THE NEW DEAL

How Digital Platforms Change Negotiations between Public Media and Independent Producers

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Digital technology hit the marketplace over two decades ago, now, but only recently has it started to remake the television landscape. A brave, new, hyphenated world of web-enabled, multi-channel, video-on-demand, pod-casting, and who-knows-what-else is now changing the game. The digital future—with its anytime, anywhere, anyhow model—seems particularly full of promise for niche programming with niche audiences.

But no one knows which changes will last and spread, and which will wither and die. It’s a scary combination—uncertainty and urgency. No one thinks they can wait to find out which boat floats; everyone’s trying to reserve a hundred different deck chairs; few are ready to pay for tickets. And that’s where “digital rights” come in. Every producer and distributor wants to control these rights, even if they don’t know exactly what they mean or what to do with them, yet.

If these insecurities are rolling the commercial industry, they hit particularly hard at public media. We invest not only in our business but through it in the health of the body politic. We work with fewer resources than commercial media, and experimentation is therefore even more expensive.

The changes rushing at us also put at risk the delicate network of relationships that make our work possible. Here at the Independent Television Service we work at the intersection of independent producers and public television. These two groups have been partners for a long time, and their partnership connects a complex ecosystem of foundations, state and federal funders, media centers, educators, outreach organizations and others. It’s a partnership that has realized incredible achievements and faced significant challenges.

At ITVS we don’t yet know how digital opportunities will reshape our relationships. But we do believe that public media must survive and thrive in the new
television landscape. Our future depends on carving out competitive, permanent, recognized real estate for independent media voices, whose first obligation is to citizens rather than to consumers.

That means serving viewers beyond the old fashioned scheduled broadcast on Wednesday at 8 p.m. Eastern, 9 p.m. Central. It means the potential to stream video to a laptop in Alabama at midnight, to crack the on-demand menus in rural North Dakota and downtown New York City, to put programs within reach through a student’s iPod.

If we’re going to do our job, we need good information. And so do the producers with whom we work, and the many institutions that form our ecosystem. That is why we were delighted to collaborate with the Center for Social Media at American University to coproduce this study, and to make it public for our fellow stakeholders in public media.

This study provides, first, a simple snapshot of current practices in rights negotiations with independent producers, in public and commercial TV, in traditional television, and in new media. It’s only a snapshot, but we think it’s a helpful one, because it shows us where the field is today.

Second, the study provides context for us to understand the environment, and to assess the pace of change.

Finally, the study challenges us to ask what is at stake. We believe that independents need a healthy public media, and that public media needs thriving independents. Right now, the urgency and uncertainty of this transitional market is putting additional pressure on this complex partnership. But the road ahead holds enormous promise for public television and independent producers to succeed together—if they can work together, make informed decisions, and talk about what comes next. We hope this report will be the beginning of a fruitful conversation about the future of television for the people, by the people, no matter what kind of screen it’s on.
REPORT: The New Deal

By Patricia Aufderheide

As television transforms itself in a digital download era, once-stable relationships among independent producers, distributors, and programmers are changing. Producers search for new ways to reach users and to monetize their own investment with new media; distributors try to extend their brand and access, also looking to take advantage of new market opportunities. At the same time, the new media market is nascent and confusing and may dramatically change the relationship that both producers and distributors have with users.

This report summarizes research on the current environment for rights acquisition of independent film production, both within public broadcasting and beyond. It also summarizes trends identified in the research and identifies challenges and opportunities, in order to clarify what is at stake for public media makers and programmers.

RIGHTS

• Producers’ Issues

Independent producers traditionally have been resourceful in maximizing their revenue opportunities. As public television producers, they usually trade limited domestic television broadcast rights (often, four releases over three years for public broadcasting) for the funding they need in order to complete their programming. For additional income, they pursue secondary distribution outlets: theatrical release, DVD sales, international television, and others. Independent producers depend on this additional income to survive and to help seed future projects.

In digital distribution, some independent producers see a new opportunity to find the right audience for their work themselves. Some want to partner with distributors and broadcasters to explore new options. No matter who distributes their content, forward-thinking independent producers know that revenue from digital delivery platforms will be an important part of their livelihood.

