Canadian Media Producers Association

Submission to

The Canada Media Fund

Re: Fall 2016 Working Groups

December 22, 2016

INTRODUCTORY COMMENTS

The Canadian Media Producers Association (CMPA) represents the interests of more than 370 Canadian independent production companies engaged in the development, production and exploitation of English-language television programs, feature films and digital media content across the country.

The financing made available by the Canada Media Fund (CMF) is critical to the success of our members. As such, any changes to the CMF guidelines and programs are taken very seriously by the CMPA's CMF Working Group, which is comprised of representatives from production companies producing in all genres from coast to coast. We appreciate the opportunity to provide the following views of our members on some of the specific proposals outlined in the CMF's October 11, 2016 Performance Envelopes Working Group Briefing Note (the "October 11 Briefing Note") and the October 13, 2016 Eligible Licence Fees, Thresholds and Other Rights Working Group Briefing Note (the "October 13 Briefing Note").

In addition to the enclosed, the CMPA plans to file two additional submissions with the CMF in response to the changes presented at the Fall 2016 working group consultations, as follows:

1. The CMPA will respond to the CMF's proposed New Funding Framework in February 2017. This response will discuss the proposals included in the presentation, specifically concerning equity, ensuring support for documentaries and the expansion of eligible market triggers for the CMF.

2. The CMPA will offer proposals on Development and our response to the October 11 Briefing Note concerning Regional Production in May 2017. Given the importance of these issues, we ask that no changes be made to these programs while we conduct member outreach on these proposals.

Finally, as we all look to better reflect the diversity of Canadian citizens both on and off screen, the CMPA is committed and looking forward to working with the CMF to find viable and timely solutions to the gender parity and diversity issues facing the industry.

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A. CHANGES TO FACTOR WEIGHTS (Historical Performance and Digital Media Investment Factor Weights)

In the October 11 Briefing Note, the CMF proposes changes to the Historical Performance and the Digital Media factor weights as they do not align with the proposed New Funding Framework. The CMF proposes the eventual elimination of these factor weights to be redistributed to Total Hours Tuned and Original First Run.

The CMPA supports the CMF's efforts which, we understand, may also serve to help prevent misuses of the factor weights to inflate broadcaster performance envelopes. However, the proposed changes will likely shift the performance envelope funds away from smaller broadcasters who are vital to the diversity of the broadcasting system. This would impact the independent production sector as a whole and the diversity of programming funded by the CMF. We are concerned about the impact that the CMF's proposed changes to factor weights will have on small broadcasters and APTN, as expressed by the CMF in the October 11 Briefing Note.

Recommendations

1. **Mitigate Impacts on Small Broadcasters.** We strongly urge the CMF to consider the impact of its proposed changes and ask that the CMF undertake steps to mitigate any undue impact on small broadcasters and, in particular, APTN.

2. **CDMI Consultation.** As the CMF indicated, the removal of the Digital Media Investment factor weight will directly impact digital media producers. The removal of this incentive means that some projects will no longer receive the benefit of a robust digital brand presence, which will diminish their discoverability. Additionally, any reduction in support for the digital extension for children and youth properties will impact both the discoverability and potential international sales of these projects where there is a market demand and expectation for brand content on multiple platforms. We strongly advise further industry consultation as the CMF contemplates changes to the CDMI as proposed in the October 11 Briefing Note.

3. **Load Factor Weights towards Original First Run**. The CMPA does not oppose the proposed removal of the Historical Performance and Digital Media Investment factor weights but recommends that the weight of these factors be shifted more towards Original First Run than towards Total Hours Tuned. While Total Hours Tuned rewards overall engagement with a project, affording more weight to Original First Run will ensure that broadcasters are motivated to trigger more projects. This will, in turn, provide more opportunities for Canadian audiences to access a greater diversity of content and more made-in-Canada productions.

