

# CODE OF PRACTICE



## **Relating to Programme Commissioning of Independent Productions by Channel 5**

### **1. INTRODUCTION**

- 1.1 Channel 5 is committed to working with independent producers to continue developing a competitive television programme supply market in the UK. Where an independent production company has conceived or developed a programme idea, we accept they should retain the ultimate intellectual property rights to such programmes. This Code of Practice sets out the principles to which Channel 5 will adhere in its dealings with independent producers when such programmes are commissioned.
- 1.2 For the sake of clarity, this Code of Practice does not apply to programme ideas that originate with Channel 5 which we may ask independent producers to make for us.
- 1.3 Throughout our existence, Channel 5 has adopted a policy of negotiating potential developments and commissions on a case by case basis in a flexible, fair and reasonable manner. We will continue to follow this approach in the future.

### **2. FUNDAMENTAL PRINCIPLES**

- 2.1 Channel 5 does not operate an annual commissioning cycle but commissions in accordance with the needs of its schedule throughout the year.
- 2.2 Channel 5 will treat all programme proposals it receives in strictest confidence.
- 2.3 Channel 5 will respond to producers as soon as possible and in any event within six weeks to advise whether or not Channel 5 is interested in commissioning a development or programme. Where Channel 5 is so interested it will ask the producer to complete a standard Commissioning Specification Form for submission to the relevant Production Representative.
- 2.4 Channel 5 will consider all programme proposals it receives from independent producers on their respective merits and by reference to the obligations imposed on it by legislation, the terms and conditions of its broadcast licence, the needs of Channel 5's schedules, the funds it has available and the existence or potential of complementary funding sources (such as co-production funding).

- 2.5 Channel 5 will commission developments on the basis that all rights will be re-assigned to the producer on repayment of Channel 5's development costs, on turnaround nine months from delivery of the completed development materials if Channel 5 has not by that time commissioned production of a programme or series.
- 2.6 Channel 5 will not prescribe any particular funding arrangement and is prepared to consider on a case by case basis a variety of financing propositions. Channel 5 will fund all or part only of the budgeted cost of production and negotiate and agree in good faith whatever position with regard to the ownership, exclusivity, duration, exercise, control and participation in exploitation income as the parties agree is appropriate, taking into account all relevant circumstances including these principles and the need to balance risk with reward.
- 2.7 All negotiations will be carried out by Channel 5 in good faith, to a reasonable timetable and in a transparent, flexible, fair and reasonable manner.
- 2.8 Channel 5 has negotiated a standard production agreement with Pact to act as a standard set of terms for agreement with individual producers, available at <http://about.five.tv/programme-production/business-affairs/documentation>. However, this does not preclude Channel 5 and an individual producer negotiating an agreement that includes variations to this agreement.

### **3. THE COMMISSIONING PROCESS**

- 3.1 The procedure adopted by Channel 5 for commissioning developments and programmes is set out below:
- 3.1.1 When Channel 5 wishes to commission a producer to produce and deliver either development work or a programme or series, the relevant Channel 5 Production Representative will raise an internal document ("a Commissioning Form") which will be sent to the appropriate departments within Channel 5. Following receipt of a Commissioning Form, the producer will be notified of the contact names and details for Channel 5's production and programme commercial affairs departments. (None of these representatives will be directly involved in the production of in-house programmes that would compete directly against independent producers for place in the Channel 5 schedules.) Channel 5's production representative will negotiate a budget with the producer. Commissioning Forms will normally be raised a minimum of four weeks before the start of production to allow for negotiations.
- 3.1.2 Once a budget and the deal terms have been agreed, they will be submitted to Channel 5's programme finance committee for approval. Producers will receive confirmation no later than five working days after the date of the meeting as to whether or not programme finance committee approval has been given. Production should not commence until such approval has been received and Channel 5 will not bear any

liability for commitments made before then. It is the duty of both Channel 5 and the producer to ensure that production does not start until approval has been confirmed. To ensure separation of responsibilities for programme commissioning and operation of in-house production activities where they exist, the managers of Channel 5's in-house production activities shall not participate in the decisions of the programme finance committee.

