In general, it is the person who creates the work that initially owns the copyright. In the film and TV industry, the copyright in the work and the products of an individual's services will need to be licensed or assigned to the production company which is making the audiovisual project, so that at the point of licence or assignment, the latter has control of the copyright, which it will need for cinema release, TV exhibition or streaming.

The period for which protection is offered by law varies between territories according to the type of work. In the UK, the period for films is 70 years after the death of last of the director, author of the screenplay and composer.

A TV broadcast receives protection for 50 years from the end of the calendar year in which the broadcast was originally made. For example, a programme exhibited on 31 December 2019 will have copyright protection until 31 December 2069. Broadcasts include radio TV and live internet streaming.

For more on intellectual property rights in films, see [Sector note, Media: regulatory overview: Film](#).

Can a TV format be protected?

Because there is no copyright in an idea, an issue that practitioners frequently face is how best to protect TV programme formats.

Case law

In [Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd \[2017\] EWHC 2600 \(Ch\)](#), a rare and groundbreaking case on TV format rights, the court indicated that it was at least arguable in principle that a game or quiz show format was capable of protection as a dramatic work. However, in this particular case the claim failed for a number of reasons, principally because there was no copyright in the synopsis. For more information on the case, see [Legal update, High Court considers subsistence of TV format rights](#).

It is worth noting that the bar for such claims to succeed is extremely high, and they usually fail.

What steps can the creator of a new TV format take to protect it?

Given the difficulties of protecting ideas for TV formats, the creator can take a number of steps to try to protect a new TV format.

Keeping records throughout the process is essential. Producers and other programme creators should take detailed minutes of meetings, identifying those attending and from whom ideas originate. All documentation and emails should be filed, stored and dated. All elements of any format should be expressly and individually listed and written down.

For a concept to be confidential, a creator should take steps to ensure that the information is treated as confidential. It is also advisable to require that a non-disclosure agreement (NDA) is signed by any third party to whom the format is submitted. The problem for creators is that broadcasters are typically unwilling to sign NDAs, because they receive so many concepts and formats. There may be common elements in different programme

proposals and broadcasters do not want to exclude their use by signing an NDA in favour of a third party who has submitted a different proposal.

An intangible “idea” can neither be protected by copyright nor registered as a trade mark. However, titles, logos and catchphrases can be registered as trade marks. Producers must consider the territories where the format is likely to be marketed and sold; ideally, they should register the trade marks there and generally as widely as possible. One of the best examples of protecting a TV format in this way is *Who Wants to be a Millionaire?* The programme had extensive trade mark protection in different territories, in which there was real and tangible value with the result that, when the property was sold, the trade mark protection across so many different territories materially benefitted the price.

FINANCE

Equity finance

Equity financing is the term used in the film industry when investors contribute money to the production of the film in exchange for a stake in the film’s proceeds. The amount of money the investor makes from the initial investment is then dependent on the film’s success or otherwise. If a project is successful, profits will be used to pay back the initial investment and any additional return depending on the initial investment return stipulated in the investor contract. This approach to funding a film allows the filmmaker to spread the financial risk associated with film production, even if it decreases their own capacity for profits. If a project is unsuccessful, an equity investor can lose some (or all) of its investment.

Crowdfunding, which involves raising small amounts of money from a very large group of people, has also become a popular form of raising production funds for filmmakers. It is usually done through an online crowdfunding platform such as “Movie Investor” or “The Movie Fund”.

Debt

Debt and mezzanine lending are also common ways in which filmmakers fund their productions.

Films can be debt-financed by way of a loan obtained from an institutional or private lender. In these situations, the lender will take security over the production vehicle and its assets, which will usually include the underlying intellectual property rights in the project.

Mezzanine financing is often seen as the middle ground between debt and equity financing. It is a form of subordinate debt, based on a film’s ability to repay the debt from free cash flow, and can be converted to equity if the borrower of the money defaults on the loan. It is considered a high-risk form of debt and the fees and interest charged reflect that risk, but it can also offer very high returns on investment. Many independent film producers will use mezzanine financing in addition to equity finance and subsidies such as tax incentives or pre-sales to reduce the risk that comes with mezzanine. See [mezzanine debt](#).

Subsidies

Subsidies, usually in the form of co-production agreements or tax credits, are a common method used by filmmakers to fund production. For information on co-production agreements and tax credits, see [Tax incentives](#).