• Public Broadcasters’ Issues

Public television entities showcase and produce a great reservoir of high-quality, information-driven, and educational content. This content covers a vast spectrum of topics, much of it perfectly suited for niche audiences. By
definition, its value tends to be more qualitative than commercial, serving an important purpose in our society despite its limited potential for profit.

In the past, this content mainly reached audiences in one of two ways. On the national level, certain high-profile series and programs were broadcast universally. On the local level, each individual public television station programmed niche content tailored to regional audiences. Public broadcasters, like commercial broadcasters, are beginning to deliver their digital content through platforms beyond broadcasting. They want to position themselves as providers and managers of content for a digital era, carrying into that era the promise of public broadcasting to provide a zone of high-quality content that enriches public life. So they need to be able to seize opportunities wherever they pop up on the digital landscape and therefore need contracts that let them do that with independents’ content.

The problems of public broadcasters are not different in kind from those of commercial broadcasters, but they have different issues in responding to them, partly because of the structure of public broadcasting. It is unclear where leadership can or should be exercised to create new platforms. The current network-affiliate model is being strained everywhere, since digital download can preempt stations. Commercial networks and stations are gradually forging new relationships, such as NBC’s National Broadband Company, a joint project of the network and affiliates to launch broadband video. Unlike commercial networks, though, PBS is a membership organization of stations, each with distinctive interests, and some of which contract individually with producers. Public television also contains other organizations, such as the Independent Television Service and the minority consortia, each of which also conducts negotiations. (Bachman, 2006)

Public broadcasters also have less flexibility to choose their own revenue models than commercial broadcasters do. As digital platforms permit more direct access to viewers and targeted audiences, and revenue models change accordingly, it is unclear how public broadcasters—whose tax dollars are tied to broadcasting—can and should collect revenue to maintain a public zone on the media landscape.

THE CURRENT RIGHTS MARKETPLACE

Method

Given the concerns both of independent producers and public broadcasters, and the public’s stake in the future of independent work on public platforms, the Center for Social Media conducted research asking two questions:
What are the current typical rights demands and deals of commercial and public television programmers with independent producers?

How do the current uses of the new media platforms intersect with these practices?

Cablecasters and broadcasters, as well as new media providers on the Internet, were interviewed at length. Interviewees were selected for their importance to independent producers as potential venues or distributors; the center pooled contacts and knowledge with ITVS to create the list of interviewees and to review data.

Thirty executives were interviewed by center researchers, in four general categories: public TV, cable TV, satellite public TV, and Internet companies with audio-visual media production or acquisition services. As well, several producers and producers’ representatives were consulted. All interviewees were promised anonymity.

Executives were asked to describe both their wish lists for rights and their usual agreements in social-issue documentary programs created by independent producers, for two different situations: equity investments and acquisition. They were asked to describe routine rights acquisitions terms for types of media, exclusivity, territory, and duration. Producers were asked to describe routine demands by programmers for rights.

Each interviewee stressed the idiosyncrasy of each negotiation, and the impossibility of generalizing with authority, given the individual nature of each work. Independent producers are also keenly aware that each work has unique elements that present negotiating advantages or limitations. Nonetheless, interviewees’ responses did form reportable patterns.

- **Findings**
  - Public broadcasters and commercial cablecasters both command substantial and very similar rights packages on an exclusive basis for the North American territory. Both are asking for and often getting new media or online rights without either increasing their payments or investment or diminishing the length of time for which they once leased the rights for broadcast in the same territories. In some cases, both in public and cable television, online—new media rights clauses have been in place for years but only now have come into contention.
  
  - Funding commands rights; distributors who acquire must honor prior obligations in their dealmaking, and win far fewer rights.
Cablecasters and broadcasters would like to hold all rights in perpetuity but rarely win such arrangements unless they fully fund all production costs.

- Broadcasters routinely expect and get exclusivity for acquisitions as well as for their equity investments. Nonprofit satellite services do not ask for exclusivity, and neither do Internet services, such as Yahoo.

- Terms used to describe emerging digital platform rights vary widely. The accompanying list displays a wide range of terms, including the emerging term "broad TV," an umbrella term being used by PBS to include online and video on-demand services with broadcast rights.

