MDR Communications REPORT

International Review of Policies and Programs that Support the Development, Retention and Exploitation of IP by Independent Producers

DECEMBER 2022

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Introduction

1. Preamble

The screen-based sector constitutes a key economic sector in Canada with significant growth potential. An innovation sector, screen-based production is based on the creation and exploitation of intangible assets in the form of intellectual property, or IP. The retention and exploitation of IP for screen-based content has been identified as the most important success factor in building robust companies.[1]

Evolving financing structures are impacting on the ability of producers to exploit their IP. New sources of financing from global over-the-top (OTT) networks have ushered in new business models, with implications for the traditional exploitation of IP. Increased global competition and rising costs of production have been met with consolidation and vertical integration in the industry in Canada and elsewhere, reshaping the relative market power of buyers and sellers of screen-based content.

Within this context, Communications MDR was commissioned to examine the policies and programs implemented in foreign jurisdictions to encourage sustainable companies through the development, retention and exploitation of IP.

1.1 Goals of the Study

The goals of the study are two-fold:

- To examine measures, programs and policies in a select number of jurisdictions aimed at helping screen-based companies to develop and retain IP.
- To identify best practices to encourage the development, retention and exploitation of original IP that can support corporate growth and capacity building post-COVID, with special consideration for underserved communities, that can inform developments in the Canadian context.

2. Methodology

The consultants conducted an extensive international review of literature on approaches being taken to help companies develop, retain and exploit their IP. The review focused on the following jurisdictions: the United Kingdom (UK), Ireland, France, Germany, Italy, Australia and New Zealand and examined policies and regulations, funding programs and fiscal incentives that support the development of IP. For each jurisdiction, the consultants identified regulations and policies such as mandated terms of trade and voluntary codes of fair practice. The consultants examined slate development programs, automatic funding mechanisms and non-repayable public financing. With respect to fiscal incentives, the consultants examined innovative tax

[1] Olsberg SPI, *Building Sustainable Film Businesses: The Challenges for Industry and Government*, prepared for Film i Väst, PACT and the Swedish Film Institute, 2012; Olsberg SPI, *Best Practice in Screen Sector Development*, Association of Film Commissioners International, 2019.

incentives and debt financing programs designed to encourage private investment and access to working and growth capital through loans and loan guarantee programs. Appendix 1 includes a selected bibliography.

Twenty-one interviews were conducted with stakeholders in Canada and selected jurisdictions to better understand the challenges facing producers, in particular as regards their ability to retain their rights to their IP and their capacity to exploit it. A list of interviewees is contained in Appendix 2.

3. Structure of this Report

This report is divided into ten sections as follows:

- Section I describes the important role played by IP in helping to build sustainable screen-based companies and sector;
- Sections II to IX presents the findings of the policies, regulations, programs, and fiscal incentives in selected jurisdictions that are assisting screen-based companies develop, retain and exploit IP;
- Section X concludes with an overview and identifies lessons learned of relevance to Canada.

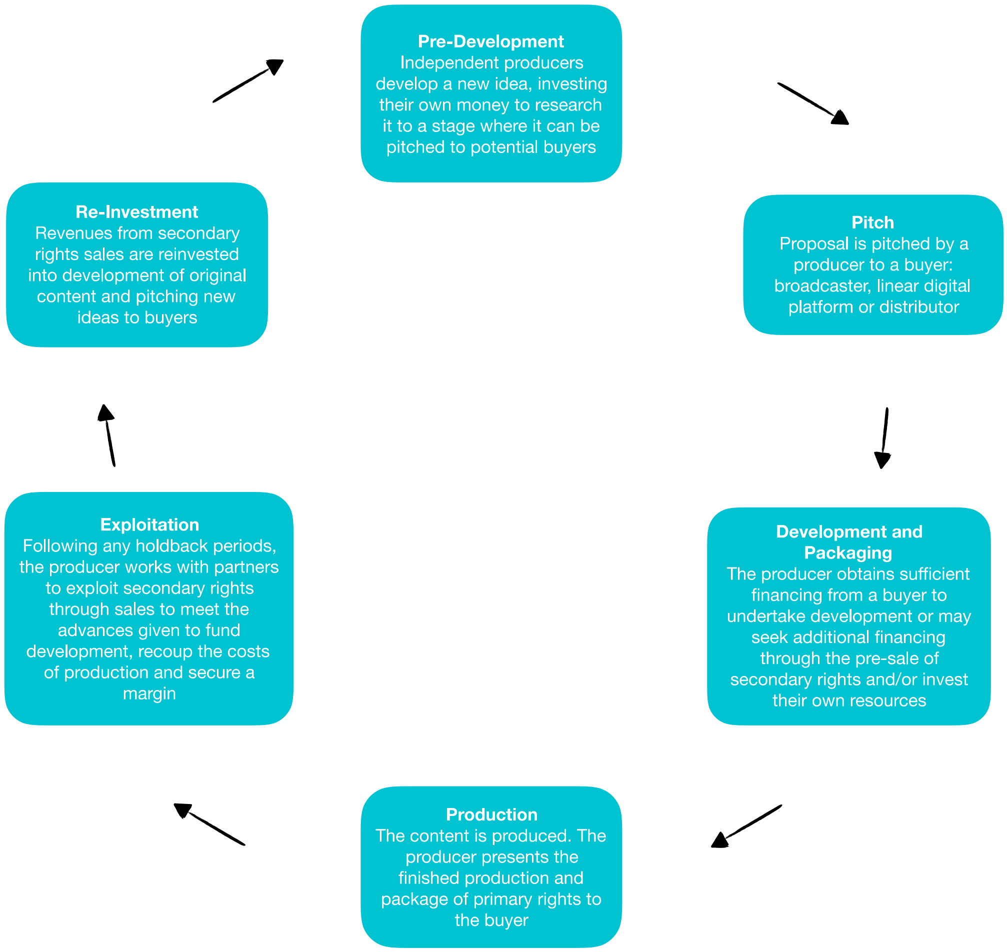
I. Understanding the Development, Retention and Exploitation of Intellectual Property in Independent Screen-based Content Production

1. Independent Productions Companies and the Importance of IP

1. The Development, Production and Exploitation Cycle Requires Investment in IP by Independent Producers

The foundation upon which independent production companies build their businesses is the development and exploitation of IP. The development, production and exploitation cycle of independent production requires investment in IP at several critical junctures. As can be seen in Figure 1, an idea is pitched to a buyer who may opt to fully fund the development stage or to partially fund it.

Figure 1: The Development and Production Cycle[2]



In the event that a buyer partially funds the development of a property, the producer becomes responsible for assembling all of the project's financing (referred to as the "deficit financing" model). To achieve their financing needs, producers may invest their own resources into the development of their property, or seek additional financing through the sale of secondary rights. Pilots and other forms of development are often expensive and it is extremely rare for the producer to use only the financing from a single sale (usually to a broadcaster) to develop the property. In television, the number of producers pitching projects to broadcasters greatly outnumbers the opportunities for projects to be developed or produced. In order to try to win a commission in this highly competitive industry, the producer will often add their own investment into funding further development.

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[2] Adapted from PACT, *Submission to Ofcom's Call for Evidence: public service broadcasters and the UK production sector*, March, 2021, page 20.

If a developed property is greenlit for production, it is likely that the producer will recoup their investment in development. If the project is not greenlit, the producer is liable for the full costs of the development. Producers interviewed pointed out that investments in development may or may not lead to revenue opportunities. Properties that do not move forward to production represent millions of dollars in development costs that are not recouped by production companies.

At the end of the development process, the producer is responsible for ensuring that all of the production financing is in place. Having obtained all the necessary rights from various owners (i.e., writers, directors and musicians), the producer presents the produced content and package of primary rights to the buyer. The producer then works with a distributor, platform or other partners to exploit its secondary rights, such as sales in foreign markets.

The limited size of the Canadian market means that significant value will have to be achieved in the export market. Generating value through sales of IP is, however, a significant challenge for production companies – financing a production is intimately tied to the perceived value of IP rights, and generating greater third-party investment will result in the producer being forced ever further down the recoupment 'waterfall'. Stakeholders interviewed for this study point out that companies with a pipeline of projects in development have more chances of moving a project from development to production, and to the extent that they own the IP, generate revenues.

2. IP Ownership Promotes a Virtuous Circle of Investment and Corporate Sustainability

IP is the lifeblood of independent production companies, growing their value over time. Producers who are able to finance the development of new intellectual property in ways that allow them to retain their ownership of secondary rights are better positioned to extract value from their work and sustain their businesses, and by extension ensure a resilient screen-based production industry. In a virtuous circle of investment, revenues from the exploitation of successful productions are used by producers to finance the development of original new ideas, pitch proposals and scripts and to sustain the operation of the company between productions.

By one estimate, the ability of UK independent production companies to exploit their IP allows them to maintain profit margins which in turn enables their companies to grow. It is estimated that independent production companies in the UK tend to invest 4.5% of their revenues, including revenues derived from the exploitation of their secondary rights, into research and development.[3]

Alongside investments in R&D, producers are investing in the training and development of talent as their businesses scale up and grow. These investments benefit the entire screen-based production ecology, as employees may go on to work for broadcasters, distributors, funders or other producers in the sector.

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[3] PACT, *Submission to Ofcom's Call for Evidence: public service broadcasters and the UK production sector,* March, 2021.

3. Market Concentration and Evolving Financing Models are Threatening the Sustainability of the Sector

According to interviews conducted for this study, a key challenge faced by producers is the ability to retain the rights to their IP when negotiating with buyers. The Canadian market is small, and even more so with the consolidation of the Canadian television system into only a handful of buyers. As producers interviewed for this study note, the supply side of the commissioning market in Canada is highly competitive. By one account, the high degree of market concentration translates into a massive inequality of bargaining power.[4] This results in negotiations where it is difficult for producers to retain any of their rights. As one study states, "Overwhelmingly, Canadian producers note that broadcasters typically require all rights to projects, in some cases leaving producers with no room to negotiate. Ceding all rights has become a condition for working with broadcasters in Canada. For feature films too, distributors now are acquiring all rights and for periods of 25 years."[5]

The imbalance in the market is exacerbated for producers for whom development is often a lengthy process involving a high degree of financial risk. Scripted content such as a feature film or a drama series requires significant financing, typically obtained from both the domestic and international markets. Producers working in all genres are making increasing investments in the pre-development, development and packaging of their projects prior to obtaining any financing. In some cases, producers may forgo a portion of their fees and corporate overhead to close a gap in production financing. Recovering these investments is a significant challenge, which must be offset by the exploitation of IP that has moved forward to production.[6] In the absence of adequate financing, producers may find it necessary to sell more of the rights to their property to finance development.

Interviews with organizations representing Indigenous and Black producers spoke of the additional challenges faced by companies owned by members of these communities due to a historic lack of access to funding that has put them at a disadvantage when competing for contracts. Indigenous owned production companies have at times been forced to dilute their ownership of their IP by partnering with non-Indigenous companies simply to afford access to public funding. Historical underfunding has resulted in lesser capacity in Indigenous-owned companies, such that there are projects on which some Indigenous producers feel compelled to find non-Indigenous partners in order to complete their financing.

Our interviews reveal that some production companies are diversifying their business models to include productions where they retain IP to be exploited later, and other productions where they work for hire on projects that provide them with set producer fees. Interviewees noted that some of the global streamers, such as Netflix, have at times offered Canadian producers significant producer fees in exchange for all rights. Although it is difficult to measure the role of SVOD in the commissioning market in Canada, producers have entered into "super service" deals

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[4] CMPA, *Comments of the Canadian Media Producers Association in response to Broadcasting and Telecommunications Legislative Review Panel, Responding to the New Environment: A Call for Comments,* January 11, 2019, page 13.

[5] Maria De Rosa and Marilyn Burgess, *Developing Screen Based Content in Canada: Trends, Practices and Perspectives*, prepared for the Canadian Media Producers Association, 2017, page 22.

[6] Maria De Rosa and Marilyn Burgess, 2017, Op. Cit. page 44.

where they "produce an entire show from script to final delivery, without the possibility to own, control, or share in any exploitation rights in the IP."[7] In these cases, production companies must consider the relative benefits of making an immediate pre-defined profit (provided that actual costs do not exceed the budget), and the possibility of long-term, potentially higher revenues through the ongoing exploitation of the work.

This study has revealed concern among producers about the risk of losing their IP-based business model altogether in the current ecology, and becoming production services companies. Clearly, this would be a major setback in terms of the ability of Canadian companies to capitalize on the significant opportunities afforded by the screen-based production sector, leaving the potential growth and wealth for others to reap.