In the UK, subsidies are often available to encourage filming in the regions. Regional investment funds include: the Welsh Government’s Media and Investment Fund, the Yorkshire Content Fund and the Liverpool City Region Production Fund. The aim of these funds is to encourage and incentivise investment within the region from production companies outside the region and to encourage regional production companies/individuals from within that specific region by investing in their productions.

The way in which the subsidies work is that a percentage of the production budget is paid for by the subsidy. The requirements and rate of investment provided by the subsidy fund varies in relation to each fund. For example, Ffilm Cymru Wales Production Funding provides grants of up to £300,000 for writers, directors and producers who are either born or currently residing in Wales and working in English or Welsh) and Creating Scotland Screen provides single project production funding of up to £500,000 for films produced in Scotland.

One major example of a successful, major production being funded through a regional subsidy is the TV series *Rastamouse*, which was funded through the Wales Creative IP Fund from the Welsh Assembly.

Some examples of feature films produced with the assistance of regional subsidies include:

- *Peaky Blinders* (Yorkshire Content Fund).
- *Testament of Youth* (Yorkshire Content Fund).
- *Dad's Army* (Yorkshire Content Fund).
- *Eternal Beauty* (Ffilm Cymru Wales).
- *The Toll* (Ffilm Cymru Wales).
- *Lady Macbeth* (iFeatures).

Pre-sale advances on distribution

Filmmakers will also often raise production funds through selling the right, prior to its production, to distribute a film in one or more territories. This is known as a pre-sale. For example, a British film company may sell its rights to distribute a project in, for example, the US in exchange for receiving an advance. Typically, the advance would be payable as to 10% on signature of the agreement and 90% when the film is delivered to the distributor. To cash-flow the advance, the production company would then borrow from a bank (or other industry lender) a sum equal to the advance, which can then be used towards production costs and forms part of the production budget for the project. Any future revenue for the film from the US will then be split after the distributor has recouped its advance and recoupable costs, with the distributor retaining a percentage and accounting to the producer for the balance. Different percentages will apply to different forms of exploitation, and each deal varies depending on a whole host of factors including the level of the advance; established industry practice; and the respective bargaining powers of the parties.

For more on film finance, see [Practice note, Film finance: overview](#).

DISTRIBUTION

Finding a distributor

The traditional route for a film seeking distribution is to enter a major international film festival such as Cannes, Toronto, AFM, London and so on. A film selected for these festivals will be seen by global distributors who will bid for the right to distribute it in their territories (countries). However, it is often unnecessary to wait for big-budget films to be shown at a festival because typically they are made with the involvement of distributors who are on board even as far back as pre-production.

Sales agents are involved in the distribution process. They assess new films and buy worldwide rights which they then sell on to distributors across the globe. The key difference between a distributor and sales agent is that a sales agent is hired by a producer to find a distributor. It is not always essential to have one but the benefit of a good sales agent is that they will have exceptional relationships and connections with festivals and distributors and are essential in getting good deals for territories. A distributor is much more likely to take up an offer on a film if it is presented to them by a recognised sales agent.

If a film is not shown at, or cannot be purchased through, a film festival, often the route is direct-to-stream. Independent producers frequently opt to distribute not through a TV broadcast but through direct-to-stream, from online distributors such as Amazon Video, YouTube or Netflix.

For TV programmes, the routes for distribution are different.

Members of the acquisition department of distribution companies, for example, Channel Four or Sky TV will make deals and purchase TV content. In common with films, the route to this is via TV festivals or as part of an ongoing relationship with a production company. Major production companies with smash hit TV programmes to their name usually have an ongoing relationship with a distribution company, or are owned by the same parent media group. However, finding a distribution deal for a one-off, low-budget programme can be a huge challenge for production companies as they are usually seen as hugely risky investments. As with feature films, often independent producers of TV programmes opt for direct-to-stream if they cannot find TV broadcast companies to air their programmes.

Distribution agreement

Subsequently, through a distribution agreement, the producer of the film grants the distributor or broadcaster the right to broadcast the content for a specific duration, in one or more specific territories. In exchange, the distributor or broadcaster will receive a distribution commission equal to a percentage of the revenues generated by the programme in that distributor's territory, as well as its out-of-pocket costs of distribution, which are typically subject to an agreed cap.