4. **Make Marketing and Promotional Spend a Weight Factor for the Performance Envelope Calculations.** As per our December 23, 2015 submission to the CMF re: Fall 2015 Working Groups (the "CMPA 2015 Submission"), the CMPA proposes the addition of a factor weight for marketing and promotion. Since the Performance Envelope program will be part of the Audience Centric vertical, this proposal aligns with the CMF's proposed New Funding Framework.

   Marketing and promotion are key to discoverability not only for linear but also on-demand viewing. This proposed factor weight will support discoverability and enhanced market awareness of a project for Canadian and international audiences, and buyers.

   We recognize the continuing key contribution that broadcasters play in the marketing and promotion of a program both through in-house resources and unaffiliated expenditures. However, in light of the possibility that broadcasters may over value in-house resource expenditures (such as lower third ads on the bottom of screens or ads on owned websites or apps), the CMPA proposes that: (i) only expenses unaffiliated with the broadcaster be included as part of the factor-weight calculation; and (ii) the CMF implement objectively measurable standards in order to verify eligible expenses. This factor could include the financial contributions that a broadcaster makes for the production of broadcaster- unaffiliated original digital media content for a program.

   We acknowledge that this proposal requires further detailed consideration of how promotional and marketing monies are tracked and benchmarked, as well as other factors. As such, we recommend that the CMF establish a working group composed of representatives of the CMF, broadcasters, and producers to assess factors for consideration. Producers are vital to the conversation as they are responsible for providing key promotional and marketing assets as well as developing and implementing promotional strategies.

5. **Reward Contribution and Engagement on Digital Platforms.** We recommend that the CMF develop methods that will encourage and reward contributions to original first run programs on digital platforms and consider how it might meaningfully measure digital audience engagement.

B. THE CMF'S PROPOSED RISK ASSESSMENT FOR BROADCASTER FINANCIAL VIABILITY

In the October 11 Briefing Note, the CMF indicated that it is considering implementing a new risk assessment for Broadcaster Financial Viability as a condition of broadcasters' access to and disbursement of their respective Performance Envelope allocations. The CMPA supports this proposal, particularly in light of the negative impact that producers experienced as a result of Allarco's disclaiming of projects under its CCAA filing. It is important that such an assessment be conducted prior to the awarding of any CMF Performance Envelopes.

There are existing resources to aid the CMF in undertaking this initiative. Many of the banks that provide interim financing of broadcast licence fees to producers already have risk assessment processes in place with regard to broadcasters. The CMF may wish to partner with banks or consider how existing bank practices may alleviate any additional burden that a new Broadcaster Risk Assessment might add to the CMF administration. We recognize this could raise confidentiality concerns, but are confident these concerns could be assuaged with the assistance of the broadcasters.

C. THE CMF'S PROPOSAL TO MAINTAIN FLEX/IN-HOUSE/AFFILIATED CAPS

In the October 11 Briefing Note, the CMF proposes to maintain current genre allocation levels, flex and maintain spending caps in the Performance Envelope program. The CMPA supports these CMF proposals provided that clearer rules are established to determine which funded projects would fall under the broadcaster In-House and Affiliated production caps.

Recently, there has been an interpretative blurring of lines between projects that qualify as independent and those that should fall under the CMF broadcaster In-House and Affiliated caps.

Service productions, in name or deal structure, must be counted under the In-House and Affiliated production caps. Only truly independent productions where the producer retains the copyright, the underlying rights and control of the exploitation of the program must fall outside of the In-House and Affiliated caps.

The CMF is a key source of financing for independent production. The caps on broadcaster In-House and Affiliated productions are an important safeguard to ensure that broadcasters do not give undue preference in their Performance Envelope spending to their owned projects. In order to preserve the spirit and intent of these safeguards, the CMF should revisit the criteria that dictate which projects truly constitute independent productions (in other words, those that are not "In-House" or "Affiliated"). Refining these criteria will help to ensure that the producer has beneficial ownership of the project and that the productions that fall outside of the CMF caps are truly independent.