[7] Jordan Pinto, "IP – retention issues must be addressed in Acts review: CMPA," in *Playback*, January 21, 2019.

II. The United Kingdom

1. Policies and Regulations

1.1 Terms of Trade for UK's Public Service Broadcasters (PSB)

According to Ofcom, PSBs remain the largest commissioners of UK content, spending about £2.8 B (CAD $4.8 B) each year on new UK programs. PSBs also make a significant contribution to regional production, commissioning 61% of independent productions outside of London.[8] These PSBs are subject to an independent production quota of at least 25% of their qualifying programming.[9] Since 2004, PSBs must put in place codes of practice setting out the principles they will apply when agreeing to terms for commissioning independent productions on their television services (i.e. they are not required for VOD services). These arrangements, which frame the terms of trade between independent producers and the PSBs, must be based on guidance issued by Ofcom.[10]

The Terms of Trade established between UK broadcasters and independent producers describe the rights available to UK broadcasters when they commission programs from independent producers and the revenue sharing arrangements relating to the subsequent use of their commissioned IP. As is pointed out in a study, "essentially, Terms of Trade give independent producers control over the secondary rights to their content, and thus the ability to monetise content they have produced in international markets."[11] The Terms apply to external commissions made by the UK PSB channels (BBC1, ITV, Channel 4 and Channel 5) and the digital channels operated by the BBC and Channel 4 of programming from independent producers.

The Terms of Trade meant that for the first time independent producers could retain the rights to their programs, allowing them to generate additional revenue from IP beyond their original commission and put this back into R&D to help grow their businesses. Terms of Trade are seen as having been critical in the transformation of the UK independent production sector from a cottage industry to the global leader in television production.[12] Since the introduction of Terms of Trade in 2004, the UK independent production sector has grown to become a global leader

[8] *Small Screen: Big Debate – Public service broadcasters and the UK production sector: Call for evidence*, Ofcom, Feb 2 2021.
[9] *Small Screen: Big Debate – Public service broadcasters and the UK production sector: Call for evidence*, Ofcom, Feb 2 2021.
[10] *Small Screen: Big Debate – Public service broadcasters and the UK production sector: Call for evidence*, Ofcom, Feb 2 2021.
[11] *The impact of Terms of Trade on the UK's television content production sector: A report for the Canadian Media Producers Association*, prepare by Oliver & Ohlbaum, December 2018.
[12] CMPA 2018, Op. Cit.

in TV production, in particular: TV related revenues have increased from around £1.5 B (CAD $2.6 B) in 2004 to more than £2.6 B (CAD $4.5 B) in 2017. International UK TV rights income grew at an average annual rate of 22 per cent between 2004 and 2008 and continues to grow at approximately 7 per cent. While there has been significant consolidation in the sector, small independent producers still account for a significant share of revenue, with those outside of the £70 M+ (CAD $120 M) income bracket accounting for around 65 per cent of revenues in 2017.[13]

These Terms of Trade cement important policy goals including promoting the UK's production sector and protecting small independent producers who would be unable to negotiate fair terms with the PSBs who wield greater bargaining power. However, they are specific to the PSBs and there is no obligation on competing broadcasters (e.g., Sky, Discovery) or other players (e.g., Netflix, Amazon) to protect the residual intellectual property rights of commissioned producers.

Applying the Terms of Trade to any organisation that commissioned content from a qualifying supplier would provide the UK production sector with greater control over their rights and revenue generation; although there are risks that non-PSB providers would look elsewhere to secure content if they were able to secure better terms (e.g., in-house production, international production). In addition, this would not lead to incremental value to the PSBs themselves. Removing the obligation for the PSBs to sign Terms of Trade with production companies would certainly give the PSBs access to greater value in non-broadcast rights windows. However, this would remove protections afforded to the UK production sector with implications for financial sustainability and the dynamism and attractiveness of the sector.

It has pointed out that this UK model of broadcaster / producer relations bring together powerful broadcasters (BBC, ITV) and a lively and competitive independent production sector in a highly integrated model that has spurred the market (even if recent developments now also show the hold of American groups). [14]

Ofcom has launched a consultation, entitled *Small Screen: Big Debate*, looking at "what the PSB system should deliver in the future, how it should be delivered and what legislative and regulatory framework might be needed."[15] The current Terms of Trade are being reviewed in the context of greater competition from global streaming services facing broadcasters. For their part, commercial broadcasters are seeking to secure greater rights ownership across multiple windows, putting public service broadcasters at a disadvantage where they must pay separately for the same windows.

1.2 Terms of Trade for BBC's Streaming Service[16]

In 2020, the BBC and UK producer association PACT signed a new Terms of Trade deal, which will give the BBC rights to stream independent commissions on its iPlayer platform for twelve

[13] CMPA 2018, Op. Cit.
[14] *Etude sur le tissue economique du secteur de la production audiovisuelle,* CSA, Direction des études, des affaires ecnomniuqes et de la prospective, January 2016.
[15] Ofcom 2021, Op. Cit. page 64.
[16] "BBC and Pact agree historic new terms of trade deal," *BBC*, May 6, 2020, retrieved from https://www.bbc.co.uk/mediacentre/latestnews/2020/bbc-pact.

months.[17] The BBC will also have the option to pay an additional fixed amount to keep shows on its streaming service for longer. In return, the broadcaster will reduce its share of revenue on international sales of content achieved by producers, from 15% to 10%. Similarly, it will reduce its share of UK sales to 20%, down from 25%.

1.3 UK Producers Roundtable Guidelines for Best Practices in the Film Industry[18]

A newly formed group representing UK film producers, the Producers' Roundtable, has developed industry guidelines aimed at helping the film industry achieve sustainability.

According to a survey conducted by the Producers' Roundtable in association with PACT and published in 2020, 83% of independent film producers think being an independent producer in the UK today is "not sustainable". Seventy-five percent of independent film producers who responded to the survey who have made 1 to 2 feature films earned less than $7,800 (£6,000) per year over the past five years for their film producing work. Of those who made 5-10 feature films, 67% still earned less than $19,500 (£15,000) per year over the past five years from producing their projects.[19]

The Producers Roundtable calls on private financiers, sales agents, talent and literary agents, distributors, writers, directors, and other gatekeepers to support a series of measures to create a more sustainable industry. These include fixing the producers' fee on any film budgeted below $3.9m (£3m) at a minimum of 8%, reducing the amount of fee deferrals, and stipulating that producers are not cut out of creative discussions with the film's talent.

These guidelines have been drawn up in consultation with BFI, BBC Films, Film4 and PACT. Specifically, the guidelines are as follows:

<u>*Guidelines for Best Practice (Producers Roundtable)*</u>

1) *In order for production companies and producers to be able to sustain themselves, and the writers and directors they work with, we recommend the production fee on any film under $3.9m (£3m) should be no less than 8% of the direct costs of production, to be divided between the producer(s) and production company(ies) as the lead producer sees fit.*

2) *Deferral of producer fees for development or production should not be encouraged, endorsed or suggested by any financier or their representatives, and the Producers Roundtable strongly encourages producers not to defer any of their fees, instead finding alternative solutions and savings within the budget. Most producers have already deferred their fees during the development of the project, and even successful features which*

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[17] "BBC Strikes "Historic" Terms Of Trade Deal With Producers, Securing 12-Month Streaming Rights," *Deadline,* May 6, 2020.
[18] *Guidelines for Best Practice*, UK Producers' Roundtable, retrieved from https://www.ukproducers-roundtable.com/guidelines.
[19] Tom Grater, "Film4, BBC, BFI & Pact Back UK Producers Survey That Reveals Stark Challenges of Indie Biz," *Deadline,* February 5, 2020.

find an audience are unlikely to see a return at the back end for the producer themselves, making fees pivotal.

3) *Given the importance of talent relationships and transparency across the board, as well as a need to not undermine the fundamental role of the producer, especially at an early stage of their career, the producer must be involved in all meetings and correspondence with the writer or director, pertaining to the shared project. Financiers must not meet with the writer or director, specifically about the shared project, except as organised and attended by the producer(s). This should be the case during the consideration of the project, during development and production, and during the project's initial exploitation.*

4) *No production financier may participate in net profits from the producer pool of net profits, even in the event of receiving a producer credit; this must be reserved only for the filmmakers.*

5) *Given the importance of film festivals in promoting and selling a film, and in career progression for all filmmakers involved, it is vital that the producer of a film is supported in attending its premiere, equal to the director, especially as salaried executive producers are often paid to attend themselves. We therefore encourage sales agents to make sure the producer is always tied to the director in attendance of any international and UK premiere of the film, including their travel, accommodation and accreditation expenses.*

2. Funding Programs

2.1. Development Slate Funding for Television

PACT is presently advocating for a program to fund the development of slates of projects, to be delivered in conjunction with regional funders in the UK. The goal of the fund is to support local production companies for the development of projects that will have already received interest from one or more broadcaster in either the UK or international territories. Producers would be able to access £50k (CAD $85,368) over two years for a slate of scripted projects, with a maximum of £10k per project.

Amongst the arguments put forward by PACT in promoting the program are that a production company's business is built on the creation of IP and in the current market, producers are under constant pressure to find big bold ideas that work both for a domestic market and have global appeal. The new fund will help companies to develop their projects to an advanced stage and provide them with a higher rate of success.

2.2 The BFI

The BFI, the UK's national film funder, has introduced three programs aimed at helping independent UK film companies grow and become more sustainable.

2.2.1 Global Screen Fund

The UK Government's Department for Digital, Culture, Media, and Sport (DCMS), in partnership with the BFI, have introduced a new one-year pilot fund for the UK's independent screen sector. The £7 M (CAD $12 M) Global Screen Fund will support international business development for film companies, minority coproductions (film and television) and international distribution of UK film titles.[20] The Fund has been designed to encourage young companies to think globally, much like startups do, and to move away from existing funding models that promote a domestic business orientation.[21]

The International Business Development stream will provide financial support for business strategies that drive international growth and IP development, such as developing a slate of titles for international exploitation, or setting up a sales function in a company. It is expected that development financing will allow producers to negotiate better terms in production, providing greater revenues and more resources to reinvest in development.[22]

The International Distribution stream will support sales agents with UK feature film titles to distribute up to six titles internationally. Sales agents must apply with the film's producer, who shares in the revenues. The main strand for production financing will be through investments in minority coproductions of feature films, animation and television documentaries, encouraging UK companies to join up with international partners, through sharing IP and revenue on projects with wide audience potential. The goal is to ensure that producers will have opportunities to capture some of the value of their IP, as they are normally positioned at the end of the income stream.

In order to facilitate relationships between UK producers and international buyers, the BFI is launching two new initiatives. The first is a data hub for producers, distributors and financiers, which will help to inform packaging and talent decisions for different territories. A need for such a service has been identified in light of the diminished box office revenues and the information they generated for the industry, due to the COVID 19 pandemic. The data hub will provide affordable access to market intelligence to companies that may be struggling to retain value in their content. The second initiative is a global promotional campaign to enhance the UK brand for all UK film production companies.

2.1.2 The Vision Awards

The BFI Vision Awards supporting producers to create slates of new projects that demonstrate ambition, risk taking and diverse voices. The Awards were designed to help grow strong and sustainable UK film businesses by equipping production companies with the financial and creative autonomy required to build an effective slate of projects. Funded companies can deliver a steady stream of quality projects into the marketplace, helping them continue to grow into effective and sustainable businesses.

Producers with the greatest potential to contribute to the success of the industry, and who otherwise would not have the resources to focus on building a slate of such projects, are selected. According to the BFI, they are not intended for producers who already have access to

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[20] Thomas Coombs, *New grant funding scheme to support international distribution of British film and TV productions, Government reveals*, blog entry, April 27, 2021, retrieved from https://www.thomascoombs.com/news/blog/new-grant-funding-scheme-to-support-international-distribution-of-british-film-and-tv-productions-government-reveals/. Interview.

[21] Interview.

[22] Interview.

substantial personal or company finance to use on building a slate."[23] The aim of the funding is to help awardees grow a slate of projects with an eye to defining their company identity; seeking out emerging writers and directors from across the UK; moving projects into production; improving their commercial expertise; and developing a viable business after the end of the award term.

