



**Response to DCMS consultation on proposal by European Commission for the Revision of the Television Without Frontiers Directive**

**Sept 8 2006**

**Pact is the trade association representing the commercial interests of independent film, television, animation and new media production and distribution companies.**

## Executive Summary

- 1) New technology is providing consumers with increased choice in how they access and engage with content. Digital television, with its wealth of channels, reaches two thirds of UK households. Content and services are increasingly available via mobile phones, the number of which now exceeds the size of the total population, or online, where more than 60% of adults buy goods.<sup>1</sup>
- 2) The UK has an opportunity to be a leading force in creating content for this 'non-linear' world. The UK production sector has already built up a worldwide reputation for excellence in traditional broadcasting, establishing itself as the leading exporter of finished programmes after the far larger US industry. The sector is showing strong and sustained growth, with total turnover amongst independent production companies rising from around £1 billion in 2003 to more than £1.7 billion in 2005.<sup>2</sup>
- 3) Key to this growth has been allowing producers to benefit from the exploitation of the rights to the content they create under the 2003 Communications Act. This has started to attract investment into the sector and encourage the growth of sustainable companies, as witnessed by the successful IPOs of independent companies such as Shed and RDF.
- 4) That success is starting to spread onto new platforms. RDF recently won the BBC's first major "360-degree" commission with *The Verdict*, a courtroom drama with distinct content for BBC2, BBC3 and new media platforms. Channel 4's *FourDocs* series, produced by another independent, Magic Lantern, democratises filmmaking by championing user-generated content. And HIT Entertainment and Endemol UK, both indies, are providing content for BT's new on-demand broadband and digital television service, alongside US suppliers such as Paramount and National Geographic.
- 5) New forms of delivery such as Google and Yahoo! now offer UK content creators the chance to compete for audiences on a global basis. *Coronation Street* may register more than 10 million viewers on UK television, but Yahoo! has a worldwide customer base of 400 million people, 200 million of whom are registered.

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<sup>1</sup> Ofcom figures, as of end 2005

<sup>2</sup> Broadcast annual survey, 2005

- 6) However, extending Television without Frontiers to include non-linear services will potentially stifle the ability of companies to innovate in new media. The additional layer of regulation created would add to compliance and reporting costs. In online content creation, budgets are far lower than for television production and additional compliance costs would therefore be proportionately higher.
- 7) Just as importantly, the proposed criteria for defining whether services are linear or non-linear bear little resemblance to the realities of the sector. The online world is highly fluid. Unlike traditional broadcasting, the nature of online content sites and services is not set in stone at point of delivery. Services evolve, changing from a private weblog to a public site, or from non-commercial to commercial. TIVO boxes and IPTV mean that, even though the media service provider decides on a schedule, the viewer decides when to view the content. The line between linear and non-linear is likely to be further blurred as IPTV platforms evolve and viewers become users, accessing email at the same time as watching the news, for example.
- 8) Trying to shoehorn services into these definitions may stifle this flexibility. The UK would be put at a competitive disadvantage with regard to countries outside Europe as, as far as Pact is aware, Europe is the only bloc considering such restrictions.
- 9) Pact supports certain basic restrictions that, for example, protect minors. However, these are already provided by existing laws, either at a national level or under the e-Commerce Directive, and the Directive will not give member states any greater powers in respect of services from outside the European Union. Furthermore, in removing countries' ability under the e-Commerce Directive to enforce their own standards on non-linear services, the new proposals may impinge on freedom of expression.
- 10) Pact therefore supports non-broadcast services remaining outside the scope of the Directive, along with certain changes to the existing Directive surrounding product placement. Such a framework would be similar to Option 3, but the definitions of linear and non-linear proposed are, in our view, unworkable, and the Directive should apply to 'broadcast' services only.
- 11) Pact also calls for the removal of the "where practicable" clauses for European works and independent productions. These clauses are in Pact's view being abused by broadcasters in order to avoid their responsibilities under the Directive.