Recommendation

As part of its intervention to the CRTC for the Group Licence Renewals of Bell Media, Corus Entertainment and Rogers Media, the CMPA proposed the following definition of independent production:

> "programs produced by independent production companies" means programs produced by a Canadian company carrying on business in Canada with a Canadian business address, owned and controlled by Canadians, whose business is the production of film, videotape or live programs for distribution and in which the licensee and any company related to the

licensee owns or controls, directly or indirectly, in aggregate, none of the equity, and in respect of which the licensee and any related entities:

i) is directly or indirectly entitled to less than 50% of any revenues earned (excluding revenues earned by the licensee from its Canadian broadcast licence for such program);
ii) does not own or control any rights or properties upon which the program is based; and
iii) is not identified in the program's credits as a producer.

In line with this definition, we encourage the CMF to clarify what constitutes In-House or Affiliated productions, to ensure that independent productions remain truly independent. This will better protect all partners in a project whereby revenue will flow equitably to all stakeholders, including the CMF when it is in an equity position.

D. LICENCE FEE THRESHOLDS, BUCKETS OF RIGHTS and LICENCE TERMS

In the October 13 Briefing Note, the CMF proposes nominal increases to Licence Fee Thresholds ("LFTs") based on licensing trends, adopts a revised proposal from the CMPA December 2015 Submission to break down the bundle of intellectual property rights exchanged between producer and broadcaster into certain "buckets" and proposes a five-year licence term.

While the CMPA agrees with the CMF's overall approach of bundling the rights, we do not support the nominal and inadequate changes to the LFTs or the corresponding "buckets" as proposed by the CMF.

Recommendations

1. **Licence Fee Thresholds**. It is our view that the CMF's examination of licensing trends does not reflect the realities of production. Rather, it tacitly accepts the broadcasters' contributions as acceptable as opposed to analyzing what the actual hard-costs of production are and how they are financed. In contrast to basing LFTs on an examination of licensing trends, the CMPA 2015 Submission recommended that the LFTs should be raised commensurate to the increases in the costs of production. We maintain our position that basing LFT changes on production budgets would better reflect the market reality. We urge the CMF to consider all factors, including average production budgets, as the basis for changes to LFTs.

   The CMPA also requests that, contrary to the CMF proposal, no changes be made to English-language documentary LFTs.

In addition, to ensure that LFTs remain relevant to market realities, the CMPA requests that the CMF revisit LFTs, including the consideration of further increases and bases for its calculations, on an annual basis.

2. **Buckets of Rights.** In the CMPA 2015 Submission, we proposed our "buckets" of rights along with concurrent increases to LFTs as fair payment in exchange for the provision of the increased rights to broadcasters. As the CMF has not adopted the higher LFTs we proposed, but instead proposes only nominal increases, we cannot support the increased rights to broadcasters as outlined in the October 13 Briefing Note.

   Instead, we propose that, in exchange for payment of the Eligible Licence Fee ("ELF"), the broadcaster would acquire the rights enumerated in Bucket A below for the licence term. Contrary to the CMF proposal, the producer would own and control the "Bucket B" rights. Under Bucket B, the broadcaster would obtain a share of net revenue upon payment of the ELF, but the amount of such share would remain subject to negotiation. (The broadcaster could, of course, negotiate a licence with the producer to acquire any or all of those rights). The rights in Bucket C would be exclusively retained by the producer, with no automatic revenue share to the broadcaster, but could be subject to further negotiation for a fair and equitable payment above the ELF.

Rights Bucket A

The Canadian rights that the Canadian broadcaster would receive in exchange for payment of the Eligible Licence Fee:

- Linear broadcast rights on all owned CRTC licensed broadcaster or CRTC licensed VOD service;
- Broadcaster owned/controlled free to consumer internet and/or mobile/wireless broadcasting/distribution rights;
- "Value Added" promotional Digital Media rights; and
- Linear broadcast rights on CRTC licensed VOD services.