With up to £2 M (CAD $2.5 M) available through the Vision Awards, up to 20 individual producers can access up to £50 K (CAD $85.6 K) per year for a two-year period.[24] While not directly targeting underserved communities, these awards have benefitted production companies owned by diverse producers.[25]

2.1.3 Locked Box

In March 2015, the Writers Guild of Great Britain (WGGB), PACT and Directors UK agreed to a revenue-sharing deal intended to incentivise the creative teams behind successful British films (i.e. producers, writers and directors) and give them more ability to start their own projects. The deal allowed the BFI to create the "Locked Box Initiative," which provides automatic funding to creative teams, based on the success of their prior films funded by the BFI .

Three types of funds are accessible in a BFI Locked Box:

<u>BFI Corridor</u> – A "locked box" account in which a portion from the BFI's recoupment income from a film it has invested in is put aside for future use by the films creative team. Up to a 37.5% share of BFI's recouped income may be held by the BFI, to be drawn down by members of the film's creative team. Minimum shares of 12.5% of recouped income are available to each member of the creative team (and more by agreement). Writers and directors can individually access their share of revenues allocated to the "locked box" to fund the development of new projects – with or without the other creative team members who were involved in the original production.[26] Producers may use their share of the locked box account to develop and produce future film projects, or for training.

<u>UK Tax Credit Entitlement</u> – independently of, and in addition to, the BFI Corridor, a UK producer can receive an equity entitlement position in the film's recoupment schedule in an amount equal to the lower of 1) the UK Tax Credit advance included in the film's finance plan; or 2) the actual UK Tax Credit proceeds, once received. This equity position is subject to approval by all financiers in the film. Income derived from this equity entitlement position will be paid directly into the BFI Locked Box for the film to be drawn down by the UK producer for development of production of a UK film, or for training.

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[23] BFI website: https://www.bfi.org.uk/get-funding-support/progress-my-creative-career-grow-my-business/bfi-vision-awards; Orlando Parfitt, "BFI revamps Vision Awards, launches new training programme," *Screendaily*, November 7, 2019.
[24] Andreas Wiseman, "BFI Reveals 2020 Vision Awards: *Bait, Saint Maud, Ammonite,* Producers Among Recipients, *Deadline,* April 22, 2020.
[25] Tim Damms, "BFI Unveils 20 U.K. Producers to Share $2.5 Million Vision Awards Funding," *Variety*, April 22, 2020.
[26] WGGB website: https://writersguild.org.uk/money-locked-box/.

Recycled Development Funding – when the BFI awards development funding to a UK producer, money repaid to the BFI can also be allocated to a BFI Locked Box for use by that UK producer, as above, to develop or produce a new UK film or for training costs. [27]

The purpose of the BFI Locked Box initiative is to ensure that revenues from successful BFI-backed films is invested directly back into the British film industry, enabling those responsible for the film's success to become more sustainable, by providing as much creative and financial independence as possible when developing and producing projects.[28]

2.3 Northern Ireland Screen Slate Development Fund[29]

Slate development funding is available to independent production companies based in Northern Ireland for 2 or more projects, which can be feature film, television (all genres and including pilots) and interactive content. Funding is available for between 50% and 90% of project costs (more for lower project budgets), to a maximum of £100 K (CAD $171.4).

All development awards are provided in the form of recoupable loans. The fund specifically excludes development support for local television output.

3. Fiscal Incentives

3.1 Enterprise Investment Scheme (EIS)

The Enterprise Investment Scheme (EIS) of HM Revenue & Customs UK is designed to help smaller, higher-risk trading companies[30] to raise finance by offering a range of tax reliefs to investors who purchase new shares in those companies. EIS investments must be held for 3 years and provide a number of tax benefits including income tax relief at 30% and tax-free capital gains on the investment in the Fund.[31]

The maximum amount of relief a taxpayer can claim annually is £300 K (CAD $513.7 K) or total tax liability, whichever is less. In addition to the tax credit, the EIS also eliminates the capital gains tax on those shares when the individual decides to sell said shares. Interested investors can purchase shares of the qualifying companies from them directly or through an EIS Fund.

3.2 Calculus Creative Content EIS Fund

The Calculus Creative Content EIS Fund launched in June 2019, in association with the BFI, to invest in UK production companies is focused on developing and producing premium commercial content for film, television, virtual reality and digital media allowing companies to develop several intellectual properties at the same time.

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[27] *BFI Locked Boxes,* BFI Fact Sheet.
[28] *BFI Locked Boxes,* BFI Fact Sheet.
[29] Northern Ireland Screen website: https://www.northernirelandscreen.co.uk/funding/development/#SlateDevelopment.
[30] Small unquoted companies carrying on a qualifying trade in the United Kingdom.
[31] *Calculus Creative Content EIS Fund – Key Benefits,* one-pager.

The Calculus Creative Content EIS Fund takes advantage of the tax incentives provided through the Enterprise Investment Scheme, to achieve tax efficient capital growth by encouraging investing in a portfolio of EIS qualifying UK companies with good growth potential and strong management teams.

With the aim of investing primarily in early stage entrepreneurial creative content companies,[32] the Fund has successfully raised £20 M (CAD $34.2 M) and made investments in a portfolio of TV, film and video game companies.[33]

Figure 2: Summary of the UK's Policies and Regulations, Programs and Incentives

Policies and Regulations	Programs	Incentives
Terms of Trade between Public Broadcasters and Independent Producers - Oversight by Ofcom - Producers control their secondary rights **Terms of Trade between the BBC Streaming Service Platform and PACT** - BBC rights to iPlayer platform for 12 months, with option to pay fixed amount for longer term - in exchange, reduced share of international revenues (from 15% to 10%), and - reduced share of UK revenues (from 25% to 20%) **UK Producers Roundtable Guidelines for Best Practices in the Film Industry** - Minimum producer fees - Producer present at all meetings with talent - Protection of producer pool of net profits - Producer travel to festivals with sales agents	**BFI Global Screen Fund** - £7 M (CAD $12 M) to support - international business development, - international distribution for sales agents applying with producers, and - minority coproduction support. **BFI Vision Awards – development slate funding** - £2 M (CAD $2.5 M) - £50K (CAD $85.6 K) for a two-year period for funded projects **Northern Ireland Screen Slate Development Fund** - Recoupable loans for: - 50% to 90% of project budget to a maximum of £100 K (CAD $171.4)	**HM Revenue & Customs UK - Enterprise Investment Scheme** - Tax reliefs to investors at rate of 30% - Tax-free capital gains on the investment in the Fund - EIS investments must be held for 3 years. - Maximum amount of relief annually is £300 K (CAD $513.7) **Calculus Creative Content EIS Fund, in partnership with BFI** - Early stage funding for UK Production companies - Companies focused on developing and producing premium commercial content for film, television, virtual reality and digital media

[32] *European High-end Fiction Series: State of Play and Trends*, European Audiovisual Observatory (Council of Europe) 2020, page 68.
[33] *Calculus Creative Content EIS Fund Key Information Document*.

III. The European Union

1. Policies and Regulations

1.1 The EU's Audiovisual Media Services Directive: Protection of IP Rights of Independent Producers

The EU's Audiovisual Media Services[34] Directive (AVMSD) provides a framework of rules to guide the development of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. The latest review of the AVMSD was completed in 2018.[35]

The new AVMSD reinforces existing broadcaster obligations and for the first time will require VOD platforms to invest a portion of their revenue in local independent productions. European countries are in the process of implementing the new rules within their domestic legislation. The AVMSD also defines independent producers in terms of three considerations: the ownership of the production company, the number of programs supplied to the same broadcaster, and the ownership of secondary rights. Of particular importance with respect to the third criterion is whether all the producer's rights, including secondary rights, have been bought by broadcasters, leaving the independent producer in a position where it cannot put together a catalogue of material with secondary rights which can be sold in other markets.[36]

Some countries have moved forward quickly to developing their legislation. France, Italy and Germany introduced significant new expenditure requirements for VOD platforms.[37] France and Italy are in the process of enshrining into law new rules that will force Netflix, Amazon Prime, Disney Plus and other streaming services to invest locally through independent producers and ensure that producers will retain a portion of the rights.[38] In Germany, negotiations with global streamers and independent producers are ongoing.

1.2 Code of Fair Practices – European Producers Club

In the context of negotiations currently underway in France, Italy and Germany, the European Producers Club (EPC) has issued a *Code of Fair Practices* to be applied to commissions from

[34] Audiovisual services refers to television broadcasting services.
[35] European Commission website: https://ec.europa.eu/digital-single-market/en/audiovisual-media-services-directive-avmsd.
[36] IRIS Plus 2019 – 1, *The promotion of independent audiovisual production in Europe*, European Audiovisual Observatory, May 2019.
[37] "Europe's New Rules of Engagement With Streamers Making Slow But Steady Progress," *Variety*, March 5, 2021.
[38] "Europe's New Rules of Engagement With Streamers Making Slow But Steady Progress," *Variety*, March 5, 2021.

streaming platforms. The EPC is an association of 130 influential independent film and TV drama producers from all over Europe, and coordinates an alliance of national Producer Associations across Europe through the EPAA (European Producer Associations Alliance) ultimately representing over 3000 industry professionals.[39]

The EPC's code comprises four basic principles covering the right of European independent producers to retain IP; to have access to streamer viewing data; and to become the exclusive conduit through which U.S. streamers can access European soft money. In so doing, the Code recognizes the value of the role of the independent production company in creative development, production and budgetary and financial management, and in the discovery and nurturing of talent. It is hoped that EU regulators will adopt some or all of the proposed rules in the code and that it can provide a useful framework for discussion with national regulators when they implement the AVMS Directive in countries where it has not been implemented yet.[40]

EPC Code of Fair Practices for VOD Services When Commissioning New Works from Independent Producers[41]

> *1. Fair and proportionate remuneration and economic participation for producers*
>
> *The principle of appropriate and proportionate remuneration, which is already provided for by the EU for authors, directors and other copyright or related rights owners, should be applied to independent producers, as well.*
>
> *Appropriate and proportionate remuneration for independent production companies includes reasonable producer fees, overhead fees in accordance with industry standards, and additional remuneration to be determined fairly and depending on viewing results. An adequate contingency reserve should also be included in the budget approved by the VOD Service.*
>
> *2. Producers' contribution and right to participate in future derivative works*
>
> *When an independent production company has acquired, created or co-developed an IP, that underlying IP shall remain with the production company, including the rights to make sequels, prequels, remakes, and any other derivative audiovisual works based on the initial film or TV series. As an example, the production company that has produced the first season of a TV series based on that IP should be involved as the production company in all subsequent seasons of that same series.*

[39] "European Producers Club Issues 'Code of Fair Practices' to Change Rules of Engagement With Hollywood Streamers," *Variety*, March 17, 2021.
[40] Produzenten Verband, *Produzentenverband Supports the "Code of Fair Practices for VOD Services When Commissioning New Works From Independent Producers,* March 2021.
[41] European Producers Club website: https://www.europeanproducersclub.org/; Melanie Goodfellow, "European producers launch new code of fair practices for streamers," *Screen Daily*, March 17, 2021; "European Producers Club Issues 'Code of Fair Practices' to Change Rules of Engagement With Hollywood Streamers," *Variety*, March 17, 2021.

The exploitation rights granted to the VOD Service should be limited to the rights in the film or TV series that the VOD Service needs in connection with the primary exploitation of the work on its service, while allowing for the production company to authorize the reasonable, additional exploitation of the remaining or unused rights of the work, e.g. a theatrical release, where appropriate, and free TV exploitation after a reasonable period of exclusivity. VOD Services should only require the license of the rights they actually exploit or should acquire those additional rights for additional fees at a fair market rate.

All exploitation rights granted to a VOD Service should revert to the independent production company after a reasonable period of time.

3. Transparency and Accountability

In order for the independent production company to gain insight into the success of the works it has produced, the VOD Services should provide the independent production company with regular and comprehensive information on the exploitation of the work, in particular with respect to (i) the number of overall views of the work on the VOD Service, including detailed data for the key territories as well as (ii) relevant and comprehensive information about any off-service exploitation and any revenues thus generated.

4. Public Benefits and Fiscal Incentives

National benefits or subsidies, regional support funding and/or tax incentives aimed at national and European works in the Member States should be accessed only through independent production companies. Such support should be recognised as part of the producer's financial contribution and allow for the production company to maintain ownership and control of exploitation rights that are of a value that is truly comparable to that contribution.

2. Funding Programs

2.1 Creative Europe 2021-2027 – Slate Development and Non-Repayable Production Grants

The Creative Europe programme provides support to European media production companies for the development, and production of European works.[42]

Slate Development Grants

Funding is available to independent audiovisual production companies for the development of slates of three to five projects in animation, creative documentary, and fiction projects for

[42] Smart atmospheres of social and financial innovation for innovative clustering of creative industries in MED area (SMATH), *D.4.3.1. The Action Plan: Outlining Policy Recommendations*, Interreg Mediterranean, SMATH, European Regional Development Fund, 2021; European Commission website for Funding and Tender Opportunities: https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/programmes/crea2027.

cinema release, television broadcasting, or digital distribution. Producers must own the majority of rights to projects for which funding is sought.