**1) To what extent would Option 2, 3, or 4 ease market entry for new providers of audio-visual media services, or prevent it or make it more difficult?**

- 1) To afford the best opportunities for easing market entry, Pact supports non-broadcast services remaining outside the scope of the Directive. Such a framework would be similar to Option 3, but should avoid the definitions of linear and non-linear and apply to 'broadcast' services only.
- 2) As creators of audio-visual media content online, many production companies would face increased costs and restrictions on potential revenues if Television without Frontiers were extended to non-linear services. These would include compliance and reporting costs, as well as the impact of restrictions on advertising.
- 3) These costs could be particularly significant in online content creation, where budgets are far lower than for television production. Any increased costs from compliance and reporting would therefore be proportionately higher.
- 4) There are also practical difficulties in implementing the proposed extension to non-linear services. Most fundamentally, distinguishing between linear and non-linear is not always possible. TIVO boxes and IPTV mean that, even though the media service provider decides on a schedule, the viewer decides when to view the content. The line between linear and non-linear is likely to be further blurred as IPTV platforms evolve and viewers become users, accessing email at the same time as watching the news, for example. This would create a problem in deciding which part of a service is covered by linear rules, and which by non-linear rules.
- 5) Secondly, it is often unclear whether an online site operates on a non-commercial, private basis. The distinction between 'private' and 'public' is blurred online. Weblogs, for example, are essentially personal creations, but some are viewed by millions of people. Such regulations could also undermine the trend in so-called user-generated content, which is typically created on non-commercial basis but increasingly used by commercial services, as illustrated by the images of London's July bombings from mobile handsets.

**2) To what extent would Option 2, 3 or 4 limit the freedom of firms active in the markets which are affected to determine their own prices, product characteristics and/or quality and standards, means of advertising the product and distribution channels?**

- 1) The online world is highly fluid. Unlike traditional broadcasting, the nature of online content sites and channels is not set in stone at point of delivery. Services evolve, changing from a private weblog to a public site, or from non-commercial to commercial. One of Pact's members is, for example, developing a public sector information site, SocialCare TV, which will not initially sell merchandise, but may sell DVDs at a later point.
- 2) Extending Television without Frontiers to non-linear services could mean that services might fall outside the Directive when conceived or launched, but then come under the regulations at a later point. This may limit companies' ability to develop new services because of additional compliance and reporting costs, restrictions on advertising and regulatory uncertainty, as noted in response to question 1.

**3) What would be the costs and benefits, both direct and indirect, to the UK generally and across the various audio-visual services?**

- 1) The UK is enjoying strong growth in many new technologies, with the resulting increased levels of choice for consumers in how they access content and services. The number of mobile phones now exceeds the size of the total population; two thirds of UK households receive digital television; more than 60% of adults buy goods online; and a third of households have broadband.<sup>3</sup>
- 2) The UK production sector is key to providing content for these platforms. The sector has already built up a worldwide reputation for excellence in traditional broadcasting, establishing itself as the leading exporter of finished programmes after the far larger US industry. The independent sector is at the heart of this success, showing strong and sustained growth, with total turnover amongst independent production companies rising from around £1billion in 2003 to more than £1.7 billion in 2005.<sup>4</sup>
- 3) Key to this growth has been allowing producers to benefit from the exploitation of the rights to the content they create under the 2003 Communications Act. This has started to attract investment into the sector and encourage the growth of sustainable companies, as witnessed

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<sup>3</sup> Ofcom figures, as of end 2005

<sup>4</sup> Broadcast annual survey, 2005

by the successful IPOs of independent companies such as Shed and RDF.

- 4) This growth is largely in traditional television production, but is starting to spread onto new platforms. RDF recently won the BBC's first major "360-degree" commission with *The Verdict*, a courtroom drama with distinct content for BBC2, BBC3 and new media platforms. Channel 4's *FourDocs* series, produced by another independent, Magic Lantern, democratises filmmaking by championing user-generated content. And HIT Entertainment and Endemol UK, both indies, are providing content for BT's new on-demand broadband and digital television service, alongside US suppliers such as Paramount and National Geographic.
- 5) New forms of delivery such as Google and Yahoo! now offer UK content creators the chance to compete for audiences on global basis. *Coronation Street* registers more than 10 million viewers on UK television, but Yahoo! has a worldwide customer base of 400 million people, 200 million of whom are registered.
- 6) However, extending Television without Frontiers to include non-linear services will potentially stifle this innovation. The additional layer of regulation created would add to compliance and reporting costs. In online content creation, budgets are far lower than for television production and additional compliance costs would therefore be proportionately higher.
- 7) Furthermore, the practical difficulties in implementing the proposed extension to non-linear services - most fundamentally, the difficulty in distinguishing between linear and non-linear - could restrict companies' ability to develop new services, as outlined in response to question 1.
- 8) The UK is believed to be the only bloc considering such restrictions. Extending the Directive would put the UK at a competitive disadvantage to non-EU countries and harm its ability to establish itself as a global content hub for future platforms.