- Public broadcasters' license periods are usually longer—about four years—than cable, which usually makes a three-year lease (but can make leases for much longer, up to seven years). Internet providers may sign extremely short contracts, even for a few months or a year.

- Cablecasters sometimes get some rights in the lucrative DVD market, even when merely acquiring, but public TV entities only get DVD rights if they are equity investors, and sometimes not even then. When DVD rights are secured, those rights buyers want video-on-demand rights as well, in an attempt to protect their interests as DVD obsolesces.

- Revenue splits are well established for the mature post-broadcast markets, such as international television and DVD. They are not established for new media platforms.

**Conclusions**

Television programmers in both cable and public TV continue to act, in their negotiations with independents, primarily as programmers rather than as archives holders and archives builders. While some organizations are building archives, the rights packages that television programmers currently win are short-term leases that permit specified rather than open-ended uses.

Both commercial and public programmers described their demands for a comprehensive rights package as protection rather than opportunity. They want to be able to move across platforms that may open up tomorrow without renegotiating rights. Public programmers fear losing viewers for potentially important information and perspectives.

The rights packages being assembled currently in television reflect the insecurity of the cablecasters and broadcasters about the emerging environment, and the lack of dependable income from any of the new media platforms at the moment.
TRENDS

Following are trends in television relevant to rights negotiations, harvested from interviews and current business reporting.

**Digital distribution promises to change the mass media model profoundly.**

New technologies and applications permit viewers (at least in principle) to select, save, edit, timeshift, and even spacetshift their media. Not only that, they can make their own media and even remix it with media they download, combining it if they wish with digital communication. The mass media model of pushing media from a central source to large numbers of passive viewers has been supplemented, and could be overtaken, by media models that depend on building relationships, providing service, and enhancing networks. Collaboration, participation and social networking are all features of the “open media” structure of tomorrow, which runs directly counter to today’s television. “Television and media will change more in the next three to five years than it’s changed in the past 50,” said one Nielsen Media Research analyst. While this change goes on, however, the “old” television continues to be a powerful media force. (Blau, 2004; Cooper, 2006; Kluth, 2006; Lavelle, 2006)

**Television continues to be an unparalleled mass medium, for now.**

Broadcast and cable television continue to be the most important media interface for viewers. Consumers spend 51 percent of their media time on television, compared with 23 percent on radio, 15 percent on the Internet and 4 percent on magazines. Advertisers continue to pay high prices—and in the case of the Super Bowl, more than ever before—for their access to television viewers, and advertising dollar volume continues to rise in broadcast. In public television, underwriters continue to value the prestige venue. (Anonymous, 2006; DeLaney, 2006)

**DVD business is a cash cow—for now—for independent production and especially for documentary.**

In the current environment, the most financially successful postbroadcast delivery system is DVD—a lucrative but a mature market and transitional format. The DVD market grosses $24 billion a year in the United States alone, out of an estimated $200 billion consumer spending on media. Although documentaries are only a small part of this, the number of docu-
mentaries on DVD has grown even more rapidly than the growth of DVD overall. Documentaries with theatrical histories have sold extremely well; for instance, *Super Size Me* sold about 200,000 DVDs in stores alone, according to Videoscan. Online rentals, such as Netflix and Blockbuster online, have grown rapidly to become a significant minority of rentals, and some indications are that more than half of documentary rentals are online. (Anonymous, 2005b; Hagan, 2005; Netherby, 2005; Plunkett-Research, 2005; Ramirez, 2005)

**New digital delivery systems and business models are still in Beta.**

Video on demand is a growing market—small today (some 24 million U.S. households having availability in 2005) but growing. Cable VOD currently attracts few advertising dollars, and even getting viewer statistics is difficult. Pornography, usually the lead content in new platforms, continues to be a sizeable part of VOD content. Revenues outside of pornography account for a tiny slice of media business—less than $1 billion. Downloading video may challenge the VOD model. As well, telephone companies are now about to launch IPTV and will become new competitors. (Anonymous, 2005, 2005a; Mullaney, 2006; Swann, 2005; Sweeting, 2005)

For public broadcasters, cable/telco VOD is currently not a market but an outlet. Local public broadcasting channels at the moment often offer video on demand (or “cached broadcast”) free to local cable companies for a brief period; the cable companies then offer it free to consumers as a means of enhancing their digital cable service. Longer-range VOD plans are not yet worked out; there is no consensus within public television about whether public broadcasting should have a video-on-demand service of its own, and if so, which entity should launch or control it. This is an important emerging market, many think. Digital cable services, including video on demand, are the fastest growing segment of the cable market, according to the video-on-demand tracking agency Rentrak.