Rights Bucket B

The Canadian rights that remain under the control of the producer, but from which the broadcaster is entitled to a negotiated share of net revenue (with no more than 50% to broadcaster) and subject to a reasonable negotiated holdback in exchange for payment of the Eligible Licence Fee:

- Consumer pay internet and/or mobile/wireless broadcasting/distribution and/or subscription video on demand (SVOD);
- Free to consumer internet and/or mobile/wireless broadcasting/distribution and/or advertising video on demand (AVOD);

- Electronic sell-through, electronic rental, DVD, Blu-Ray or other compact devices, otherwise generally known as “Home Entertainment”;
- In-flight; and
- “Rich and Substantial” Digital Media rights.

For clarity, the broadcaster is only automatically entitled to a share of net revenue for these Bucket B rights. The producer may licence these Bucket B rights to any party, including to the broadcaster, but only for an amount over and above the ELF negotiated in good faith.

Rights Bucket C

Rights that historically have been held exclusively by the producer who can freely exploit without restriction:

- Theatrical;
- Non-theatrical;
- Educational;
- Merchandising;
- Ancillary rights (including music publishing);
- Retransmission; and
- Any other right not specifically allocated to Bucket A or B (including but not limited to international rights).

For clarity, the producer may freely exploit these Bucket C rights, including to the broadcaster, but only for an amount over and above the ELF negotiated in good faith.

3. **Licence Fees Over and Above the ELF Need to be Fairly Valued**. While the current Terms of Trade agreement remains in effect through August 31, 2017, we see an increasing trend in inequitable deal terms, such as the broadcaster taking a 30% worldwide profit participation position, licensing numerous ancillary rights and acquiring non-exclusive rights to exploit the project internationally, for a nominal, improperly-valued fee of $100.

   As a primary funder, the CMF has a key role in ensuring equitable participation in the system. The CMPA recognizes that fair market value is subjective, but remains concerned about the rights that a broadcaster may acquire in exchange for nominal payments that exceed the ELF. As an equity investor in projects, this should be equally concerning for the CMF and it ought to introduce strong policies to ensure that there is fair balance in the system and that revenues will flow to all stakeholders in an equitable fashion.

4. **Use it or Lose it.** In concurrence with rights principles followed by the CMF and the Certified Independent Production Funds, all rights licensed to the broadcaster – whether automatically (i.e. Bucket A) or through a good faith negotiation over and above the ELF (i.e. Buckets B and)C

- should be subject to use-it-or-lose it conditions in order to ensure that projects receive maximum exposure on a variety of platforms for the benefit of audiences and to ensure that all parties benefit from all potential Canadian and international rights exploitation. The use-it-or-lose-it clause has been pivotal in enabling producers to make use of every available opportunity and platform. As indicated during the working groups, producers are open to negotiation with broadcasters for any rights which may have reverted due to non-use should new platforms or technologies emerge later in a licence term. The CMPA strongly asserts that the use-it-or-lose-it principle should remain in place.

5. **Licence Terms.** The CMPA supports the CMF proposal to restrict the licence term for all genres to five (5) years.

E. THE CMF'S RESEARCH INTO BROADCASTER PAYMENT SCHEDULES

In the October 11 Briefing Note, the CMF indicated that it is researching the drawdown payment schedules of broadcasters in order to mitigate risk for the CMF and the industry in the event of broadcaster financial difficulty. The CMPA supports these efforts and highlights the importance of front-loading payments to producers to ensure CMF dollars are spent on the screen as opposed to interest payments to the bank.

The current CMF drawdown schedule of 85/15 works and is preferable for producers. Any changes to drawdowns could be detrimental to producers and would, again, reduce the money that ends up on screen and increase the money that flows to the banks.