Streaming

Catch-up services

Catch-up services are exactly what their name suggests: viewers can catch up on TV programmes they may have missed on the date of the original broadcast. Most of the UK's major broadcasters offer a catch-up TV service:

- BBC programmes are available on iPlayer free of charge for at least 30 days after they are first aired.
- ITV programmes are available on ITV Hub free of charge for streaming for 30 days.
- Channel 4 programmes are available free of charge on ALL4 for at least 30 days.
- Now TV provides Sky TV programmes through buying one of four TV passes (for non-subscribers); Sky subscribers get the service free as part of their package.

Video-on-demand

Today's global film industry is dominated by traditional film studios, principally Sony, Time Warner and Walt Disney along with streaming services, the major ones being Netflix, Amazon Video and Hulu.

Video-on-demand (VOD) enables audiences to access films or TV programmes through a range of devices anytime, anywhere. Providers normally allow users to stream content through a set-top box or other device, either in real time or to download for viewing at any time.

VOD subscriptions are set to jump from £439 million in 2018 to over £900 million in the next five years, on any analysis a staggering rate of growth (see *"Global video-on-demand subscription set to near 1bn by 2024"*, James Warrington, City A.M. (3 June 2019)).

According to the BFI Statistical Yearbook 2018, the total value of the VOD film market in 2018 was estimated at £681 million, up by 18% from 2016.

Revenues from subscription VOD (SVOD) platforms are estimated to have been over £20 million in 2018 (see *Video-on-Demand statistics from Statista*).

One of the key drivers of growth in the digital video market in the UK in recent years has been the rapid take-up of over-the-top (OTT) SVOD services. Figures showing this can be seen at *BARB's UK Television Landscape Report: Subscription VOD households* which updates quarterly. See also *Ofcom: Communications Market Report 2019 (4 July 2019)*.

Worldwide

The following are statistics from Statista on the rise of VOD worldwide (see *Video-on-demand statistics from Statista*):

- Revenue in the VOD segment amounts to \$32.8 billion in 2019.
- Revenue is expected to show an annual growth rate (CAGR 2019-2023) of 3.3%, resulting in a market volume of \$37.3 billion by 2023.
- The market's largest segment is SVOD with a market volume of \$24.8 billion in 2019.
- User penetration is 23.9% in 2019 and is expected to hit 25.4% by 2023.
- The average revenue per user (ARPU) currently amounts to \$23.22.

Online VOD services in the UK employ three basic types of business model:

- Rental VOD: one-off rental, also known as download-to-rent (DTR) or retail or download-to-own (DTO). This is also known as EST, for example, iTunes or Google Play.
- SVOD: unlimited access to content for a fixed monthly sum, for example, Amazon Prime Instant Video or Netflix.
- Free/advert-supported VOD from catch-up services, for example, BBC iPlayer or 4oD.

Audience for on-demand film

People can watch films on demand wherever they are, as long as there is a 3G/4G/5G hotspot or wireless router to connect their (mobile) devices to the internet. According to the *2019 Office of National Statistics (ONS) report on internet access*, 93% of households in the UK had access to the internet and 73% had "on-the-go" access (that is, away from their home or work). Among all adults, 84% of adults used a mobile phone or similar portable device to connect to the internet "on the go". In addition, 64% of households connected via mobile broadband.

REGULATORY FRAMEWORK AND INDUSTRY BODIES

Although this note only deals with UK bodies, it should be noted that, where key personnel are involved in international feature films, agreements often have to be tailored to comply with the rules of SAG (the US Screen Actors' Guild), and the WGA and DGA (respectively the US Writers' and Directors' Guild). The UK relevant bodies are set out below.

Ofcom

Ofcom is the UK regulatory and competition authority for the broadcasting, telecommunications and postal industries. It is a government-approved body that ensures viewers and listeners are protected from harmful or offensive material on TV, radio and on-demand. Its Broadcasting Code sets the UK standards for programmes including on-demand services, TV and radio stations. Strategic direction is provided by Ofcom's board, which also acts as its main decision-making body.

BBFC

The British Board of Film Classification (BBFC) is a non-governmental organisation responsible for the national classification and censorship of films. Founded in 1912, the board has responsibility for classifying content under the *Video Recordings Act 1984*. The BBFC is also associated with the Advisory Panel on Children's Viewing (APCV), which provides advice on issues relating to classifying children's content, and the Video Packaging Review Committee (VPRC), a voluntary system designed to prevent offence being caused by violent or sexual imagery on the covers of videos and DVDs displayed in public places.