3.1.3 Once programme finance committee approval has been granted, Channel 5's programme commercial affairs representative will issue a contract setting out the terms and conditions of the commission as soon as reasonably practicable.

3.3 Up-to-date information relating to programme production, technical delivery and credit requirements, guidance and advice shall be made available to producers at <http://about.five.tv/programme-production/programme-management>.

## 4. PAYING FOR RIGHTS

4.1 Channel 5 will be clear about what it is prepared to pay for each category of rights it is to acquire on all commissions. In particular, Channel 5 will publish in clear terms and make available to producers at <http://about.five.tv/programme-production/programme-management> a range of indicative prices by genre and sub-genre for peak and off peak transmission slots for the licence fees it would be prepared to pay in order to acquire a licence of the Primary Rights, the scope of which is set out in this section of this Code and is expanded upon in Channel 5's standard production agreement settled with Pact.

4.2 Channel 5's indicative prices for Primary Rights shall be based on historical costs paid per genre and for particular broadcast time-slots, which may be updated from time to time to reflect changes affecting costs and value across the broadcast industry. Among the factors that Channel 5 will take into account when negotiating the price it will pay for a specific commission are: prevailing economic conditions; competition from other broadcasters; and the changing popularity of different genres.

4.3 As is common in the industry, we will also negotiate and agree in good faith production fees on all commissions on a case by case basis by reference to current industry rates and in particular the scale and volume of a production.

4.4 Primary Rights include an exclusive licence to transmit the programme on the main linear Channel 5 service however delivered, non-exclusive Clip & Promotional Rights and, subject to exercise of an option, exclusive 30 day video-on-demand rights (which may be exercised according to various categories of business model and the remuneration formulae agreed between Channel 5 and Pact).

- 4.5 In addition, Channel 5 will also acquire further rights including:
- 4.5.1 certain operational rights and entitlements to enable Channel 5 to effect the efficient transmission or exploitation of the rights granted to it (including the right to subtitle and dub; the right to edit for timing, regulatory, legal or specification compliance and other specified reasons); technical manipulation rights; off-air recording rights and limited cable relay rights in the UK; and
  - 4.5.2 an option to obtain exclusive transmission rights for Channel 5's secondary television channels. (Pact and Channel 5 have agreed a formula for calculation of a fee for transmission on Five's secondary channels based on the number of such transmissions, although there is no obligation on the Producer to accept such a fee if it is offered.) Such an option shall not apply when a contribution to production funding has been secured from a third party broadcaster in exchange for secondary television rights;
  - 4.5.3 the right to operate telephone lines (both premium and otherwise) for and in connection with competitions and similar activities featured in or associated with a transmission of a programme with revenue received from such telephony-based activity being shared with the producer on terms to be agreed in good faith on a case by case basis.
- 4.6 Channel 5's television rights shall be exclusive in the UK for at least six months from first transmission (subject to a maximum of 12 months from delivery), except:
- 4.6.1 for returning series where a further series is commissioned in succession to an earlier series within a timetable agreed with Pact, when Channel 5's rights shall be exclusive until the first transmission of the next series is shown on a Channel 5 service; or
  - 4.6.2 for programmes where Channel 5 has itself contracted the talent appearing in the programme, or for some other good reason (such as the calling of a General Election or other major news event, legal proceedings, force majeure or to respect the feelings of individuals who have suffered bereavement or other major loss or suffering), in which case Channel 5 may by notice extend the exclusivity by up to six months.
- 4.7 Channel 5's video-on-demand rights (where the option to acquire them has been exercised) shall be as defined and set out in Channel 5's standard production agreement settled with Pact, except when a contribution to production funding has been secured from the producer itself or from a third party acquiring DVD rights in the UK.
- 4.8 A standard licence of Primary Rights for all genres (except for Children's programmes where additional transmissions may be required) will be for three "transmission weeks" over three years and will provide Channel 5 with options

to extend this period by two years and/or for further transmissions on terms agreed between Channel 5 and Pact.

- 4.9 Producers shall be required to clear the first two transmissions (and any associated time-shifted retransmissions) in any transmission week. Any actual clearance payments required to be made in respect of additional transmissions will be payable by Channel 5.

