

**Submission to Convergence  
Think Tank Seminar 2 -  
Competition and innovation:  
content and services**

**pact.**

---

**February 2008**

---

## Introduction/Executive summary

- 1) Pact is the trade association that represents the commercial interests of the independent production sector. We have more than 700 member companies across the entire UK, involved in creating and distributing television, film and interactive content.
- 2) The independent production sector is showing strong growth. Turnover has risen from £1.6 billion in 2005 to more than £2 billion currently. This represents a total increase over three years of approx 26.6% in real terms.<sup>1</sup>
- 3) This document summarises Pact's position on the opportunities and challenges facing UK providers and producers due to convergence. The public's access to UK-made content has historically been largely limited to the dominant terrestrial broadcasters. However, new technologies are providing greater choice in how, when and where the public accesses programmes and services.
- 4) Intellectual property (IP), and in particular the competitiveness of the market for IP rights, is central to both providing this choice for the public and stimulating growth in the creative industries. As the recent Gowers Review of Intellectual Property for HM Treasury concluded:

"In today's global economy, knowledge capital, more than physical capital, will drive the success of the UK economy. Against this backdrop, IP rights, which protect the value of creative ideas, are more vital than ever."<sup>2</sup>
- 5) In Pact's view, ensuring that the market for IP rights is as competitive as possible is the best way to stimulate competition amongst the platforms and services that are emerging with convergence and new technology. This means ensuring that IP rights are appropriately 'unbundled', or disaggregated, so that content creators are able to retain a share of those rights that they can then exploit. This will allow new entrants to content distribution, such as internet service providers, telecommunications companies, and content creators turned aggregators, to secure IP rights and stimulate competition and innovation in developing new way of offering content to the public.
- 6) The 2003 Communications Act helped achieve this in broadcasting by introducing Codes of Practice between producers and broadcasters. The Codes of Practice ensured that content creators were able to retain a share of the IP rights to the programmes they made. They could then

---

<sup>1</sup> Independent Production Census 2007/08, Digital-I for Pact.

<sup>2</sup> Gowers Review of Intellectual Property, 2006, page 6.

exploit those rights on secondary channels and new platforms, as well as overseas, providing the primary broadcaster with a share of revenues generated in the process.

- 7) The result is that the UK has perhaps the most commercially successful independent television content creation sector in the world, with compounded annual growth at more than 15%.<sup>3</sup> We urge policymakers to consider where it would be appropriate to extend the principle of a Code of Practice to other sectors.
- 8) The online content creation is sector a prime example. Currently, online SMEs commissioned by, for example, Government departments, NGOs and public sector organisations, are denied any ownership of the IP rights to the content that they create. This is a missed opportunity. Allowing SME content creators to retain certain rights for appropriate subsequent exploitation could stimulate the online content creation sector in much the same way that the Codes of Practice have benefited the television production sector. At no additional cost to the taxpayer, public sector procurement would deliver substantially enhanced value, acting as seed capital for creative companies.

---

<sup>3</sup> Independent Production Census 2007/08, Digital-I for Pact.

## What are the future opportunities and challenges for UK providers and producers?

- 1) Convergence will bring about a seismic shift in how the UK public is able to engage with content. UK citizens' access to UK-made content has historically been largely limited to the dominant terrestrial broadcasters. However, new technologies and platforms are offering the public greater choice in how, when and where it accesses programmes and services. There is no option but to offer people what they want, when they want it, on a commercial basis. If we do not, developments in technology mean that they will find an alternative way to obtain that content anyway, as the example of the music industry illustrates.
- 2) In providing the public with new, legitimate ways of accessing content, the UK's creative industries have an opportunity to develop new revenue streams that will continue to deliver growth into the future. Already, content creators are becoming aggregators by launching innovative new platforms, such as RDF Media's online portal for on-demand comedy content.
- 3) New entrants, such as internet service providers, telecommunications companies, and content creators turned aggregators, will stimulate competition, encourage value for money, provide more investment and offer more choice to UK citizens and consumers. However, if the UK is to realise the full potential of new forms of delivery it is vital that new entrants to the sector are allowed reasonable access to the IP rights to UK content.
- 4) This access is by no means guaranteed. Ofcom's analysis, and independent research commissioned by Pact from Oliver & Ohlbaum Associates, suggests that the dominance of the incumbent terrestrial-based broadcasters will continue long into the digital era. The primary commission from the main broadcasters currently provides over 85% of the lifetime income for an average new programme, excluding children's. The Oliver & Ohlbaum study suggests that in the next 10 years, despite growth in secondary and ancillary markets such as video-on-demand and mobile, this is likely to remain above 75%.<sup>4</sup>
- 5) There was little evidence of this dominance weakening in Digital-I's 2007/08 census for the independent production sector for Pact. The report found that primary commissions from broadcasters rose from representing £1.14 billion in revenues for independent companies in 2005, to £1.35 billion. Of this, all but a little over £200m came from the main terrestrial-based broadcasters. The report concluded that:

---

<sup>4</sup> UK TV Content in the Digital Age – Opportunities and Challenges, Oliver & Ohlbaum, page 3.