The total budget of the program is estimated at €12.5 M (CAD $18.4 M). Funding contributions are from €70 K (CAD $103 K) to €200 K (CAD $295 K) for a slate of projects.[43] In 2019 the program supported 71 slate development applications.

Production Grants

Non-repayable grants are available to independent producers to produce fiction, animation or creative documentary television programs. Production companies must own the majority of rights to the project, and the exploitation rights licensed to the broadcaster must revert to the producer after a maximum period of 7 years for a pre-sale or 10 years for a co-production.[44]

The non-repayable grants available depend on the genre and type of project (series or single episode) of production, ranging from €300 K (CAD $442 K) to 1 M (CAD $1.5 M).[45] The program supported 44 television production projects in 2019, with a total of €14.1 M (CAD $20.8 M).[46]

3. Fiscal Incentives

3.1 Loan Guarantee Facility

The Cultural and Creative Sectors Guarantee Facility (CCS GF) provides loan guarantees to lenders, such as banks, in order to improve access to credit to small and medium enterprises (SMEs) from the cultural and creative industry sectors.[47]

The Cultural and Creative Sectors Guarantee Facility helps businesses in the cultural and creative sectors to scale up and become more competitive, by allowing businesses to access loans more easily since lenders are more willing to extend financing.[48]

Through the CCS GF, the European Commission has committed to partially cover financial intermediaries' potential losses on a portfolio of loans made to cultural and creative industries projects. The CCS GF covers up to 70% of the losses of individual loans and to a maximum rate of 25% of the lenders overall portfolio of cultural and creative industry loans. The European

[43] European Commission Website: https://wayback.archive-it.org/12090/20210123010610/https://eacea.ec.europa.eu/creative-europe/actions/media/3-development-audiovisual-content-slate-funding-call-eacea-182019_en.
[44] IRIS Plus 2019 – 1, *The promotion of independent audiovisual production in Europe*, European Audiovisual Observatory, May 2019.
[45] IRIS Plus 2019 – 1, *The promotion of independent audiovisual production in Europe*, European Audiovisual Observatory, May 2019.
[46] *2019 Monitoring Report*, Creative Europe, 2020.
[47] *2019 Monitoring Report*, Creative Europe, 2020; European Commission Website: https://digital-strategy.ec.europa.eu/en/policies/finance-creative-sector.
[48] European Commission Website: https://digital-strategy.ec.europa.eu/en/policies/finance-cultural-creative-sectors.

Commission has designated over €250 M (CAD $368.4 M) to guarantee loans of up to €2 B (CAD $3 B) for thousands of cultural and creative SMEs, including screen-based production companies, in partnership with EU member states' lending institutions.

In addition to the guarantee, financial intermediaries have access to training, technical assistance and knowledge / networking-building services to build up their expertise for financing the sector.

Currently, a total of 15 agreements in 11 countries have been signed, which are expected to generate €1.3 B (CAD $1.9 B) of debt financing for companies from the cultural and creative sectors. Several new agreements are currently in the assessment process within the European Investment Fund. At the end of 2019, debt financing of €424.4 M (CAD $361 M) was made available to 1,547 cultural SMEs (and to 2,013 projects, as some companies benefit from more than one loan) to finance projects worth over €1.08 B (CAD $1.6 B).[49]

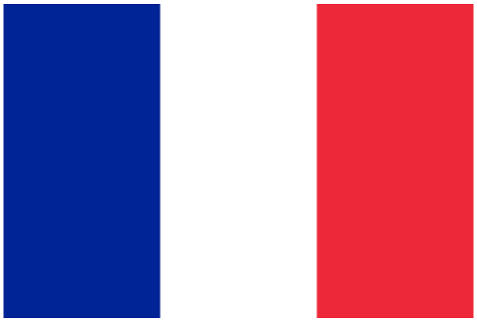
Film companies have accessed guaranteed loans through this facility, including in France, Germany and Italy.[50]

Figure 3: Summary of EU's Policies and Regulations, Programs and Incentives

Policies and Regulations	Programs	Incentives
Audiovisual Media Services Director of the European Union - Reinforces existing broadcaster obligations - Requires VOD platform to invest a portion of their revenues in local independent productions - Independent producers hold IP rights **European Producers Club – Code of Fair Practices** - Independent producers to retain IP - Have access to streamer viewing data, and - Are exclusive conduit to European soft money	**Creative Europe Slate Development Grants** - Funding of €12.5 M (CAD $18.4 M) per year - €70 K (CAD $103 K) to €200 K (CAD $295 K) per slate **Creative Europe Production Grants** - Non-repayable grants for fiction, animation or creative documentary TV shows - Producers must own the majority of rights to the project - Broadcaster rights revert to producer after 7 years (pre-sale) or 10 years (co-production). - Support ranges from €300 K (CAD $442 K) to €1 M (CAD $1.5 M).	**Creative Europe Cultural and Creative Sectors Loan Guarantee** - Guarantees 70% of the losses of individual loans, and - 25% of lenders' overall cultural portfolio.

[49] *2019 Monitoring Report*, Creative Europe, 2020; European Commission Website: https://digital-strategy.ec.europa.eu/en/policies/finance-creative-sector.
[50] *Cultural and Creative Sectors - Guarantee Facility (CCS GF)List of Final Recipients as of 31/12/2019.*

IV. France



1. Policies and Regulations

1.1 Terms of Trade with Independent Producers

One of the defining characteristics of an independent production in France is whether or not the producer retains the secondary rights; that is to say the rights to exploit the film or audiovisual work throughout other distribution windows and in other markets beyond the initial distribution by the conventional broadcaster or VOD provider (audiovisual media service or AVMS). Initial distribution rights of independent productions obtained by French audiovisual media services are usually limited in time and, in the case of broadcasting, in the number of retransmissions. The control over the intellectual property rights (including the secondary rights) is often regulated by agreements between public service broadcasters and the State or the producer's associations.

The most recent agreement with independent producers' unions and France Télévisions, which will be in effect until 2022, has significantly changed the terms of trade with independent producers, with the goal of allowing the broadcaster to compete with global streamers, who have been commissioning original series from local producers with no limitations on their rights ownership.[51] Prior to the current agreement, France Télévisions had linear exploitation rights for 4 years and digital replay rights for 7 days. The producer had the secondary rights and could sell their series to Netflix or any other SVOD platform.[52] The new agreement provides the broadcaster with exclusive SVOD rights for a period of 12 to 24 months for fiction productions, where it finances 66% of production costs (55% for documentaries). In addition, France Télévisions also has exclusive free non-linear exploitation rights for a period of 6 to 9 months, depending on the level of funding of the work.

In exchange for producer concessions on secondary rights, a standard duration of 36 months has been set for the exclusive exploitation of works intended for free online viewing by France Televisions[53] and 30 months for single episode fiction productions.[54] France Television has also increased its share of independent production to 82.5%, up from 75% in its previous agreement,

[51] Rhonda Richford, "France Televisions Signs Producers Pact Ahead of Netflix Rival Launch, *The Hollywood Reporter*, January 11, 2019.
[52] Enguerand Renault, France Television s'entend avec les producteurs pour retirer ses series de Netflix, *Le Figaro*, January 11, 2019; Delphine Soulas-Gesson, "France Televisions détaille son nouvel accord avec les sinydicats de producteurs," *Stratégies*, September 16, 2019; Rhonda Richford, 2019, Op. Cit.
[53] Delphine Soulas-Gesson, 2019, Op. Cit.
[54] Enguerand Renault, 2019, Op. Cit.

and committed to spending €32 M (CAD $47 M) per year on independent production and €150 M (CAD $221 M in digital by 2022.[55]

Following the adoption of the EU's new Audiovisual Media Services Directive (AVMSD) in 2018, France has approved a legislative framework under which the government will force Netflix and other platforms to invest up to 25% of their local revenues to produce French TV series, and two-thirds of these investments will have to be done through independent producers to whom rights will revert within 36 months. On the film side, streamers in France will be obliged to channel 75% of their investments through independent producers who will get their rights back after 18 months.[56]

2. Funding Programs

2.1. Automatic Film Funding Through the CNC

France offers independent producers a form of automatic support based on the success of their previous films. The national public funder, the Centre national du cinéma et de l'image animée (CNC), provides automatic support for productions calculated on the basis of revenues from the exploitation of the producer's previous films (in cinemas, on television and DVD). Productions must meet minimum cultural requirements on a points-based cultural test, and obtain certification as French national productions to be included in the calculations.[57]

Amounts calculated are placed in accounts with the CNC for use by the producer. Automatic support may be used to finance new development or production, or to settle preferred creditors of the film previously produced. Amounts invested by the producer may benefit from a bonus increase, for example if the new production is shot in French, according to the number of points it obtains on the cultural test, and if gender parity is achieved in the production. Automatic support is aimed at supporting the film industry and eligible producers must be established companies based in France. In general, CNC financing in development and in production may not exceed 40% of the total budget.[58]

3. Fiscal Incentives

3.1 SOFICAs

The "Sociétés de financement de l'industrie cinématographique et de l'audiovisuel" (SOFICAs), are film and audiovisual industry tax sheltered financing companies created in 1985 with the goal of providing producers with access to private funds for the financing of independent film and audiovisual productions. They provide a financing tool to producers who face delays

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[55] Delphine Soulas-Gesson, 2019, Op. Cit.
[56] "Europe's New Rules of Engagement With Streamers Making Slow But Steady Progress," *Variety*, March 5, 2021; Stuart Thomson, "European Commission takes issue with planned French SVOD rules," *Digital TV*, April 15, 2021.
[57] Julio Talavera Milla, et al, *Public financing for film and television content: The state of soft money in Europe*, European Audiovisual Observatory, July 2016.
[58] CNC, *Présentation du Fonds de soutien audiovisuel (FSA)*, June 8, 2020.

between the time production costs are incurred and revenues recovered,[59] and are said to be a guarantee of the sustainability of French independent production.

SOFICAs are similar to the Enterprise Investment Scheme in the UK in that they are fiscally based investment incentives for the film and television sector. Usually created by operators in the banking and financial sector and operated as limited investment companies, SOFICAs gather investments from private individuals to be invested in a variety of types of production.

Investors are drawn to the tax advantage of buying shares, which reduces their tax liability. A basic reduction of 30% increases to 36% for SOFICAs that commit at least 10% of its investments in production companies in order to finance the development stage. The reduction is increased to 48% for SOFICAs, which, in addition to this commitment, devote 10% of their investments in the acquisition of rights relating exclusively to the exploitation revenues of cinematographic or audiovisual works abroad. In practice, all SOFICAs make these two commitments and benefit from the highest rate of tax reduction. Investors must hold their investments for five years.[60]

SOFICAs may be backed by a third party, such as a larger film and television production group, which undertakes to buy back part of the investments at a price agreed in advance. For non-backed investments revenue rights are negotiated on a case-by-case basis. These generally give SOFICAs revenue corridors on different media that is greater than their share in the financing, taken from the producer share until recovery of the initial contribution plus a fixed rate of interest.

Non-backed productions are said to be the types of projects favoured for SOFICA investment by the CNC, which approves all investments. To minimize their exposure to risk, financing from SOFICAs is mostly available as gap financing.[61] Investment levels in individual productions are governed by EU rules and treated like public funding, such that they may not exceed 50% of the production budget.

In 2019, the SOFICAs invested €56.7 M (CAD $83.5 M) in French independent feature films. This included investments of €44.2 M (CAD $65.1 M) in production and €11.8 M (CAD $17.4 M) in development. Investments in non-backed film productions accounted for 69% of all investments. Eighty percent of production investments (€28.3 M) (CAD $41.7 M) ws invested in films with budgets of less than €8 M (CAD $11.8 M). A total of €10.3 M (CAD $15.2 M) was invested in television series, including €3 M for series development.[62]

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[59] HEC Paris, Frédérique Sandot, *Méthodes de financement et rentabilité dans la production cinématographique: Les SOFICAS,* Sous la direction de Monsieur Alessandro Citanna, Mémoire de recherche de fin d'études, 2006

[60] CNC, *Les SOFICA : Un dispositif original de financement du cinéma et de l'audiovisuel*, July 2018.