Mobile video continues to be experimental, with no evidence of public broadcasters taking advantage of this platform yet. Mobile video must go through the gate of the telephone service provider, and standards are not yet uniform. Yahoo is both commissioning and selling short video for cell phones, but standards problems plague innovation. Mobile video has not been a strong fit with the long-form documentaries that are more common to public television. (Noguchi & Schneider, 2006)

Some public broadcasters are providing video podcasts to iTunes, for free download. Public broadcasters, such as WGBH's *Frontline*, post and stream some video and even entire programs on their Web sites. But as of today,
public broadcasters have seen no revenue from this platform, and there is no consensus among different public television entities about whether to offer material at no charge or for pay.

Internet TV, or iTV, is nascent but expected to be huge.

The future of television is on the Internet but it's still not clear exactly how or when. Digital windows or platforms are being opened daily, and deals being struck for downloading. Many viewers now control their viewing much more actively than ever before, with a welter of applications and appliances. They program their TiVos, they purchase an iPod copy of a Battlestar Galactica episode they may have missed, they bring a DVD along on the airplane to watch on their computers. Perhaps half the households in the country have some kind of set-top box for their TVs (often, however, obsolete or offering limited services). Video iPods became one of the hottest gift items in the holiday season of 2005, and networks have seized upon new digital-channel delivery both for marketing (posting previews and clips), resale, and even launch, as in the case of Nickelodeon's children's show Go, Diego, Go! Some broadcast network programs, such as some of the leading shows on ABC/Disney, are now available for download the day after broadcast. (Barnes, 2006)

The number of potential viewers for digitally distributed, nonbroadcast video is increasing. Broadband access is rapidly increasing. Broadband access from home grew 28 percent last year to 95.5 million users, and in February 2006, according to Nielsen, 68 percent of all active Internet users were using a broadband connection. Both compression and new transmission processes, such as the software that the peer-to-peer sharing network BitTorrent depends on, are making it easier to ship and receive digital film. Telephone companies are getting into video distribution, over broadband. iPods now permit an astonishingly pleasant viewing experience on a small screen, with iTunes now delivering selected television programs. All this has eroded cable's viewer base; some 1.4 million subscribers dropped cable last year. (Mermigas, 2006a; Nielsen/NetRatings, 2006)

Advertisers are beginning to allocate budgets for new platforms. Online advertising has more than doubled since 2002, although it is still less than 5 percent of all ad spending. Mainstream packaged-goods companies, traditionally conservative, are now investing in online ads. Some corporations are developing sophisticated strategies for product placement and other integrated advertising approaches. Advertisers' respect indicates the rising numbers of viewers, which producers and public media programmers ignore at their peril. However, the viewership does not yet translate into revenue for public broadcasters. (DeLaney, 2006; Lafayette, 2006)
Sizeable challenges impede the consolidation of ITV.

The Internet is still not a viewer-friendly environment, although large changes are expected in the near future. High-quality video with resolution appropriate for a TV screen still takes a sizeable amount of time to download in the United States, where broadband speeds are relatively low. Connections between TVs and computers continue to be bulky and clumsy, discouraging non-tech-savvy viewers, although Slingbox—which permits a computer to pull video from a variety of remote digital video recorders—may provide new answers. With companies like Microsoft and Intel developing products to create the integrated digital home, progress in these areas should be rapid.