“Primary commissions remain by far the greatest source of revenue for the UK independent production sector.”<sup>5</sup>

- 6) Historically, this dominance has enabled the main broadcasters to control the buying and selling of rights to IP, allowing them to stifle the growth of secondary markets. The dominance of the main broadcasters has allowed them to bundle additional rights, such as new media, into the main television license and ‘warehouse’ rights – ie keep hold of rights in order to suppress competition from new markets. Additionally, the conditions attached to ‘hold-backs’ – which allow a broadcaster to veto subsequent sales of a programme to a third party - frequently restrict the producer’s ability to sell on programming.
- 7) Such practices are clearly not consistent with the spirit and intent of the 2003 Communications Act, which introduced Codes of Practice between producers and broadcasters in order to ensure that content creators were able to retain a share of the IP rights to the programmes they made. They could then exploit those rights on secondary channels and new platforms, as well as overseas, providing the primary broadcaster with a share of revenues generated in the process.
- 8) In Pact’s view, therefore, the best way to ensure a healthy level of competition in the platforms and services emerging with developments in convergence and media technology is to ensure there is a more open market for IP rights. Key to this will be ensuring that IP rights are appropriately disaggregated, and that content creators are able to retain a share of those rights that they can then exploit. This will allow new entrants to content distribution, such as internet service providers, telecommunications companies, and content creators turned aggregators, to secure IP rights and stimulate competition in developing new ways of offering content to the public.

---

<sup>5</sup> Independent production census 2007/08, Digital-I for Pact, page 18.

**Is there a case for action to ensure effective access to key networks and/or access to content for a) consumers, b) service providers?**

- 1) Pact agrees with the European Commission's current proposal that the standardisation of DRM systems should be considered to address technical interoperability issues. In the UK, for example, Pact has supported the BBC's efforts to make on-demand film and television content available through its iPlayer service on both PCs and Macs, providing appropriate DRM solutions are developed to protect IP owners' rights.
- 2) It should be stressed, however, that the owners of IP rights must still have the ability to choose the windows and distribution platforms where their content is made available. This is so rights holders are able to generate revenues from a range of different platforms and means of delivery – these revenues typically being necessary to fund, or at least part fund, the production or creation of the content in the first place.
- 3) From an IP owners' point of view, prompt exploitation of those rights across different platforms is imperative as a way to meet consumer demand (and provide legitimate, commercial alternatives to illegal downloading). However, the way different means of exploitation are interlinked can directly impact on the value of rights to the intellectual property that our members create. For example, the timing of when content is made available over the internet on-demand can have a substantial effect on the potential to generate revenues from DVD sales.

## **What are the potential barriers to, and opportunities for, competition, growth, and innovation in content supply?**

- 1) UK citizens not only enjoy one of the highest levels of domestically produced original content in the world, that programming is internationally renowned for its quality. The UK is the only European television sector to come anywhere near a positive balance of trade with the far larger US industry.
- 2) The independent production sector is a substantial part of this success, last year generating £2.1 billion a year in revenues, of which primary commissions from UK broadcasters represented £1.35 billion.<sup>6</sup> By way of comparison, total first-run originated network production for 2006 (the most recent year available) stood at £2.7 billion, including commissions won by broadcasters' in-house production departments and all external suppliers.<sup>7</sup> Pact's annual census of the UK independent content supply sector shows strong year-on-year growth. Since 2005, the sector has generated a compound annual growth rate of 15.6%.<sup>8</sup>
- 3) The Codes of Practice in the 2003 Communications Act have been one of the drivers for this growth. In allowing independent companies to benefit from a share of the revenues from the content they create, they have incentivised investment in the content supply sector and stimulated growth. Pact's annual census shows that a significant share – perhaps more than half – of the growth in the independent production sector in recent years has come from areas where producers now have an enhanced ownership of IP rights under the Codes of Practice and the ensuing terms of trade. For example, the sale of so-called format (remake) rights, particularly to the US market, is now worth more than £210m a year to the independent production sector, and a key factor behind this is likely to be independent companies' improved rights position regarding format sales under the new terms of trade.<sup>9</sup>
- 4) As we mentioned earlier, such growth cannot be taken for granted. The dominance of the incumbent terrestrial broadcasters is expected to continue long into the digital era, allowing them to potentially control the buying and selling of rights to IP, and thereby stifle the growth of secondary markets.
- 5) Pact is also concerned that broadcasters have, following the terms of trade, cut back on the prices they pay for programmes under the primary

---

<sup>6</sup> Independent Production Census 2007/08, Digital-I for Pact, page 6.

<sup>7</sup> 2007 Communications Market Report, Ofcom, page 122.