[61] Donovan Rodriques, *Countries with the best film incentives*, blog entry, Rodriques Law, September 6, 2017, retrieved from *https://rodriqueslaw.com/blog/countries-best-film-incentives/.*

[62] "*III. Le système de soutien financier au cinéma français,"Rapport d'information n° 276 (2002-2003) de MM.* Yann Gaillard et Paul Loridant, fait au nom de la commission des finances, déposé le 6 mai 2003; *Sofica: Investissement dans les sociétés de financement du cinéma et de l'audiovisuel*, retrieved from https://www.leguidedupatrimoine.com/sofica.php; Julio Talavera Milla, et al, *Public financing for film and*

3.2 IFCIC Loans and Guarantees

The Institut pour le Financement du Cinéma et des Industries Culturelles (IFCIC) is a lending institution created by the Ministry of Culture for the financing of cinema and cultural industries. With a focus on independent films, IFCIC provides loans and loan guarantees to support production, and participatory loans to support corporate development and growth. IFCIC provides loans of up to several million Euros to companies with a greater need to access credit.

Guarantees are available for short-term loans at all stages of film and television development, production and distribution, as are guarantees for medium-term loans for investment into production and distribution companies. Backed by the European Investment Fund, the Creative Europe Loan Guarantee Facility and an endowed fund of the CNC, IFCIC guarantees 70% of loans of up to €300 K (CAD $442 K). In 2019, IFCIC provided guarantees of €134.4 M (CAD $198 M) on loans totaling €246.8 M (CAD $363.6 M) to finance the production, export and distribution of feature films. Guarantees for television production, export and distribution activities amounted to €67.6 M (CAD $99.6 M) on loans totaling €135.3 M (CAD $199.4 M). Eighty-seven percent of film and television guarantees, respectively, were for production loans and two percent were for development. Two percent of loan guarantees financed cash flow for film producers and 5% financed cash flow for television projects.[63]

In 2019, IFCIC received additional funding of € 25 M (CAD $36.8 M) from the Fonds national pour la société numérique (National Digital Society Fund). This allowed it to extend participatory loans to the film and audiovisual production sector.[64] Participatory loans - a form of financing for which the lender is remunerated with part of the profit or turnover of the respective project to which is usually added an agreed interest rate[65] - are intended to help finance the development and growth of companies by providing the independent production sector with new opportunities for structural financing. IFCIC awarded its first participatory loans in December of 2019 totalling €3.3 M (CAD $4.9 M), for activities including cash flow and intensive script writing aimed at moving projects to production.[66]

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television content: The state of soft money in Europe, European Audiovisual Observatory, July 2016; Code general des impôts, *Légifrance*, retrieved from https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000036431386/; Nicole Vulser, "Financement du cinéma : les Sofica plus efficaces que TF1 ou France," *Le Monde*, December 5 2019; *Building sustainable film businesses: the challenges for industry and government*, Prepared by Olsberg SPI for Film I Vast, PACT and the Swedish Film Institute, June 2012; Annabelle Gauberti, *Film finance: How to Finance Your Film Production?*, Crefovi blog entry retrieved from: https://crefovi.com/articles/how-to-finance-your-film-production/; Sébastien Lachaussée & Elisa Martin-Winkel, "SOFICA : news on French private funds for film investment," *L'actualité*, May 31, 2017.

[63] IFCIC, *Rapport d'activité 2019*, page 14.

[64] IFCIC, *Rapport d'activité 2019*.

[65] Marvest website: https://www.marvest.de/en/magazine/glossary/participatory-loan/.

[66] IFCIC, *Rapport d'activité 2019*.

Figure 4: Summary of France's Policies and Regulations, Programs and Incentives

Policies and Regulations	Programs	Incentives

Terms of Trade between public service broadcasters and producers associations or the State
- Independent producer defined as retaining secondary rights to their IP
 	
Terms of Trade with France Televisions:
- Exclusive VOD rights for 12 months where France Televisions finances 66% of production (55% for documentaries)
- Standard duration of 36 months for SVOD rights and 30 months for single episodes
- 82.5% share of expenditure on independent production for France Televisions: €32 M (CAD $47 M) and €150 M (CAD $221 M in digital by 2022
 	
New legislative framework following AVMSD
- Streaming platforms must invest 25% of local revenues, of which 67% must be in independent productions
  ○ Rights revert back to producers after 36 months
- 75% of streamers' feature film investments must be for independent productions
  ○ Film rights revert back to producers after 18 months.
	CNC Automatic Support for Film Producers
	- For development or production of new film or to settle accounts of previous film
	- Up to 40% of total budget, subject to overall EU rule of no more than 50% public financing
		SOFICAs
		Tax sheltered investment companies for film and television that provide:
		- Tax reductions of up to 48% for individual investors
		- Gap financing for French feature film producers
		
		IFCIC Loans and Guarantees
		- 70% guarantees for loans of up to €300 K (CAD $442 K) for all stages of film and TV development, production and distribution
		- Loans of up to several million Euros
		- € 25 M (CAD $36.8 M) fund for participatory loans to finance growth and development.

V. Germany

1. Policies and Regulations

1.1 Terms of Trade for Television

In Germany, there are no quotas or investment requirements for independent production, and no definition of "independent producer" in German law.[67] Broadcasters in Germany must simply ensure that their programs contain a mix of in-house productions and commissioned and joint productions from German-speaking and European countries".[68] The German government has also passed a 30% European content quota for VOD providers pursuant to the AVMSD. However, the country's politicians and producers are said to be "lagging behind" in terms of negotiations on fair remuneration rules, for which they are "watching [the development of similar legislation in] France and Italy very closely".[69]

Most independent deals in Germany are struck as All Rights deals, with producers receiving payment based on the cost of production plus a fixed percentage.[70] Under German copyright law, every author generally has a continuing contingent claim to further profit sharing[71] if the agreed remuneration is noticeably disproportionate to the proceeds and benefits to be derived from the use of the work in the future. This claim cannot be waived in advance or in the course of a total buyout agreement.[72]

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[67] IRIS Plus 2019 – 1, *The promotion of independent audiovisual production in Europe,* European Audiovisual Observatory, May 2019, *Page 39; State Treaty on the modernisation of media legislation in Germany, 2020*; *Communication from the Commission - TRIS/(2020) 00328, Directive (EU) 2015/1535*; *State Treaty on the modernisation of media legislation in Germany,* ratified in 2020.
[68] *State Treaty on the modernisation of media legislation in Germany*, 2020.
[69] "Europe's New Rules of Engagement With Streamers Making Slow But Steady Progress," *Variety*, March 5, 2021.
[70] Independent Film & Television Alliance website: https://ifta-online.org/marketplace-research/territory-snapshots/germanys-entertainment-market-still-one-of-europes-strongest/.
[71] Pursuant to Sec. 32a of the German Copyright Act.
[72] Jens-Uwe Hinder, Lukas Kawka, *Total Buyout & Copyrights – Highest German Tax Court Confirms Application of German Withholding Tax,* blog entry, Morrison & Foerster LLP, May 22, 2019, retrieved from https://www.jdsupra.com/legalnews/total-buyout-copyrights-highest-german-65543/.

Terms of Trade have existed between German public service broadcasters and independent producers since the 1990s.[73] The most comprehensive of these have been negotiated with the two public service broadcasters, ARD and ZDF.[74]

Revenue Sharing in All Rights Deals

Terms of trade with both ARD and ZDF provide opportunities for independent producers to participate in revenues of productions fully financed by the broadcaster, and to retain all or a portion of their secondary rights where the broadcaster provides only partial financing. Any rights not exploited by a broadcaster within a specified time frame (five years) revert to the producer.

In the case of fully financed productions, independent producers participate in a fixed share of gross revenues from the exploitation of secondary rights, in particular international rights, retained by the broadcaster. This rate is established at 25% for ARD effective 2021. This has been put forward by the Alliance of German Producers as a more appropriate share in the proceeds of sales by broadcasters to third parties that that offered by ZDF. Producers with ZDF participate in gross revenues at a rate of 20% (2016).[75] ZDF does not share revenues for sales transactions of less than EUR 1,500.

Secondary and Ancillary Rights for Producers

Where producers also participate in the financing of a production, the Terms of Trade with ARD provide that the partners acquire or keep corresponding rights in accordance with the principle that "rights follow risk."[76] ARD commits to negotiating an equitable splitting of rights between itself and the producer on a case-by-case basis, where producers also participate in the financing, with a view to promoting a market for ancillary and secondary exploitation rights. The Terms of Trade provide guidelines for the calculation of production costs and an agreed upon mechanism to evaluate a number of secondary rights (including online rights) and ancillary rights that may be retained by the producer in the event that ARD does not provide 100% of project financing. Amendments were introduced in 2021, which allow green production and

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[73] *The Results of the Knowledge Survey on the Sector Approved of Audiovisual Production*, The Council of the Authority for Communications Guarantees, rapporteur, Commissioner Antonio Martusciello, approved by majority the outcomes of the fact-finding survey on the audiovisual production sector issued with resolution no. 20/15 / CONS.

[74] Sources for the discussion on terms of trade with ARD and ZDF are: *Cornerstones for balanced contract terms and a fair division of rights, effective 01.01.2021*; *The ZDF and the television producers - Framework conditions for fair cooperation (2018)*; *The Results of the Knowledge Survey on the Sector Approved of Audiovisual Production*, Op. Cit.

[75] Produzentenallianz website: https://www.produzentenallianz.de/beitraege/pressemitteilung/12-jahre-%20gemeinsame-ard-eckpunkte-wichtige-verbesserungen-fuer-dokumentarische-produktionen/.

[76] SKW Schwartz, "New Terms of Trade Agreed for Television Productions Commissioned by ARD Stations," January 28, 2016, retrieved from https://www.skwschwarz.de/en/details/new-terms-of-trade-agreed-for-television-productions-commissioned-by-ard-stations.

social media costs to be included in the calculation of production costs. The parties have also agreed to review the model as early as 2022.[77]'

The Terms of Trade with ZDF stipulate that if the ZDF does not fully cover the established production costs, the producer retains exploitation rights to the production, the scope of which are negotiated and defined in an individual contract. The assignment of rights to the parties is based on the producer's share in the production costs and the value of the respective individual rights, calculated individually, based on sales forecasts. In principle, all exploitation rights that the ZDF does not need to fulfill its functional mandate are negotiable. In the case where secondary rights are retained by the producer, ZDF may participate in their exploitation, after recoupment the producer's investment in the production.

In cases where any development financing contributed by ZDF does not result in a production agreement, producers are free to exploit their developed property without any obligation to repay ZDF.

Performance Bonus for Development

As per Terms of Trade with ARD, producers have access to a performance bonus system to reward productions that have been particularly successful (as evidenced by prizes received or number of reruns). These bonuses may be invested by producers in the development of a new program. ARD awards bonuses to the ten highest performing productions by genre in each year. Producers may use the bonus to develop new programs and formats for broadcasting on ARD that can also be successful in international markets.

The ZDF provides an Innovation Fund in the amount of € 2 M (CAD $2.9 M) per year, which may be used by producers to finance development of projects in all genres. The Innovation Fund is intended to promote the development of successful programs and the creative industry in Germany.

Format Rights

It is interesting to note that format rights are not copyright protected in Germany.[78] Format rights are assigned according to the share of production financing assumed between ARD and independent producers. Format rights are negotiated on a case-by-case basis by ZDF, and exclude fiction and docudramas.

1.2 Terms of Trade for German Films

The German Federal Film Board (FFA) is responsible for ensuring Terms of Trade agreements with the two national public broadcasters, ARD and the ZDF, for projects in which the latter

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[77] Produzentenallianz, "12 Jahre gemeinsame ARD-Eckpunkte: Wichtige Verbesserungen für dokumentarische Produktionen und Erhöhung der Erlösbeteiligung von Produzenten," February 1, 2021.