BECTU

The Broadcasting, Entertainment, Communications and Theatre Union (BECTU) is the national media and entertainment trade union. It represents more than 40,000 staff, contract and freelance workers in creative industries across broadcasting, film, independent production, theatre and the arts, IT and telecoms, live events, leisure and digital media. Its work includes negotiating pay and contracts on behalf of its members, providing advice and representation on health and safety, training, support and networking opportunities, as well as a quarterly union journal. BECTU is run by a senior executive committee, made up of members elected in a ballot every two years.

PACT

The Producers Alliance for Cinema and Television (PACT) is the UK trade association representing independent TV, film, digital, children's and animation media companies. It also provides legal and business advice to its members as well as campaigning for the rights of independent content producers. PACT also works with broadcasters and producers to encourage diversity in the film industry and to promote fair access for all.

TAX INCENTIVES

Tax credit for film and TV

As an incentive for filming in the UK, film and TV production companies are able to apply for tax credit through HMRC. Companies can apply for Film Tax Relief (FTR) if the film passes a cultural test, is intended for theatrical release and at least 10% of the total production costs relate to activities in the UK. Companies can claim High-end Television Tax Relief (HTR) if the programme in question passes the same cultural test and is intended for broadcasting. Additionally, the TV programme must be classified as a comedy, drama or documentary, have a slot length greater than 30 minutes and have at least 10% of the total production costs relating to activities in the UK. In addition, for the TV programme to qualify, the average qualifying production costs per hour of production length must also not be less than £1 million per hour.

Co-productions

Films and high-end TV programmes can also apply for tax relief if they qualify through an internationally agreed co-production treaty. Certification of a co-production is administered by the British Film Institute (BFI). The UK currently has 11 bilateral co-production treaties with countries both inside and outside Europe. The decision to grant a film or TV programme co-production status "is made jointly with the competent authority in the co-producing party country or countries".

Enterprise Investment Scheme

The Enterprise Investment Scheme (EIS) is a government scheme that helps new and high-risk companies raise finances by offering generous tax reliefs to investors. Among other conditions, the money raised must be used for a qualifying business activity and not be used to buy all or part of another business.

However, since 2018, EIS is no longer applicable for films. This is because, although a film company could be considered high risk, the monies raised for a film do not provide a long-term benefit, as film revenue will eventually

decline after its release. This is a disappointing turn of events for many UK film producers; the British film industry was previously one of the biggest sources of the scheme, which helped to fund many popular British films.

There may be a way around this for film companies if the investment is used on costs unrelated to a specific film in a way that will grow the company, such as by hiring permanent staff, although many companies applying with this criteria are still being rejected.

MAIN RECENT CHALLENGES FOR PRACTITIONERS

There is less work in this field than used to be the case, with competition to get instructions for film and TV work that much greater.

Much of the work that solicitors used to routinely do is not now farmed out to external lawyers but is done by in-house legal teams; companies like Viacom, Netflix and Disney employ literally hundreds or even thousands of lawyers.

The work is also often far from remunerative. Budgets for legal work for film and TV projects are almost always fixed, but there is no way of knowing at the outset of a project just how much work is going to be involved. To illustrate the point, a low-budget film may have a very modest allowance for legal fees, but using multi-financiers, complex distribution arrangements, and detailed and drawn out negotiations for hiring talent can easily cause work to spiral and go way beyond the agreed budgeted figure for legal costs.

Agreements, both those to acquire rights and talent deals, are becoming ever more bespoke with agents' specific demands and requirements meaning that standard templates only take you so far and are usually now just a starting point for individual deals. Also making the contractual position more complex are the new forms of commercial exploitation, both due to the digital explosion and the desire to exploit audiovisual works in seemingly ever-increasing number of ways. These factors result in ever more complex contracts which need frequent updating.

Notwithstanding these challenges, there is no shortage of applicants wanting to get into the field, as the work is always varied, intellectually stimulating and of course fun.

PIRACY

The rise in internet usage (see [Audience for on-demand film](#)) has inevitably led to a rise in file sharing and online piracy. To rectify this, the industry has taken legal action against peer-to-peer networks. In the past few years, piracy cases in the High Court have mostly related to music and premier league football matches.

Losses to the industry

A 2018 IPO study, [Online Copyright Infringement Tracker](#) (2018 IPO study), estimated that 15% (approximately 6.5 million) of UK internet users aged 12+ downloaded or streamed at least one item of infringing content between January and March 2018. The highest level of infringement was in TV (23%), followed by sport (21%), with music and films the next highest (19%).