Producers must spend significant amounts to cash-flow various elements of production financing, including broadcaster licence fees and tax credits. These interest payments do not benefit the production itself, but are necessary to ensure that the production proceeds. The unfortunate practice of some broadcasters paying out licence fees and contributions well after the delivery of a project means that producers are often waiting for payment long after a show has aired. In the extreme case of Allarco, a number of projects aired to the benefit of the broadcaster but were subsequently disclaimed, effectively cancelling all payments and causing undue hardship to the producers.

For the same reasons, the CMPA also objects to any slow-down of CMF payments. As an example, we understand that the CMF is now slowing payments to producers to be concurrent with an Allarco drawdown. This now has the effect of delaying payment to the producer from multiple sources, not just from the broadcaster, adds to the already significant cash-flow burden on producers and quite directly increases interest payments to the bank.

Broadcaster draw-down payments are also being unreasonably extended as a result of challenges with meeting certain conditions of drawdown payments that are outside the producers' control, such as the broadcasters' requiring CAVCO Part B certification.

Recommendation

The CMPA requests that the CMF set a standardized required broadcaster drawdown schedule with reasonable payment terms, timelines and required deliverables in the interest of keeping more funds on screen and the production on schedule. We further request that the CMF consult with producers before it makes any changes to either the CMF drawdowns or to any requirements of broadcasters with regard to drawdowns.

F. OTHER PRODUCER CONCERNS

1. Feature Film Pilot Program. The CMPA is grateful that the CMF adopted the new lower LFT component of our Feature Film pilot program proposal as submitted in December 2015. We acknowledge, as per the October 13 Briefing Note, that no Canadian theatrical feature films have yet been supported through this initiative. That said, we understand that there may be projects in development which will access this initiative. We wish to reaffirm the importance of encouraging greater broadcaster participation in the financing of Canadian English-language theatrical films. As such, with a view to maximizing its effectiveness, we would welcome the opportunity to explore how best to enhance the incentive to achieve this goal and to harmonize it more fully with the requirements of Telefilm's Canada Feature Film Fund.

2. Institute a Floor on Licence Fees paid for Renewals of Previous Seasons. Some broadcasters are effectively implementing a workaround to the CMF guidelines that disallow co-terminus renewals by paying as low as $1.00 to licence previous seasons when ordering a new subsequent season of a program. For this reason, as proposed in the CMPA 2015 Submission, we urge the CMF to institute a floor on licence renewals for previous seasons of a television series.

3. Customer Service Agreement. The CMPA would like to further engage with the CMF to explore opportunities for administrative efficiencies. Our members report increasing challenges with closing files, particularly the closing of development files when a project proceeds to production. In some cases, a producer may be put into default due to an outstanding issue with closing a development file which subsequently delays production filing. In many cases, outstanding issues are due to things outside the producer's control such as awaiting a fully executed broadcaster agreement. Challenges with administrative flow are reported in all phases of programs including development, production and audit. We welcome further discussions with the CMF about how we might alleviate these concerns.

4. Transparency. The CMPA reiterates its concerns that not all industry submissions to the CMF are made public. While we appreciate the notion of sensitive business intelligence and strategy, it remains a concern that decisions may be made without full transparency and discussion among all parties. First, it is difficult to find effective solutions as an industry if all parties do not have a view into the positions of the other parties. Second, it is inconceivable that a broadcaster could not draft its submissions to avoid disclosing such sensitive or confidential information, or alternatively, that a broadcaster could not easily produce a public version of its submissions to the CMF (as they do for CRTC filings). Finally, the CMF generally endeavours and ought to be guided by the principles of transparency and accountability, open information and open dialogue. For these reasons, we request that the CMF make all industry submissions publicly available.

CONCLUSION

The CMPA appreciates the CMF's engagement of stakeholders throughout the ongoing consultations, and in particular, the CMF presentation to our Working Group and Board of Directors. We remain committed to collaborating with the CMF and other stakeholders to increase the efficiency and effectiveness of the fund. We welcome any questions or comments that you may have.