#### **4) What impact would the Options have in terms of compliance costs, especially for smaller firms?**

- 1) Costs would be significant for the many Pact members who are small businesses. Few if any companies of 20-30 people currently employ a compliance officer, for example, and many operate on margins as low as 5%. Budgets in online content creation are lower than in television production, and costs therefore may be proportionately higher.

**5) Would any of the Options give rise to a potential for displacement of economic activity as between different parts of the audio-visual services sector? Would it give rise to decisions in this sector to relocate to or invest in non-EU locations?**

- 1) The internet is a uniquely global medium. If new regulations are too onerous, content creators could store content offshore, or create virtual offices in countries such as India.

**6) Would Option 4 have any indirect impacts on firms' competitiveness in audio-visual services, or more generally?**

- 1) As discussed in response to question 1, Option 4 would be likely to increase costs and restrict advertising revenues, harming companies' ability to compete with services operating from less regulated countries. To Pact's knowledge, no other trade bloc is planning such restrictions.

**7) If the TVWF Directive were extended to add only mass-media video-on-demand services of the kind currently available - so excluding all other forms of 'non-linear', on-demand services - what would the costs and benefits be?**

- 1) As mentioned in answer to question 1, it is difficult to assign such definitions to actual services. An online VoD 'service' might only offer very personal video footage, but which is available to the general public and viewed by many people. Trying to force this service to conform to such definitions is likely to create market uncertainty and may potentially discourage companies from developing new services.

**Market information**

**8) What are the market structures in the various sub-sectors covered by the draft AVMS Directive, and what are the overlaps between them?**

- 1) The independent production sector is growing year-on-year, with total turnover rising from around £1 billion in 2003 to more than £1.7 billion in 2006.

- 2) Most of Pact's membership of 700-plus independent businesses are involved in content creation primarily for television and film. However, more and companies are diversifying across different genres and types of content as the sector matures, and interactive media is a rapidly growing part of their businesses.
- 3) Examples of independent companies already established in the traditional television production sector but now pioneering content creation for non-linear services include Endemol (Big Brother), Wall To Wall (Who Do You Think You Are?) and Celador (Who Wants To be A Millionaire?). For a show such as Big Brother, interactivity is at the heart of the whole concept of the programme, with viewers voting for housemates.
- 4) In addition, many companies within the independent sector are only marginally involved in traditional broadcasting. They specialise in creating content for online services or other interactive formats such as mobile phones. Even within these 'specialist' companies, there can be considerable variety in terms of the nature of content that is being produced.
- 5) A poll of Pact's Interactive Policy Group, made up of both companies involved in television and new media and more specialist, 'new media only' companies, showed that company turnover from content creation broke down as follows:
  - broadcasting-related: 20-80%;
  - new media (education/learning): 20-80%;
  - new media (corporate): 0-30%;
  - new media (public sector): 10-20%.

### **Country of origin**

#### **9) Are there any instances in which the current lack of harmonisation of controls on non-linear audio-visual services among Member States is limiting competition in this sector?**

- 1) Pact is not aware of any such instances in the independent production sector.

#### **10) Specifically, have businesses felt that the current derogations under Article 3 of the Electronic Commerce Directive harmed their business and**

**thus whether the inclusion of their services under this proposed new Directive would be beneficial?**

- 1) As noted above, Pact is not aware of any such instances in the independent production sector. We can therefore see no benefits to these proposals.

**Place of establishment, jurisdiction, and derogation**

**11) Would the rules proposed in Article 2.3, for establishing which Member State has jurisdiction over any particular non-linear service, provide clear and effective jurisdiction in this sector?**

- 1) Such rules are likely to have only a limited impact in legislating the internet. As noted in answer 5, content creators could store content offshore, or create virtual offices in countries such as India.