Some expect VOD and ITV to merge into one format, but this will require technical innovation and industry cooperation. There is still great confusion in the cable television industry about how TVs should be smart (a multifunction set-top box? a low-end set-top box? a card in the machine itself?), and there is much work to do on common standards. And, should the interface become lovely and popular, ITV will then face the problem of clogging up the broadband pipes bringing it into viewers’ homes, especially outside major metropolitan centers. (Donohue, 2006; Mermigas, 2006b; Mullaney, 2006)

Comprehensive and reliable menus and search mechanisms have not yet supplanted the de facto filtering system of time-based television programming. It is still hard for viewers to find interesting, reliable, high-quality, public-interest or educational video on the Internet, even through particular portals, such as tv.oneworld.net, blinkx.tv, Open Media Network, and ourmedia.org.

Internet financial models for video continue to be aggressively experimental. At the 2006 South by Southwest Interactive conference, representatives from a variety of aspiring Internet video businesses spoke hopefully about the possibilities of advertisements and subscriptions, but none of them, including Rocketboom, was able to show a dependable revenue stream, much less a profit. Google and Yahoo are both acquiring material as fast as they can, prioritizing collection while experimenting with a variety of business models—principally advertising and subscription. On individual downloads, prices are still experimental, as are splits with content providers. Downloads from iTunes return 70 percent of revenues to providers; CBS offers 60 percent on VOD; this compares with a typical 50/50 split for DVD. Such models could presage a complete shift in revenue generation. One projection shows that, even with conservative assumptions, broadcasters
could in the future well make more money on downloads than they now do on advertising. How this changing business model applies to public broadcasting has yet to be determined, however. (Mermigas, 2006c)

**Windowing is declining.**

In the old days, viewers could expect to find a movie in a theater, then have it appear on broadcast, then cablecast, then DVD, and then video. This measured cascade was thought to ensure that one audience did not cannibalize another, that each market would have maximum chance to reach audiences, and that each market could benefit from publicity and interest created in previous windows. This model is collapsing, in part because of changing viewer habits with increasingly portable media, in part because of vertical integration in the media industry, and in part because of digital opportunities and the need to harvest revenues before digital piracy overcomes legitimate offerings. 2929 Entertainment (HDNet, Landmark Theaters, Magnolia Pictures, and more) has aggressively pursued so-called day-and-date distribution—release of films on multiple platforms at the same time. The two leading series for social documentaries on public television, *Independent Lens* and *P.O.V.*, permit Netflix to release DVDs 24 hours later, when the producer agrees.

Some studies show that DVD availability at the time of initial release can provide more revenue and eyeballs than the traditional sequencing, even if many fewer people go to theaters. Traditional distributors fear losing the publicity won by windowing. But for producers and public media programmers, it seems there is a lot to gain by simultaneous release, since the highest value is public knowledge and action, and synergies between the programs and related information (for instance Web sites, teachers’ toolkits, and games) may be high.

**It’s never been easier to self-distribute, but it requires time and friends, and collecting may be hard.**

The advent of the DVD, with low mailing and reproduction costs, and of downloadable video offers producers more opportunities to “cut out the middleman” and go directly to consumers. Some filmmakers have been able to market their films directly to viewers using Internet-based viral marketing. Most producers have built up valuable contacts over months or even years of work on a documentary; these contacts can be extremely valuable. Producer Peter Broderick has worked with a broad range of producers who have succeeded in distributing DVDs via the Internet to targeted audiences, from small-plane aficionados to free-Tibet activists. They comb the Internet
for links and blogs, promote their films, and build extensive e-mail lists that they can then use for future fundraising. Brave New Films (Robert Greenwald's film studio) has produced a range of low-cost, polemical films, earning back the investment costs (but not the costs of grassroots promotion) from a virally marketed product. In order to do this, of course, Brave New Films depended on deep-pockets capital and on a base of activists and worked closely with two well-networked organizations, MoveOn.org and Center for American Progress, to establish ongoing relationships with activists. In the case of the advocacy film *Oil on Ice*, which was used in the successful campaign to block oil development in the Arctic, several environmental organizations paid for the filmmaking and drove the film's use.

In the DVD market, where the returns from direct distribution can be $20 a disk or more, cutting out the middleman can be very lucrative. This also requires time and energy to focus on networking, and good networks. Historically, the power of networks, plus marketing and contacts with retailers, is what good distributors have offered to filmmakers.