## **5. LICENSING RIGHTS**

- 5.1 Channel 5 will be flexible in its approach to windowing arrangements for linear rights to match the need to complete finance for the programme.
- 5.2 Channel 5 will not hold on to rights that it has decided either that it does not intend to exploit or which it has failed to exploit for a continuous period of 24 months and shall, at the producer's request, re-assign rights and/or endeavour to release holdback periods early to enable exploitation by the producer on the understanding that Channel 5 will receive its due share of Net Receipts. This early release policy is, however, unlikely to be applied in respect of the secondary television holdback in the UK where the programme belongs to a strand or to Returning Series.
- 5.3 A licence of Primary Rights will be drawn up in a manner designed to ensure that the Producer will be able to use Channel 5's commitment to raise additional funding for the production from a bank or other third parties on market terms.
- 5.4 All rights not acquired by Channel 5 under a standard licence of Primary Rights will be retained by the independent producer unless otherwise agreed. Channel 5 will not link negotiations relating to the acquisition of Primary Rights and their exploitation to negotiations for exploitation beyond the periods specified in Channel 5's standard licence. Channel 5 will negotiate in good faith with producers where it wishes to extend the term or the rights granted and, subject to the foregoing, will not seek to extend the scope of its control over the producer's retained rights beyond the standard licence holdbacks.
- 5.5 Subject to the above, Channel 5 will not be precluded from seeking to acquire additional rights through commercial negotiation. Where Channel 5 is prepared to contribute amounts in excess of the tariff ceiling for the genre/slot concerned (as set out in its current published indicative programme tariffs), it will normally make the commitment of such excess (but not of the amounts up to the tariff ceiling) conditional on securing additional rights.
- 5.6 Channel 5 will normally require that the commissioning documentation grant to it the right to commission further programmes on terms substantially similar to the original commission within 12 months of delivery of the original (but no later than six months following the first transmission by Channel 5 of all episodes).

- 5.7 Channel 5 will not seek matching-rights provisions (or provisions which have that effect) in relation to any part of the producer's retained rights.

## **6. CHANNEL 5 INTEREST IN PRODUCERS' RIGHTS**

- 6.1 Channel 5 shall retain an interest in fully-funded commissions, the level of which shall be subject to commercial negotiation.
- 6.2 Channel 5 accepts that the decision as to which distributor to appoint will be made by the producer and no deal will be conditional on the appointment of a distributor linked to Channel 5.
- 6.3 Channel 5 will negotiate and agree in good faith the position with regard to ownership control and exploitation of format and changed format rights in keeping with the principles set out in Channel 5's standard production agreement settled with Pact.

## **7. REVIEWING AND REPORTING ON THIS CODE**

- 7.1 Channel 5 will undertake regular internal reviews at senior management level of the operation and effectiveness of this Code and meet with Ofcom as and when requested to review its operation.
- 7.2 Channel 5 will refer any complaints it receives from independent producers and/or Pact with regard to application of this Code of Practice for consideration by a Committee chaired by Channel 5's Director of Programmes and ensure that any complainants are afforded a reasonable opportunity to detail their complaint including, if requested, at a meeting between members of the Committee and the complainant and shall provide a detailed written response to a complaint within a reasonable time.
- 7.3 In order to keep costs on both sides to a minimum, Channel 5 will submit unresolved complaints to arbitration by an independent third party approved by Channel 5 and the complainant and will abide by the decision of such third party.
- 7.4 Channel 5 will prepare a report on the operation of this Code for each calendar year and submit the same to Ofcom no later than the end of the first quarter of the following year. Each report shall include:
- 7.4.1 data on the number of commissions undertaken during the period covered by the report by genre;
- 7.4.2 a breakdown on whether rights acquired in relation to those commissions were for Primary Rights only or included additional rights such as UK secondary television rights;

- 7.4.3 a report of instances where Channel 5 exercised its right to renew the original licence;
- 7.4.4 where the price paid for each commission sits in relation to the relevant tariff range;
- 7.4.5 the duration of rights acquired;
- 7.4.6 the operation of Channel 5's early release policies;
- 7.4.7 a review of Channel 5's compliance with its commissioning timetables; and
- 7.4.8 a summary of the operation of its dispute procedures (including number of disputes and how they were dealt with).

*Channel 5 Broadcasting Limited*

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