

23 July 2013

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Dear broadcaster,

I am writing to you as a broadcaster with licence obligations to comply with requirements under the Communications Act 2003 that you include in your licensed service, in each year, no less than a specified percentage of the total amount of time allocated to the broadcasting of qualifying programmes to the broadcasting of a range and diversity of independent productions.

The Broadcasting (Independent Productions) Order 1991 (as amended) ('the Order'), gives effect to these requirements.

I wish to draw to your attention that:

- (a) the Department of Culture, Media and Sport ('DCMS') has written to us about a drafting error it has identified in Article 3 (4) (b) of the Order which affects the definition of 'independent producer';
- (b) as currently drafted, Article 3 (4) (b) prevents producers connected with any (non-UK/EEA) broadcaster from qualifying as an independent producer'. This does not properly reflect Parliament's intention¹ which was that ownership ties between an independent producer and a broadcaster should not affect the independent status of the producer, unless the broadcaster operated television services in the UK;
- (c) we understand that broadcasters have been complying with their obligations on the basis of what they understood Parliament's intention to be rather than in accordance with the law. As a result, productions that broadcasters have treated as contributing to fulfilling their independent production obligations may not in fact, qualify as 'independent' under the Order; and
- (d) DCMS has confirmed that it is moving swiftly to amend the Order to remedy this error.

¹ As explained in the Explanatory Note to The Broadcasting (Independent Productions) (Amendment) Order 2003 (2003 No 1672) – see also Hansard Debates, House of Lords 20 June 2003: columns 1059ff

Ofcom appreciates that, until this amendment is made, broadcasters may be concerned that the way the Order is presently drafted may jeopardise their ability to comply with their independent production quotas.

Similarly, producers may be concerned that their ability to compete for business may be affected by uncertainty about whether or not their productions would count towards broadcasters' independent production quotas.

In view of this and Parliament's clear intention that producers who are not linked to UK broadcasters should be treated as independent for the purpose of fulfilling the independent production obligations under broadcasters' licences, we are writing to inform you that in this particular situation, pending the change in legislation to correct this error (and in the absence of any exceptional circumstances justifying a different approach in any particular case), we do not intend to take action against broadcasters for breach of their licence conditions where they have complied with Parliament's intention but not the Order as it currently stands as regards non-UK/EEA broadcasters.

Ofcom has also decided, on grounds of administrative priority, that it will not carry out a general review of the returns made by broadcasters in respect of 2012 and previous years.

Separately, DCMS has recognised that the term 'connected with' used in paragraph 5 of the Order is very broad indeed, given that it is to be interpreted in accordance with and by extension - insofar as it refers to 'associate' and 'control' - to Schedule 2 to the Broadcasting Act 1990. The definition of 'associate' in particular is extremely broad including as it does a very extensive list of relatives, which are not only relatives of the producer/broadcaster but also relatives of the producer's/broadcaster's past and present husband, wife or civil partner; and where the producer/broadcaster is a body corporate, includes the relatives of the controlling shareholder of either body and of any sister body, again, wherever those bodies are located.

We have been advised by DCMS that it intends to amend the Order in this respect as well, and intends to bring into force measures to correct both the drafting error in Article 3 (4) (b) and simplify the law in relation to the definition of 'connected with', by 2014.

We should make clear however, that in respect of the proposed policy change in relation to the definition of 'connected with' under the Order, we would expect broadcasters to comply with this requirement until this change to the Order is made law.

Ofcom will be in touch with those broadcasters required to make annual returns on independent productions (public service broadcasters) to discuss how future returns should be prepared pending these changes to the law.

We shall be publishing this letter on our website later today.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Peter Davies', with a long, sweeping underline that extends to the right.

Peter Davies