<sup>8</sup> Independent Production Census 2007/08, Digital-I for Pact, page 6.

<sup>9</sup> Ibid, page 20.

licence. Again, this so-called 'netting off' was not the intent of the Communications Act. Indeed, it undermines the transfer of value to the producer that was the intention of Parliament.

## What are the implications for future public policy?

- 1) It is incumbent on regulators and Parliament to create an environment in the UK that rewards investment, encourages innovation and delivers the high quality programmes and content that UK citizens expect - wherever they are and however they want to access it.
- 2) The key to achieving this in Pact's view is for public policy to ensure that the market for IP rights is as open and transparent as possible. This will underpin the growth of new and innovative forms of content delivery. As we have previously noted, the Codes of Practice introduced in the 2003 Communications Act have helped drive strong growth in the independent television production sector, as illustrated by the strength of format sales. In turn, this has allowed independents to raise investment for programme production by exploiting their IP rights. This has been important at a time when the licence fee payments from broadcasters for programming are under increasing pressure.
- 3) The result is that the UK has perhaps the most commercially successful independent television content creation sector in the world. Any future re-bundling of IP rights risks undermining this success.
- 4) In fact, we would urge policymakers to consider where it would be appropriate to extend the principle of a Code of Practice that allows SME content creators to own a share of IP rights to other sectors. We suggest that any sector of the creative industries characterised by relatively few buyers and many SME suppliers should be considered, with the online content creation sector a prime example. The BBC and Pact have recently agreed a framework for rights whereby content creation companies working for the BBC are able to retain a share of IP to the online content they create. This might be extended to other broadcasters and indeed any internet service commissioning online content from UK SMEs.
- 5) We also propose that policymakers consider the benefits of creating a similar Code of Practice for public sector procurement of online content and services. Government, local authorities and publicly-funded organisations invest heavily in digital communications. For example, the Central Office of Information (COI) has an annual budget of £400 million, of which last year 10% was spent directly on new media commissioning.<sup>10</sup> This is twice as much as the BBC spends annually on external online commissioning, and does not take into account the Government departments and local authorities that choose to procure content direct from suppliers.

---

<sup>10</sup> COI accounts, <http://www.coi.gov.uk/aboutcoi.php?page=82>

- 6) Suppliers are required to surrender all of their IP to the procurer within the terms and conditions of these contracts. Pact has seen no evidence to suggest that the public sector ever exercises the rights its owns. The IP is effectively 'warehoused.'
- 7) This is a missed opportunity. Retaining all IP rights in this way prevents companies from developing new ways of exploiting the content they create. Allowing SME content creators to retain certain rights for appropriate subsequent exploitation could stimulate the online content creation sector in much the same way that the Codes of Practice have benefited the television production sector.
- 8) At no additional cost to the tax payer, public sector procurement would deliver substantially enhanced value, acting as seed capital for creative companies.
- 9) This would build on the conclusions of the recent Cox report on Creativity in Business for HM Treasury, which highlighted the role of the public sector in helping unlock the potential for the creative industries, stating:

"The public sector is estimated to spend around £125 billion each year on goods and services, of which local authorities spend around £47.5 billion. The public sector therefore exerts a huge influence over the tens of thousands of companies, indeed over whole industries, that supply it. The extent, to which it allows, encourages or even demands creativity from its suppliers therefore has a huge influence on the UK business environment. At present, this power to stimulate creativity is not being used effectively. Indeed, in many cases, it is having the opposite effect."<sup>11</sup>

- 10) The potential benefits for the UK are significant. Export sales, for example, have been a key area for independent television production companies exploiting their rights under the new terms of trade. The potential export market for online content producers, if they were able to retain and exploit IP rights to the content they create, is also substantial, as Nesta's research has indicated:

"Even relatively small improvements in export activity across these [creative] sectors could mean significantly increased revenues for the UK, given the size of the international market for creative products and services (estimated for the media industries alone to be \$1.8 trillion by 2009). A growing market is out there to be won by businesses that are willing and able to innovate."<sup>12</sup>

---

<sup>11</sup> Cox Review of Creativity in Business, page 34.

<sup>12</sup> Creating Growth: How the UK can develop world class creative businesses, Nesta, page 29.

- 11) At the same time, public policy must ensure that the copyright and DRM framework adapts to technological changes and the increasing ways of delivering content. It must also closely monitor safety issues, particularly online, which is a key area of public concern according to numerous examples of consumer research, and there is a role for Ofcom under the Communications Act to promote media literacy.
- 12) Crucially, public service content in certain key genres is under threat as broadcasters face fragmenting advertising revenues as more channels are launched in the digital era. This creates pressure on certain public service genres, such as children's television, which has already seen a substantial drop in investment in UK-made programming from the commercially-funded broadcasters. Such genres have typically not benefited from the Codes of Practice and terms of trade, as they tend to generate few secondary or ancillary revenues.