**Protection of minors**

**12) Article 3d of the Directive would require member states to ensure that audiovisual services within their jurisdiction do not carry material which might seriously impair the mental, physical, or moral development of minors. However, this Directive will not give the EU or Member States any greater powers than they have now in respect of undesirable Internet services from outside the EU, and would remove their ability, under the e-Commerce Directive, to enforce their own standards on non-linear services from other Member States. In view of this, would Article 3d give consumers adequate protection from services which might be harmful to minors?**

- 1) No. Pact supports certain basic requirements applying to online services but many of these are already in place under the current European framework, namely the e-Commerce directive, and national laws. UK law, for example, prohibits advertising tobacco through any medium and it prohibits child pornography.
- 2) Nor would consumers necessarily be any more protected from services originating from outside the EU. Indeed, the increased level of regulations proposed by extending the directive to non-linear services may encourage some of those services to migrate to non-EU countries. Sector growth within the EU would thereby be diminished, while consumers would not enjoy any greater protections.

## Incitement to hatred

**13) Would Article 3e give consumers adequate protection from services which might contain incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation? These prohibitions go much wider than current UK law. What consequences would this have for freedom of speech?**

- 1) As individual member states' interpretation of what constitutes incitement on these grounds may differ, the flexibility of the existing provision under the e-Commerce Directive seems more appropriate.

## Advertising – qualitative controls

**14) Articles 3g(c)(iii), 3(d), and 3(e) contain controls on advertising via any audio-visual service which bear on health and safety. They are supplemented, for linear services only, by Articles 14 and 15. Would these controls between them be effective in achieving the right balance between commercial freedom and public health?**

- 1) For non-linear services, basic protection for consumers in this area is already provided for under national laws and the e-Commerce Directive. Adding another level of regulation risks creating legal uncertainty.

## Advertising - quantitative controls

**15) What will be the impact of allowing for isolated advertising and teleshopping spots in sports programmes (Article 10.2)?**

- 1) Viewers of sports programmes are used to seeing a higher level of commercial references than in other genres. This is reflected in Ofcom's guidance notes to its Broadcast Code, which state that:

“Editorial justification will depend on the nature of the programme and there may be certain types of programmes - eg sports and music coverage in television programmes - where there is a general acceptance that brands will feature.”<sup>5</sup>

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<sup>5</sup> Guidance Notes, Section 10: Commercial references and other matters, rule 10.4, p3

- 2) It is therefore unlikely that audiences would be put off by proposals for allowing isolated advertising and teleshopping in sports programming, while the sector stands to benefit from increased revenues and investment into programming.

**16) What will be the impact of removing the prohibitions in Articles 18 and 18a that put a limit on the amount of teleshopping allowed on a channel that was not ‘exclusively devoted’ to teleshopping?**

- 1) Pact would expect the amount of teleshopping to increase in off-peak hours.

**17) What will be the impact of the rule (Article 11.2) that films made for television, cinematographic works, childrens’ programmes and news programmes may be interrupted by advertising or teleshopping once for every period of 35 minutes?**

- 1) Channel 4’s argument that the 35-minute rule be relaxed has merit if Channel 4 can demonstrate that it is genuinely committed to promoting UK and European film culture. As new non-linear services develop, broadcasters will need flexibility in order to provide a range of films and services. Pact would, however, be concerned if such increased flexibility resulted only or principally in the greater availability and distribution of non-European product.

## **Sponsorship**

**18) Are the rules on sponsorship of audio-visual media services set out at Article 3h necessary and sufficient to safeguard the integrity of the services that are sponsored?**

- 1) In the context on linear services, these rules are sufficient. Pact welcomes in particular article 3h (c), which places the emphasis on clarity in identifying the existence of sponsorship.
- 2) However, these rules should not be extended to all non-linear services, which are already subject to a number of transparency requirements under the e-Commerce Directive, which states that a commercial communication “shall be clearly identifiable as such.”<sup>6</sup>

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<sup>6</sup> Directive 2000/31/EC, Article 6 (a)

## Product placement

**19) OFCOM have consulted on the possibility of allowing product placement on TV services within the UK if the EU – as a result of this draft Directive – removes the current implicit EU-wide prohibition of it. But the UK will retain its discretion not to allow product placement in programming made by and for UK broadcasters whatever the outcome of the EU discussion. If the UK were to continue not to allow product placement, but the EU allowed it, what practical impact would that have for UK broadcasters, UK programme makers, and the UK advertising industry?**