[78] *Copyright Protection of Formats in the European Single Market, Copyright Protection of Formats in the European Single Market - The definition of the copyright protected work with respect to utilitarian copyright theories*, Master thesis in the framework of the European Legal Informatics Study Program 2012/13 Institut für Rechtsinformatik Leibniz Universiät Hannover Author:Maximilian von Grafenstein.

are investors in projects supported by the FFA. These agreements detail the division of rights between producers and the ARD and ZDF, respectively, for their involvement in pre-acquisition, co-production and production. Generally speaking, the agreements allow producers to exploit their secondary rights, while broadcaster rights are awarded rights based on their share of financing. Profits are shared between investors on a pro-rata basis.[79]

Where ARD or ZDF contribute more than 18% of the project financing, they can obtain first window rights of 5 years for unlimited free terrestrial broadcast and catch up viewing. However, if their 18% contribution amounts to less than € 200 K (CAD $295 K) or € 250 K (CAD $368 K) where ARTE is also co-financing, the broadcasters may acquire only the rights to five free terrestrial broadcasts and their catch up viewing. A broadcast right may be exchanged for four digital broadcast rights. Alternatively. the parties may agree to unlimited free terrestrial broadcasts for a reduced duration from five years to four.[80]

2. Funding Programs

2.1 FFA Automatic Funding

Germany's national film funder, the German Federal Film Board (FFA) provides automatic funding, called "reference funding" to German producers of successful films for the development, production or release of new films. Funding may also be used to further capitalize companies by increasing their total authorized share capital. Funding is in the form of a grant that does not have to be repaid.

Funding is awarded based on points earned with respect to the number of cinema tickets sold domestically and the success at nationally and internationally significant film festivals and awards. The minimum number of reference points needed to qualify for automatic funding varies between feature films, debuts, children's films and documentaries. Funding must be drawn down within three years and used to fund projects that pass a cultural test.

Producers may access up to €2 M (CAD $2.9 M) per production, subject to EU rules capping combined subsidies at 50% of the budget (or German share of the budget if the film is an international coproduction).[81]

2.2 Automatic Funding - German Motion Picture Fund (GMPF)

The GMPF, which has an annual budget of €30 M (CAD $44.2 M), provides automatic funding to producers based in Germany for the production of high budget fiction and documentary TV and VOD series as well as films. Non-repayable grants are available to projects that meet all

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[79] *Mapping of national rules for the promotion of European works in Europe*, European Audiovisual Observatory, 2019; *Broadcasters' Obligations to Invest in Cinematographic Production*, European Audiovisual Observatory, 2006.

[80] Produzentenallianz, "*Eckpunktevereinbarung - über die vertragliche Zusammenarbeit zu Film-/Fernseh-Gemeinschaftsproduktionen und vergleichbare Kino-Koproduktionen der ARD,"* May 2019, retrieved from https://www.produzentenallianz.de/wp-content/uploads/2019/06/Eckpunkte-Papier-KinoKo-PA-ARD.pdf.

[81] *Guide to German Film Subsidies*, Greenberg Traurig gray paper.

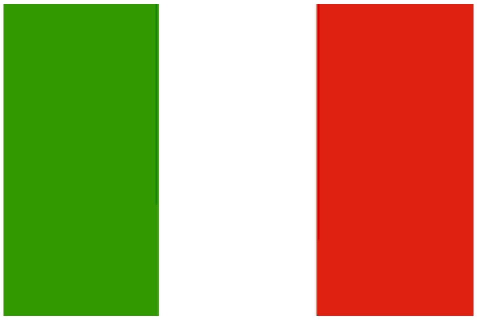
eligibility requirements, until funds run out.[82] Funding may represent up to 20% of German production costs, to a maximum of €2.5 M (CAD $3.7 M) per film or series, and €4 M (CAD $5.9 M) for series with a German spend of more than €20 M (CAD $29.5 M).

Figure 5: Summary of Germany's Policies, Regulations and Programs

Policies and Regulations	Programs
Terms of Trade with ARD and ZDF - Where broadcaster pays 100% for a production, producer participates in fixed share of revenues from exploitation of secondary rights o 25% for ARD and 20% for ZDF - Where broadcaster partially funds a production, producer retains secondary rights proportional to their investment, and projected sales (ZDF). - Calculation of production costs is defined. - ZDF may participation in producer revenues on secondary rights, after full recoupment of producer's investment. - Any rights not exploited within 5 years revert to producer. - Format rights negotiated on a case by case basis - Development financing by ZDF is not repayable if not greenlit by it. - Performance bonus for development - ARD - Innovation fund for development - ZDF **FFA Terms of Trade Terms for Films Co-financed with ARD or ZDF** - First window rights for five years to ARD or ZDF if they contribute 18% of financing and € 200 K (CAD $295 K) or € 250 K (CAD $368 K) where ARTE is also co-financing. - Rights to only five free terrestrial broadcasts and catch up viewing for contributions of lesser amounts. - Number of broadcasts can be exchanged for digital broadcast rights or for shorter duration of rights, from five years to four.	**FFA Automatic Reference Funding** - Automatic Film Funding for producers of successful films - Producers have 3 years to draw down funds - Up to €2 M (CAD $2.9 M) per production, subject to EU subsidy cap of 50% of the budget - Funding may also be used to further capitalize companies **German Motion Picture Fund Automatic Funding** - High budget fiction and documentary TV and VOD series and films. - Non-repayable grants - Funding on first come first service basis - Annual budget of €30 M (CAD $44.2 M) - Up to 20% of German production costs or €2.5 M (CAD $3.7 M) - For series with a German spend of more than €20 M (CAD $29.5 M) funding capped at €4 M (CAD $5.9 M)

[82] *German Motion Picture Fund*, Federal Ministry for Economic Affairs and Energy, retrieved from https://www.bmwi.de/Redaktion/EN/Artikel/Economy/german-motion-picture-fund.html; https://www.ffa.de/german-motion-picture-fund-gmpf-1.html

VI. Italy



1. Policies and Regulations

It Italy, commercial and public service broadcasters, as well as video-on-demand (VOD) services are subject by law to minimum investment quotas for the production, pre-acquisition and acquisition of independent film and television productions: 20% of annual revenues for public service broadcasters and VOD services, and 4.5% for commercial broadcasters. [83] For the purpose of these quotas, Italian law defines independent producers as companies that hold secondary rights and are neither related nor affiliated to the broadcaster."[84]

The national public service broadcaster, RAI, is mandated to ensure adequate support to the development of the national audiovisual industry, through acquisition or co-production of product made by or with independent production companies based in Italy. RAI must be transparent in its dealings with independent producers, publishing on its website its methods for costing production budgets, and the timing of investment drawdowns and payment deadlines. However, there are no terms of trade between Italy's producers and broadcasters or VOD streamers.

Italy's Audiovisual Producers Association (APA) reports that some Italian producers are unhappy about the deals being offered by the global streamers, which are effectively cost plus a production fee. Some producers would like the opportunity to hold on to more of their rights, in exchange for providing the global streamers' with access to Italy's production tax rebates on their commissioned productions. Italy's legal framework for the audiovisual sector is currently being updated to reflect the AVMS Directive, and it is hoped that new legislation will provide clear rules of engagement between streamers and producers.[85] A draft law is awaiting approval in Italy's Parliament.

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[83] Ernesto Apa and Donata Cordone, "Three new pieces of legislation implementing Franceschini Act on cinema and audio-visual media services, *Media Laws*, February 2018; Ernesto Apa and Donata Cordone, New content and investment quotas binding on audio-visual media service providers as result of the "culture decree," *Portolano CAvallo Inform@ Digital & IP*, September19, 2019, retrieved from https://portolano.it/newsletter/portolano-cavallo-inform-digital-ip/new-content-and-investment-quotas-binding-on-audio-visual-media-service-providers-as-result-of-the-culture-decree.

[84] IRIS Plus 2019 – 1, *The promotion of independent audiovisual production in Europe,* European Audiovisual Observatory, May 2019.

[85] Italy, Giancarlo Leone, Audiovisual Producers Association, (APA), cited in "Giancarlo Leone, Head of Italy's TV Producers' Association, on New 'Rules of Engagement' with Streamers, *Variety*, December 13, 2020.

Negotiations have been held with the streamers with the goal of imposing obligations similar to those implemented in France. An investment quota amounting to 25% of revenues is anticipated, all of which would be channelled to independent producers. Of particular concern is ensuring that producers retain some rights. Giancarlo Leone, head of Italy's TV producers' association APA, who is the chief negotiator, has been quoted as saying, "Producers can't just be getting a producers' fee in exchange for what they do."[86]

2. Funding Programs

2.1 Automatic Funding - MiBAC

Automatic subsidies are available to film and television producers through the Fund for the Development of Film and Audiovisual Investments (Fondo per lo Sviluppo degli Investimenti nel Cinema e nell'Audiovisivo), with an annual budget of €640 M (CAD $943 M).[87] The fund is administered by the national Ministry for Cultural Heritage Activities – General Directorate for Film ("MiBAC").

Automatic funding is in the form of a grant that may be used to finance the development, production or distribution of new Italian film or television property, based on a number of performance-based criteria. These include theatrical, home entertainment, media services and foreign performance measures. Companies do not need to have secured any other funding to access their automatic grant.

The maximum amount of automatic subsidies is determined by the MiBAC on a yearly basis, depending on the available resources, the number of films supported and on their performance. There are no minimum spending requirements in Italy.

Development support is in the form of a non-repayable grant. Producers with access to automatic funding may invest it in the development of an Italian work, subject to the overall project funding cap of 50% of total project costs. There are no minimum budget thresholds or maximum budget caps on funded development projects.

While no proof of other financing is required to access funding, distribution deals must be submitted within 24 months (36 months for animation) as a condition for the disbursement of the last 20% of the granted subsidy.

Projects must pass a cultural test of Italian nationality.

3. Fiscal Incentives

3.1 Tax Credit for Third Party Investors in Productions

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[86] "Europe's New Rules of Engagement With Streamers Making Slow But Steady Progress," *Variety,* March 5, 2021.

[87] Rosy D'Elia, "Tax credit cinema 2021, credito di imposta fino al 40% con la nuova Legge di Bilancio," *Informazione Fiscale*, retrieved from https://www.informazionefiscale.it/tax-credit-cinema-2021-credito-di-imposta-importi-novita-legge-di-bilancio.

Italy provides a tax credit to individual third-party investors in an Italian film that has passed a cultural test, at a rate of 40% of the total investment to a maximum of €1 M (CAD $1.5 M) per tax period. The investment may not exceed 49% of the total production budget. In the case of a distributor making an investment, the tax credit rate is 20% to a maximum of €1 M (CAD $1.5 M). At least 80% of the investment must be expended in Italy.[88]

3.2 Loan Guarantee Fund for Creative Sector Companies

Loan guarantees are available to Italian creative sector SMEs including companies, through a state owned lender.

With support from the Creative Europe Loan Guarantee facility, Italy's loan guarantee facility – the Guarantee Fund – provides support to film and television companies by enabling them to access credit through guarantees to lenders provided by the Cassa Depositi e Prestiti (CDP). The guarantee can cover up to 80% of the loan and allows lenders to offer better terms to borrowers in terms of loan amount, required collateral and interest rate levels.[89]

The Guarantee Fund is expected to provide up to €300 M (CAD $442 M) in new financing to the creative and cultural sector. Launched in 2018, the program is said to be the largest initiative in terms of access to finance to have been launched within the Creative Europe loan facility program.[90]

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[88] Tax *Credit Produzione Audiovisiva,* Ministero della Cultura, Direzione generale Cinema e audiovisivo, retrieved from http://www.cinema.beniculturali.it/direzionegenerale/122/tax-credit-produzione-audiovisiva/; *Tax Credit Produzione Cinematografica (Investitori esterni e film stranieri),* Ministero della Cultura, Direzione generale Cinema e audiovisivo, retrieved from http://www.cinema.beniculturali.it/direzionegenerale/57/tax-credit-produzione-e-distribuzione/; *The Italian Tax Credit*, Italian Trade Commission, Los Angeles, retrieved fromhttp://www.filminginitaly.com/tax_credit; Julio Talavera Milla, et al, *Public financing for film and television content: The state of soft money in Europe*, European Audiovisual Observatory, July 2016; *Tax Credit and Tax Shelter Under Italian Law,* Mario La Torre, ("La Sapienza" University of Rome), Gian Marco Committeri (High School of Economics and Finance) (Tonucci & Partners – Rome) New York, October 2009.

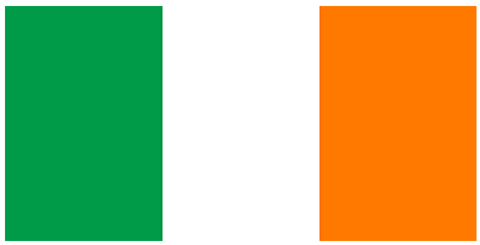
[89] *EUR 5.8 billion in new loans for Italian small and medium enterprises* , CDP website: https://www.cdp.it/sitointernet/page/en/eur_58_billion_in_new_loans_for_italian_small_and_medium_enterprises?contentId=CSA24841.

[90] *EUR 300 million for Italian SMEs in creative and cultural sectors,* European Investment Fund, September 3, 2018, retrieved from https://www.eif.org/what_we_do/guarantees/news/2018/eif-cdp-ccs.htm.