Prevalence of the problem

The 2018 IPO study reported that 65% of UK consumers who consumed any type of content online paid for at least some of it between January and March 2018, up from 60% in 2017.

However, global research carried out by tech company MUSO (see [Press release, "Global piracy increases throughout 2017, MUSO reveals"](#)) found that global piracy rose by 1.6% over the course of the year from 2016 to 2017 and that more than a third of the 300.2 billion visits to piracy sites were to those hosting TV content.

Due to the rise of online streaming services, film studios have also increasingly found it difficult to generate revenue through DVD sales, which, according to a 2018 report by Digital Entertainment Group (DEG) (see *"US Home Entertainment Spending Rose 11.5% In 2018 To \$23.3B, DEG Says"*), fell in the US in 2017 and has been consistently declining since the introduction of VOD.

The downloaders

The 2018 IPO study contained the demographic profile of the infringers, of whom:

- 58% are male.
- 66% are under 35.
- 15% are ABC1s.

The 2018 IPO study also reported that convenience and the fact that the illegal service was free are the principle reasons cited by infringers for engaging in illegal download sites. Other reasons claimed as reasons for infringement included, speed of access, the ability to try before buying, and simple availability.

Geo-blocking

Due to the increase in use of technology facilitating illegal downloads, the prevalence of geo-blocking has increased to protect rights owners. Geo-blocking is a system used to limit a user's access to the internet based on their geographical location.

The system is similar to that previously used in region coding on DVDs. Website administrators online, such as those who manage video-streaming sites such as iPlayer and Netflix, use geo-blocks to limit their audiences in certain territories. The majority cite rights-licensing limitations as the reason for geo-blocking. Controversially, many online retailers use geo-blocks to advertise products at different prices in different countries.

Cross-border access to online TV and radio content

In April 2019, the European Council adopted a draft directive on rights clearance for online TV programming, which will simplify the licensing of copyright-protected material contained in programmes intended for broadcast across EU member states (see [Legislation Tracker, Digital Single Market Strategy: TV and radio programmes: legislation tracker](#)).

The directive clarifies the legal status of "direct injection". This is where a broadcaster transmits its programme-carrying signals to signal distributors in such a way that these signals are not accessible to the public during that transmission. Some broadcasters and distributors had claimed that using this means of transmission meant there was no communication to the public under copyright law and so no liability to pay for creative material. The new directive aims to ensure that creatives will be adequately remunerated when their works are used in programmes transmitted through direct injection.

The directive covers all radio programmes, TV news and current affairs programmes as well as TV programmes which are fully financed own productions of the broadcasting organisations.

Existing contracts will remain unaffected for a period of four years from the entry into force of the directive. The directive covers retransmissions carried out via cable, satellite, digital terrestrial, closed circuit IP-based or mobile networks. It also covers retransmissions carried through the open internet if they can take place in a managed environment, that is, they are subject to some kind of digital identification.

Member states will have two years, from the signature and publication of the directive in the Official Journal of the EU, to transpose the new rules into their national law.

The future

The tides do seem to be turning. Unauthorised copying is down 72%, a decline ascribed to the rise of legal alternatives such as Amazon Video, Hulu and Netflix, which offer consumers a more reliable experience than illegal file sharing sites.

Furthermore, the new *Digital Economy Act* came into effect on 1 October 2017. This extends criminal penalties for online copyright infringement, bringing them in line with equivalent offences for physical copyright infringement (maximum custodial sentences have increased from two to ten years).

IS TV THE NEW FILM?

The first credit on the new series of *The Handmaid's Tale* is illustrative: a joint credit for MGM and Hulu. Note the juxtaposition of one of the most famous US film studios with a rising star among the major streaming services. MGM has been associated with Hollywood from the 1930s onwards, and the name conjures up images of glamorous A list actors and mogul film producers from a time gone by. The latter is associated with new technological advances, the subscription model, and an audience ever hungry for new and varied content.

Or consider *Catch 22*. This TV series is the latest hit for terrestrial broadcaster Channel 4, but is produced by George Clooney, one of Hollywood's most bankable film stars.

There is increased demand for content to be delivered faster than ever before. Streaming sites have been around for a few years, but the film industry has yet to really deal with this fundamental shift towards content that targets big audiences who can connect with that content online. The seamless connection between films and social media, and across devices, makes on-demand services the ideal format for filmmakers, studios and TV broadcasters to focus their efforts on in the future.