In other digital platforms, such as the nascent ITV, there are no proven revenue models yet. Piracy problems are real, and collecting from downloading is still tricky.

**IMPLICATIONS AND RECOMMENDATIONS**

- **Independent Producers**

  In many cases, producers continue to be well served by associating themselves with programmers and distributors. However, producers need greater specificity, clearer articulation of revenue splits, and clearer demonstration of uses.

  At this uncertain moment, negotiation is typical, and producers can continue to expect to find all programmers demanding large amounts and kinds of rights at the outset. Producers will face similar rights demands across the televisual spectrum, with differences in the perceived value of their product having most to do with the audiences and missions of the programmer. Therefore, once a producer has grasped the particular negotiations profile of his or her work, the core questions will be:

    What is the most appropriate outlet for this work?

    How can the rights package work best to showcase the work in the greatest number of appropriate venues and platforms?
What is the value of this property on its own, compared with the value of the property within the programmer's brand or environment?

Independent producers need to explore new digital platforms for the opportunities they provide to extend existing networks and provide the crucial revenue to continue to produce independent media. Independent producers will likely be able to find public broadcasters as potential partners in that effort, and public broadcasters may be able to extend networks and value. This is a good time to establish terms of the producer-programmer relationship tailored to the experimental moment.

Public Broadcasters

Programmers and producers alike find inconsistency in terminology for different digital platforms frustrating. Standardizing terminology will reduce confusion.

Public broadcasters lack the ability to demonstrate how they can use rights they acquire for new platforms. Demonstration projects that link the power of public broadcasting's credibility with the innovation of new digital platforms are critical.

Public broadcasters need to stay current with the rapidly changing marketplace to understand how commercial media are shifting structures and monetizing new media platforms, and how this affects and translates to the mission of public broadcasting to reach broad and diverse audiences.

Public broadcasters need to be able to offer producers value as great—if different in character—as that offered by cable companies. This means providing high-quality service and comparable or better rights packages and also articulating and demonstrating the distinctive value of the public broadcasting name and environment.

Public broadcasters need to clarify for producers the mechanisms by which value that accrues as a result of new platforms is shared with and returned to the producer.

In general, there needs to be more transparency with independent producers about market conditions and more discussion of business models.

The many entities that compose public broadcasting need to collaborate and to draw upon stakeholders in order to build and maintain a public media zone in the emerging open digital environment.
Future of Public Media

Public broadcasters and independent producers have long supported each other in ways that permit the general public incalculable benefit. This relationship, never easy, is newly strained by the changing digital landscape. The needs to be served by public media will not disappear as media models change, although they may be served differently in the future. At the moment, independent producers and public broadcasters are separately struggling to find ways to sustain their own enterprises and take advantage of new opportunities. Both will be hurt by the other’s misfortunes in this emerging environment. A better understanding of what these stakeholders in tomorrow’s public media have to gain and lose may create a platform for joint projects that can benefit both.

For responses, comments, and news go to centerforsocialmedia.org.

New Media Terms

Media rights are assigned by type of media, and at the moment many terms are used, some of them overlapping. For instance, some place downloading under video on demand, while others think of it as Internet TV. Those used in interviews, as well as referenced by interviewees (Heaney, 2006; Ramirez, 2005) include:

**Free TV**
- Broadcast
- International broadcast
- Free terrestrial TV
- Digital terrestrial TV
- Over the air

**Pay TV**
- Nonstandard TV (also used for VOD)
- Cable
- Basic Cable
- Direct broadcast satellite

**Theatrical**
- Educational

**Nontheatrical**
- Home video
  - VHS
  - DVD/Home video

**Video on demand**
- VOD
- IPTV (on-demand via telephone company)

**Near video on demand**
- Pay Per View
- Cached broadcast
- Download to rent/own

**Internet TV**
- Interactive media
- IPTV
- ITV
- Internet
- Broadband
- Podcasting
- Webcasting
- Video streaming
- Online streams
- Content-rich Web site
- New media
- Digital delivery
- Digital download

**Mobile devices**
- Phones
- Cell phones

**Broad TV**
- (a catch-all term)
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