- 1) UK companies' inability to attract investment through product placement under current regulations has put them at a significant competitive disadvantage compared to imported programming. Highly successful imported shows such as Lost, CSI: Crime Scene Investigation and Desperate Housewives are allowed to contain product placement and air in the UK while domestic programmes are not.
- 2) This imbalance is becoming more pronounced as investment from product placement in the US is increasing. Spending on product placement in the US is rising by around 30% a year and is worth more than \$2 billion annually.<sup>7</sup>
- 3) A situation where programme-makers in other EU countries were allowed to use product placement but UK producers were not would inevitably exacerbate this. While the level of investment into the US production sector has been small in relative terms, it is growing rapidly by around 30% a year. By comparison, advertising and marketing spending increased by 7% in 2004.
- 4) There is no reason to suggest that such a growth would not be replicated in EU markets were product placement to be permitted. US shows containing product placement such as Lost and Desperate Housewives have achieved high audience figures worldwide, suggesting that UK and European viewers do not object to product placement, providing the programming around it is of sufficiently high quality and the product placement itself is managed well enough so as not to intrude.
- 5) The loss of investment into new UK programming through UK restrictions on product placement would not just be detrimental to UK programme makers, but to UK audiences as well. UK audiences have a strong desire

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<sup>7</sup> Source: PQ Media (US media research company).

to see new, domestically-produced programming, as opposed to repeats and imports. Ofcom's public service programming review illustrated this when it identified new, UK programming as a key characteristic of public service content.<sup>8</sup>

### **Surreptitious and subliminal advertising**

**20) Is the definition of surreptitious advertising at Article 1(h) sufficient to catch all possible forms of abuse?**

1) Yes.

**21) Should there also be a definition of the 'subliminal techniques' which are to be banned (Article 3g(b))?**

1) Yes.

### **Right of reply**

**22) The right of reply at Article 23 of the existing TVWF Directive will remain, but with its scope extended to cover 'linear' (but not 'nonlinear' services). Is this right? What is the case for or against extending this right of reply to all 'audio-visual media services'?**

1) Plaintiffs already have protection under existing libel laws. However, demanding a right of reply regarding non-linear service would often be impractical. An online forum, for example, can be open to the public and more akin to a conversation rather than a newspaper publication, where it is possible to vet everything in advance.

### **Film rights**

**23) Article 3f2 of the Directive would require Member States to ensure that audio-visual media services do not transmit cinematographic works outside the periods agreed with their licence holders. This re-enacts Section 7 of the existing TVWF Directive, but applied to audiovisual services as a whole rather than simply to television broadcasters. Would this provision achieve anything, given the existence of copyright law?**

1) As in the UK, the accepted system of windows – the periods in which a film can be shown on a relevant distribution platform – is a matter of

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<sup>8</sup> Ofcom review of Public Service Broadcasting, Phase 3 – Competition for Quality, 1.11: PSB Purposes

contract between licence-holders and distributors. This provision should result in no change to current practice.

### Short reports

**24) Article 3b offers a limited transfrontier right of access to footage of major events, including (and especially) sports events for television news purposes. Does this strike a fair balance between the respective rights of the rights holders, broadcasters, news agencies, sports organisations and other event organisers, and the interests of the public? Should this right be available to broadcasters in all Member States, or should it be available only in Member States that already allow such access to footage of major events to their own domestic broadcasters?**

- 1) Article 3b does strike a fair balance between the stated parties and represents how the UK has operated informally and generally successfully.

### Promotion of European work

**25) Article 3f requires Member States to ensure that media service providers under their jurisdiction promote production of and access to European work. No specific quota is set. What would be the most effective ways for the Government to meet this obligation?**

- 1) The “where practicable” clause in the existing version of Television without Frontiers has allowed broadcasters to avoid fulfilling current quotas regarding European works.<sup>9</sup> This has severely limited the impact of the current Television without Frontiers in raising levels of European content on traditional broadcaster services in the UK and Pact would call for its removal in the new Directive.
- 2) As the proposed Directive includes an identical “where practicable” clause regarding non-linear services, Pact sees no reason why it will have any more impact on these services.
- 3) For identical reasons, Pact also calls for the removal of the “where practicable” clause for independent productions. Both clauses are in Pact’s view being abused by broadcasters in order to avoid their responsibilities under the Directive.

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<sup>9</sup> Directive 89/552/EEC, Article 4.1