Figure 6: Summary of Italy's Policies and Regulations, Programs and Incentives

Policies and Regulations	Programs	Incentives
Legislative decrees relating to Law no. 220 of 14 November 2016 (known as Franceschini Act) - For the purpose of broadcaster investment quotas, independent producers are recognized as companies that hold secondary rights. **Draft law following AVMSD before parliament.** - Ongoing negotiations with streaming platforms with goal of imposing terms of trade.	**MiBAC Automatic Funding - Fund for the Development of Film and Audiovisual Investments** - Annual budget of €640 M (CAD $943 M) - Automatic grant based on past performance of a film. - Funds may be used for development or production, subject to 50% overall project funding cap from public sources. - No minimum spending requirement in Italy.	**Tax Credit for Third Party Investors** - For investors, tax credit rate of 40% of total investment up to €1 M (CAD $1.5 M) per tax period. - For distributors who invest, tax credit rate of 20% up to €1 M (CAD $1.5 M). - Investment may not exceed 49% of the total production budget. - 80% of the investment must be expended in Italy. **Loan Guarantee Fund for Creative Sector Companies** - Guarantees up to 80% of a loan to a film or television production company

VII. Ireland



1. Policies and Regulations

1.1 Terms of Trade with RTÉ

A “Code of Fair Trading Practice” was put in place by Ireland’s public broadcaster RTÉ in 2013, as mandated by Ireland’s *Broadcasting Act 2009*. Terms for program rights are laid out in the Code.[91]

The producer retains the secondary rights for the world in perpetuity. Acquisition of secondary rights by the broadcaster are subject to separate negotiations.

Where RTÉ provides at least 51% of a project’s funding, the broadcaster will receive exclusive broadcast rights on all RTÉ Services throughout Ireland for five years. In cases where RTÉ is not the primary funder, the number of RTÉ transmissions must be negotiated, subject to a minimum of 5 during the initial term. After two years, producers may propose the exploitation of the program in Ireland on third party services/platforms other than television, over which RTÉ will have the right of approval.

RTÉ shall receive on an ongoing basis 50%, or a percentage of such reflecting RTÉ's proportionate contribution to the program budget, of the net revenue throughout the world in perpetuity from all exploitation of the Secondary Rights. RTÉ will also be entitled to up to 15% of all revenues received by the producer from the exploitation of the format rights in all media throughout the world in perpetuity, where RTÉ is the first broadcaster to commission and broadcast the format.

According to Screen Producers Ireland, this Code of Fair Trading Practice has had little impact on the growth of Irish production companies, largely because RTÉ’s investment obligations in independent production are too low. The obligation is set out in Section 116 of the Broadcasting Act 2009, and fixed at €40 M (CAD $59 M). Screen Producers Ireland have recommended that the amount be doubled to €80 M (CAD $118 M) and that investment obligations in independent production for commercial broadcasters also be increased. It is argued that without these increases, the investment obligations of Irish broadcasters are not having the desired impact on the independent production sector.[92]

Screen Producers Ireland is of the view that growth in the Irish production sector in recent years is not the result of the terms of trade only because the investment quota for RTÉ is too

[91] *RTÉ TV “Code of Fair Trading Practice” For the Commissioning of TV Programming Material from Independent Producers*, October 2013.
[92] Screen Producers Ireland, *Submission to the Future of Media Commission*, January 2021.

low. Growth is attributed to support for production from Screen Ireland and the Section 481 tax incentive, as well as success in international markets through co-production and licensing of rights to international sales agents, distributors, broadcasters and more recently through acquisitions by streaming services such as Netflix and AppleTV. [93]

2. Funding Programs

2.1 Strategic Slate Development

Screen Ireland recognizes that the capacity of Irish producers to hold and exploit the IP within the projects they develop and produce contributes to their sustainability. [94] The funder has established the Strategic Slate Development Program with total funding of €2.5 to €3 million (CAD $3.7 M to CAD $4.42 M), which provides a line of credit to producers to develop and own IP. Screen Ireland provides a line of credit to be expended on the development of audio-visual projects – features, series, and documentaries. The slates may be a mix of genre and can be a single format, for example solely made up of any one of the following: feature films, animation (series or features) or documentaries. [95]

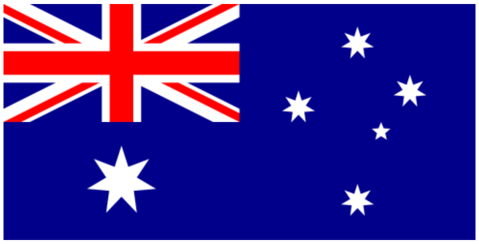
Figure 7: Summary of Ireland's Policies and Regulations, Programs and Incentives

Policies and Regulations	Programs

RTÉ Code of Fair Practice
- Imposed by Broadcasting Act 2009
- Producer retains secondary rights in perpetuity
    o Acquisition of secondary rights by RTE subject to separate negotiations
- Where RTE contributes at least 51% of costs:
    o Exclusive Irish broadcast rights for five years on all RTE platforms.
- Where RTE is not the primary funder:
    o Number of RTE transmissions must be negotiated (minimum term of 5 years)
    o RTE receives a share of net revenues from the work in perpetuity on exploitation of secondary rights, proportional to initial investment
    o RTE will receive 15% share in exploitation of format rights
	Screen Ireland - Strategic Slate Development
	- Line of credit for the development of slates of projects aimed at produces so that they can own IP
	- Total funding of €2.5 to €3 million (CAD $3.7 M to CAD $4.42 M)

[93] Screen Producers Ireland, *Submission to the Future of Media Commission*, January 2021.
[94] Creative Ireland, *Audiovisual Action Plan*, Department of Culture, Heritage and the Gaeltacht.
[95] Screen Ireland website: https://www.screenireland.ie/funding/development-loans/strategic-slate-development-fund.

VIII. Australia



1. Policies and Regulations

1.1 Screen Producers Australia Advocating for Terms of Trade with Broadcasters

Screen Producers Australia (SPA) are presently advocating for the adoption of terms of trade by their regulator similar to those that exist in the UK. Under the New Eligible Drama Expenditure, or NEDE, scheme of the 1992 *Broadcasting Services Act*, subscription broadcasting licensees and channel providers are required to spend at least ten per cent of their total program expenditures for each drama channel on new Australian drama programs.[96] Subscription broadcasters are subject to investment quotas linked to overall program expenditures.[97] These requirements are driving investment in Australian screen production.[98] However, a key challenge most commonly cited by Australian producers is the bargaining power held by broadcasters.

In the Australian broadcasting market, producers have generally sold limited primary rights to distribute their content via means such as a limited broadcast 'window' or DVD and Blu-ray sales. This business model has been profoundly disrupted by video on demand (VOD) services, putting pressure on producers. In addition, SVOD services often seek to purchase perpetual, global rights to content.

With the entry into the market of powerful global streaming platforms, it is becoming increasingly difficult for independent producers to negotiate equitable deals with commissioning parties and to retain their secondary rights. This affects export earnings and the ability of producers to realise the full potential of their content beyond its initial run.[99]

The large number of independent producers and small number of commissioning platforms in Australia has led to calls from producers for mandated terms of trade. As SPA notes, the key to a strong Australian production sector that supplies the market is producers' capacity to retain the intellectual property in their productions and leverage this through international trade.[100]

In the *Final Report of the Digital Platforms Inquiry* (DPI Final Report) published in 2019, the Australian Competition and Consumer Commission (ACCC) recognised the inequality of

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[96] *Supporting Australian stories on our screens, Options paper*, Screen Australia, Australian Communications and Media Authority, March 2020.
[97] *Supporting Australian stories on our screens, Options paper*, Op. Cit., p. 33.
[98] *Supporting Australian stories on our screens, Options paper*, Op. Cit., p. 30.
[99] Screen Producers Australia, *Fact sheet*.
[100] Screen Producers Australia, *Submission to the ACCC's Digital Platform Inquiry*, page 5.

bargaining power between media businesses and digital platforms and recommended the development of a code of conduct by the Australian Communications and Media Authority (ACMA).[101] The Government accepted this recommendation as regards news media only, following concerns expressed by both Free TV and Seven West Media about their ability to negotiate fair licence terms with digital platforms.[102] New legislation has been passed (Bill 2021), which establishes a mandatory code of conduct between news media producers and digital services platforms."[103] The SPA has advocated that the Code be extended to other types of content and to media more generally.

Other reviews could potentially support terms of trade, though their mandates are not directly focused on the issue. Screen Australia and the Australian Communications and Media Authority (ACMA) have co-authored an options paper considering how to best support Australian stories in a multi-platform environment. A consultation is currently underway.[104] Australia's Treasury Department is conducting its own separate review of unfair contract terms provisions offered to small businesses in the cultural and creative arts sector.

In the meantime, in April 2021, SPA established the Screen Export Advisory Council to help advance the export potential of Australia's local screen industry and help secure original production opportunities.[105] As broadcasters and platforms are increasingly requiring a buyout of rights, there is a need to increase revenues from international markets.

1.2 Terms of Trade Between Screen Australia and Producers

Public funding in Australia has been largely designed to encourage producers to retain meaningful equity and future revenue streams.[106] Projects funded by Screen Australia are subject to terms of trade, which aim to ensure that the producer retains a share of the Australian production tax rebate – the Producer Offset – at a rate of 10% for feature films and television and 15% for documentaries.[107] This margin allows producers to retain some equity in productions and ensure their long-term sustainability.

2. Funding Programs

2.1 Screen Australia's Enterprise Program

Screen Australia's Enterprise Program aims to build capacity in the screen-based sector by supporting businesses to diversify, innovate, and develop pathways to sustainability. Support is provided to established and emerging businesses to take advantage of a changing media

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[101] *Digital Platforms Inquiry Final Report,* Australian Competition & Consumer Commission, June 2019.

[102] *ACCC Digital Platforms Inquiry Submission by Seven West Media,* April 28, 2018.

[103] "Australia: New Legislation Establishes Code of Conduct for Negotiations between News Media and Digital Platforms over Payments for Content," *Global Legal Monitor,* February 26, 2021.

[104] *Supporting Australian stories on our screens, Options paper*, Op. Cit.

[105] Marcus Gillezeau, "How might Aussie producers best take advantage of the global streaming boom?," *if.com.au*, November 12, 2019.

[106] *Supporting Australian stories on our screens, Options paper,* Op. Cit.

[107] Screen Producers Australia, *Submission to the ACCC's Digital Platform Inquiry*, page 9.

landscape, collaborate with international partners, reach divergent audiences through multiple pathways, and develop new financing sources and revenue streams.

All funding is in the form of a grant and is not limited to particular genres of filmmaking or platforms.

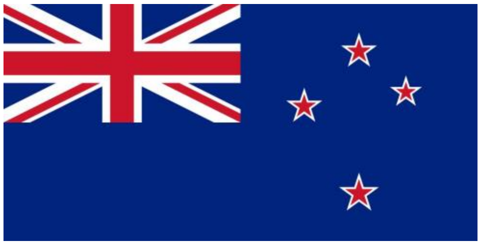
The Fund has had a demonstrated success in building screen industry business capacity for eligible production companies, as many of the beneficiaries of the initial rounds of funding are said to have successfully built sustainable business with diversified revenue streams and foreign investment. While the program does not specifically target underrepresented groups, a number of recipients are Indigenous owned companies, while others have funded projects involving underrepresented communities. Other companies having received support are specialised in documentary, animation and impact producing.[108]

Figure 8: Summary of Australia's Policies and Regulations and Programs and Incentives

Policies and Regulations	Programs
Screen Producers Australia is advocating for terms of trade with streaming platforms **Terms of Trade with Screen Australia** - Producers retain a share of their production tax rebate: 10% share for feature films a television programs and 15% for documentaries -	**Screen Australia Enterprise Program** - Grants for established and emerging businesses grow their business through innovation, new partnerships and revenue streams.

[108] "Screen Australia announces $1 million in Enterprise funding," *if.com.au,* July 28, 2020.

IX. New Zealand



1. Policies and Regulations

New Zealand does not impose production quotas on broadcasting services.[109] Direct funding is provided for local production by way of a grant. Projects that spend above a certain amount receive support as an equity share rather than a grant.

Funding for television content is administered by broadcasting commission New Zealand On Air (NZOA), which is charged under the *Broadcasting Act 1989* (NZ), with reflecting and developing New Zealand identity and culture through promoting programs about New Zealand or New Zealand interests. Through its platform agnostic New Zealand Media Fund, NZOA is a major investor in independent productions in New Zealand.

Te Mangai Paho (Maori Broadcasting Funding Agency) was established in 1993 and is responsible for promoting Maori language and Maori culture through the provision of funding to audio-visual works.[110]

2. Funding Programs

2.1 NZ Film Commission - Boost Funding

The New Zealand Film Commission administers the Booster Program, a development slate funding program which supports, "the growth of producers and screen businesses who have a strategic vision in a fast-changing environment and a plan to deliver on this."[111] The Program supports producers with non-recoupable grants to actively develop their lead project while continuing to progress a slate of projects. The producer must hold or share the necessary intellectual property rights in relation to all the projects on the slate. No funding will be provided if the producer does not hold the rights to the projects.

Up to NZD $75 K (CAD $65.7 K) is available for up to four projects on a slate, including the lead project that will have the most meaningful impact/benefits on the business to innovate and progress. Applicants may include in their slate multiple formats, such as feature film, television, series drama, interactive content and games.

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[109] *Digital Broadcasting: Review of Legislation*, New Zealand Ministry of Economic Development, 2008, page 100.

[110] *Supporting Australian stories on our screens, Options paper*, Op. Cit.

[111] New Zealand Film Commission website: https://www.nzfilm.co.nz/funding-and-support/funding-programmes/project-development-funding.

Up to 50 percent of funding can be taken towards producer overhead costs and fees with the balance going to project development costs.

2.2 Development Grant for Premium Content

Up to NZD $2 M (CAD $1.75 M) of the Fund is available for development of diverse Aotearoa New Zealand content. This assistance is in the form of a grant. The grants are provided through the Premium Productions for International Audiences fund (the Fund). The fund aims to encourage economic growth by providing opportunities to New Zealand owners of IP to be competitive in the global market.[112]

Figure 9: Summary of New Zealand's Policies and Regulations and Programs and Incentives

Policies and Regulations	Programs
No terms of trade	**Premium Productions for International Audiences Fund** - NZD $2 M (CAD $1.75 M) available as grants for development of diverse Aotearoa New Zealand content. **New Zealand Film Commission Booster Program** - Development slate funding - NZD $75 K (CAD $65.7 K) per slate - Non-recoupable grants - Up to four projects in a slate - 50% can be taken as producer fees and overhead

[112] *Premium Productions For International Audiences Fund – High Level Design Decisions for Sector Consultation*, NZ On Air, New Zealand Film Commissin, Te Tumu Whakaata Taonga, 2020; *Premium Productions For International Audiences Fund - Terms of Trade*, January 2021.

X. Concluding Overview and Lessons Learned for Canada

1. Overview of Findings

1.1 Global Recognition of IP Ownership as Foundational Business Model of Independent Production Companies

Our study finds that the investment that independent producers make in the creation of IP through commissions, partnerships and international coproductions is the foundation on which their businesses are built. This principle is enshrined in legislation, policies and regulation around the world. These jurisdictions recognize the value that independent producers bring to their screen-based sectors by investing in innovation, talent development and the plurality of voices, and that these investments are sustained by the exploitation of IP.

Independent production companies typically rely on retaining certain rights to monetize their productions in secondary markets, using these revenues to grow their companies. Many of the jurisdictions examined for this study have introduced policies or regulations to enable producers to retain IP for the works they create so that they may benefit from its secondary exploitation. In numerous jurisdictions examined, independent producers are defined as companies that hold secondary rights. The policies and regulations introduced vary according to jurisdiction and include a variety of measures: terms of trade and program funding guidelines that protect the right of producers to control the exploitation of their secondary rights and in some cases enshrine producers' share of revenues on the exploitation of secondary rights sold to broadcasters, as well as funding guidelines that protect producers' retention of their fees.

Be it through regulation such as the UK's Terms of Trade, the EU's Audiovisual Media Services Directive (AVMSD) or codes of practice put forward by industry associations such as the European Producers Club, or those of public broadcasters, there is a recognition that the global streaming platforms have disrupted the traditional business model of independent producers and that it is timely for governments to intervene to level the playing field. At their most basic, these policies and programs ensure that a specific share of the gains of a project remains with the independent producer. There is an understanding by governments that at issue is the long-term viability of the independent production sector. In European jurisdictions, also at stake is diversity of cultural expression and plurality of perspectives.

Broadcaster and VOD streaming platforms investment quotas ensure a domestic market for independent productions, while terms of trade and codes of fair dealing address disparities in market power and ensure a fair playing field for independent producers. Significantly, the Audiovisual Media Services Directive in the EU provides the legislative framework for individual countries to introduce VOD investment quotas on local independent production. France, Germany and Italy have all introduced such quotas.

The UK's Terms of Trade have been in place for a number of years and therefore their impact can be measured. By one account: "enabling independent producers to own their IP has been one of the most forward thinking policy interventions of the past 20 years."[113] The Terms of Trade are perceived to be a key factor in supporting the success of the independent production sector and their level of exports.[114] The Terms have provided an incentive to sell content abroad to generate revenue, helping the UK independent production revenue to grow. This has driven a virtuous circle in terms of talent, attracting more investment.

Terms of trade with individual public broadcasters exist in France, Germany and Ireland, mandated by national authorities. These ensure that producers can better hold on to their secondary rights, and in some cases provide a stream of revenues to producers when the broadcaster retains these rights.

In France, legislation will now provide independent producers with even stronger terms of trade to ensure that they can retain and exploit secondary rights when producing for broadcasters and VOD services. Negotiations are ongoing in Italy and Germany to secure similar protections for independent producers working with broadcasters and VOD services in these jurisdictions.

The lesson learned for Canada is the importance of ensuring that Canadian independent producers can control how they choose to exploit their intellectual property in a market where buyers have a disproportionate amount of power. Two elements are needed in the Canadian system: recognition that the producer business model is built on holding and exploiting IP, and the reinstatement of terms of trade between broadcasters and independent producers.

The Canadian Broadcasting and Telecommunications Legislative Review Panel's report *Canada's Communications Future: Time to Act* has recommended that an approach similar to the terms of trade model implemented in the UK be adopted in Canada. The Panel has recommended that the regulator "should be able to determine or approve terms of trade to ensure that independent producers are treated fairly." The Panel goes on to provide the rationale: "The media content industry is characterized by high levels of concentration, compared with the number of creators seeking access. For example, there are over 600 independent Canadian producers of television programs in Canada but fewer than a dozen major potential buyers. The situation is similar in the United Kingdom, and its regulator Ofcom has addressed the imbalance of negotiating power by prescribing terms of trade between independent producers and broadcasters."[115]

In addition to terms of trade, it would be instructive for Canada to adopt a similar approach to jurisdictions that have created rights protections for feature film producers. We note that in the UK and the EU industry codes of fair practice have been introduced to address the feature film sector specifically. France has passed legislation protecting the rights of feature film producers who undertake commissions for streaming platforms. In Germany, terms of trade between the national film funder FFA and the two public service broadcasters, ARD and ZDF, ensure that

[113] Creative Industries Federation Submission, *Response to Ofcom's consultation on Public Service Broadcasting:Small Screen: Big Debate –The Future of Public Service Media*, March 2021.
[114] *International perspectives on public service broadcasting*, prepared by EY for Ofcom, October 2020, page 13.
[115] Canadian Broadcasting and Telecommunications Legislative Review Panel, *Canada's Communications Future: Time to Act*, Final report, January 2020.

feature film producers are treated fairly. In Australia, funding provides companies with corporate financing by protecting their access to their producer fees and corporate overhead.

It is also timely to examine commissioning practices and review the standard arrangements covering the release and exploitation of independent films in different media. The goal would be to gain an understanding of the different forms of windowing and the opportunities afforded to independent producers to maximize revenues in a more complex digital landscape. It may also be timely to examine trends with respect to producer fees and corporate overhead to ensure that these revenues can help address the capitalization of production companies.

1.2 Global Trend in Funding for IP Development and Retention for Eventual Exploitation

Seven of the eight jurisdictions examined have introduced programs that support the development of a slate of projects, whether through dedicated slate programs or through producer envelopes. Development financing allows producers to negotiate better terms in production, providing greater revenues and more resources to reinvest in development. Having a number of projects in development increases producers' opportunities to make sales and advance projects to production.

Whether through dedicated slate funding programs or automatic performance based funding envelopes that provide producers with the flexibility to invest in a slate, jurisdictions recognize that the development stage is the most critical for the development of IP. It is at this stage that the capacity of independent producers to hold and exploit the IP within the projects they develop and produce contributes to their sustainability.

In addition, automatic funding mechanisms provide producers with greater flexibility and a predictable funding envelope that helps companies to attract investment in their productions and strengthens their position when negotiating with buyers over the sharing of revenues.

The UK's Global Screen Fund innovates in its support for business strategies that drive the international exploitation of UK films and high-end television. Recognizing the value of IP that can be extracted by independent producers from international markets, the program supports the development of international networks and projects, including developing for the international market and minority coproduction as well as export activities such as the creation of a sales function and support for sales agents who ensure a viable revenue stream to producers to distribute UK films in foreign markets.

1.3 Global Trend Towards a Broad Range of Incentives to Increase Capacity of Independent Production Companies

Our study finds that jurisdictions have introduced fiscal incentives to help increase the capacity of independent production companies.

The UK's Enterprise Investment Scheme and Calculus Creative Content EIS Fund, as well as IFCIC participatory loans in France provide growth capital to production companies.

France's SOFICAs and Italy's third-party investor tax credit provide access to private investments by producers without diluting their ownership of their IP.

Loans and loan guarantees provided by the EU, France, and Italy provide producers with greater financial stability by ensuring that companies have access to working capital at lower costs, strengthening companies overall.

The study did not identify any initiatives specifically aimed at helping diverse producers develop retain or exploit their IP. We note however that initiatives aimed at emerging producers in Australia and the UK have benefitted companies owned by members of underserved communities. Australia's Enterprise Scheme provides corporate investments to emerging producers to support initiatives that position them for growth. The UK's Vision Awards supports emerging companies to define their company identity and become viable businesses through financing for the development of a slate of projects. Interviews with industry organizations representing Indigenous and Black producers spoke of the need to build capacity in their companies, due to historic lack of access to support that has impeded their growth and in some cases forced them to sell their IP to larger production companies that are not Indigenous- or Black-owned in order to finance their projects.

To be successful at home and abroad, Canada needs strong Canadian production companies capable of creating content that will stand out in a competitive global marketplace. This should include a strong independent production sector to preserve the diversity of voices in the face of market concentration. A high level summary of the policies and regulation, programs and incentives put forward in each of the jurisdictions examined for this report are shown in Figure 10. It is clear from this overview that Canada is falling behind its competitors. Reinstating terms of trade, funding development slates, and creating investment incentives would go a long way to level the playing field for independent producers in Canada, while bringing the domestic industry in line with the competitive advantages currently enjoyed in other jurisdictions.

Figure 10: Overview of Types of Policies/Regulations, Programs and Incentives, by Jurisdiction

	Policies and Regulations		Programs		Incentives
Jurisdiction	**Terms of Trade**	**Codes of Conduct**	**Development Slate Programs**	**Automatic Funding Programs**	**Fiscal Incentives**
UK	✓	✓	✓	✓	✓
EU		✓	✓	✓	✓
France	✓	✓		✓	✓
Germany	✓	✓		✓	
Italy	✓	✓		✓	✓
Ireland	✓	✓	✓		
Australia		✓		✓	
New Zealand		✓	✓	✓	

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Appendix 2: List of Interviewees

1. Agnes Augustin, Shaw Rocket Fund
2. Jamie Brown, Frantic Films
3. Erin Creasey, Ontario Creates
4. Matthew Deaner, Screen Producers Australia
5. Damon D'Oliveira, Conquering Lion Pictures
6. Ken Faier, Epic Story Media
7. Scott Garvie, Shaftesbury
8. Prem Gill, Creative BC
9. Nathalie Clermont, Canada Media Fund
10. Noreen Halpern, Halfire Entertainment
11. Brian Hamilton, Omnifilm Entertainment
12. James Hickey, European Producers Club and Former Director of Screen Ireland
13. Joan Jenkinson, Black Screen Office
14. Alexandra Lebret, European Producers Club
15. Dawn McCarthey-Simpson, PACT
16. Sarah Nathanson, Thunderbird Entertainment
17. Steven Stohn, Skystone Media
18. Josette Normandeau, Ideacom International
19. Neil Peplow, British Film Institute
20. Karen Stone Thorne, Ontario Creates
21. Jesse Wente, Indigenous Screen Office