

**Indies: Great Content for Great Britain  
Submission to Digital Britain Review  
Second Phase**

**pact.**

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**March 2009**

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## Executive summary

- 1) The Cox Review of Creativity, commissioned by Gordon Brown when Chancellor of the Exchequer, identified what it saw as a perennial problem for Britain's creative industries: the UK was strong creatively, but weak at turning that creativity into businesses. From the concept of the worldwide web, to the design of the iPod, the UK generated ideas, while overseas companies exploited them. The report concluded that unless UK companies could exploit their ideas, and do so before anyone else, they could not be successful.
- 2) Before the 2003 Communications Act, the independent television production sector was a textbook example of this. The hundreds of mostly small companies in the sector produced acclaimed and popular programmes, in the process delivering public value in the form of creative completion and diversity. But those companies were constrained by the structure of the programme supply market from exploiting those programmes. As the four PSB broadcasters controlled over 90%<sup>1</sup> of investment in new UK programmes, they were able to demand all rights to programmes, with independent suppliers working for hire.
- 3) As Pact outlined in its presentation to the Digital Britain steering group March 6, the Codes of Practice in the 2003 Communications Act, and the ensuing Terms of Trade, have transformed the external programme supply sector by enabling indies to own rights and exploit them. This has addressed the perennial British problem highlighted in the Cox report – indies now not only excel creatively, they are leading the world in many forms of content exploitation.
- 4) Summarised briefly, the Codes of Practice/Terms of Trade have had the following key impacts:
  - Limited warehousing of content by PSBs by enabling indies to own/exploit secondary/ancillary rights, thereby increasing availability of content to consumer;
  - Made indies investable, enabling the indie sector to grow and build companies of global scale;

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<sup>1</sup> Ofcom.

- Enabled indies to significantly increase UK global exports;
  - Enabled indies to become investors in UK content creation (£126m in 2008);<sup>2</sup>
  - No evidence that the Terms of Trade have materially damaged PSBs;
  - Broadcasters able to pay less per hour for content, with indies providing investment to cover the “gap”.
- 5) Although there is likely to be a decline in broadcaster spend on UK content, the proportion of this spend controlled by the PSB groups will not change. Ofcom’s most recent forecast predicts PSBs will continue to account for more than 90% of UK commissioning through to 2020, comparable to 2003 levels.<sup>3</sup> This spend may be spread across more channels and platforms, but it will ultimately be controlled by the same four PSB groups.
- 6) Without the Terms of Trade, or an intervention that achieves a similar disaggregation of rights and enables creators to own IP, there is a high risk that PSBs will be able to use their continuing market power to warehouse rights in the digital era. Our view is supported by new analysis that we have commissioned for the Digital Britain review from Oliver & Ohlbaum Associates (O&O). O&O’s interim report, attached as an Appendix, concludes that PSBs still have both the market power and the incentive to restrict or warehouse rights, and that some form of regulated Terms of Trade are still required to address this.
- 7) The report also cautions against any attempts by PSBs to respond to current economic challenges through a significant and rapid move to extract a sudden increase in indie “gap” production investment (i.e. setting primary prices well below the costs of production), as this: “would force too much risk too quickly onto content producers who are already facing increased risks.” It suggests that this might lead to a contraction in the UK content sector, or to independent producers being forced to sell secondary and ancillary rights back to the broadcasters to stay solvent, effectively transferring the rights back to the broadcasters who would then focus on using them to influence upstream competition in the domestic market.
- 8) It is clear that material changes to the Terms of Trade would be highly likely to seriously damage the independent sector, and would conflict with the

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<sup>2</sup> Pact survey. See Section 2 of this submission.

<sup>3</sup> Ofcom’s Second PSB Review.

Secretary of State for Culture, Media & Sport's recent statement that: "Having seen how the independent production sector has developed, none of us wants to see that development injured in any way by a change of the rules."<sup>4</sup>

- 9) The overriding issue here is not the development of the independent sector for its own sake, but the fact that the Terms of Trade have increased opportunities for the exploitation of content in secondary/ancillary markets in the UK and worldwide. This has resulted in more choice for the UK consumer in how content is accessed, and in the ability of UK indies to generate investment from global revenues that is being used to fund UK content.
- 10) Digital Britain's interim report acknowledged that the Terms of Trade "have worked well", and proposed that they evolve for the digital era.<sup>5</sup> The opportunities for building on the success of the Terms of Trade are considerable, with digital technology creating more and more opportunities for exploiting content. Over the last few years, independents have proven that they are best incentivised to drive the exploitation of the content they create, primarily to date in terms of exports, but also increasingly via new media.
- 11) In section 4 of this submission, we propose a rights framework for digital Britain that would focus on preventing the warehousing of content, or other practices that unduly restrict the exploitation of content. Based on the high-level principles of the Codes of Practice, this could be achieved by rights disaggregation and IP ownership on the part of the creator.<sup>6</sup>
- 12) This set of "Digital Rights Frameworks" should in our view at the very least be applied, in varying forms, wherever services that commission UK content benefit from public support, either direct or indirect. This would include:
  - All BBC services (broadcast and new media);
  - PSB2/Channel 4 (broadcast and new media);
  - All licensed commercial PSB broadcasters/providers (broadcast and new media);

<sup>4</sup> The Times, Friday March 6 2009, page 57, "The British are coming..."

<sup>5</sup> Digital Britain, interim report, page 50.

<sup>6</sup> Ofcom's guidance notes on the Codes of Practice state that: "A key principle underlying Ofcom's approach to the Codes of Practice is that producers should retain rights in the programmes unless these are explicitly sold to a PSB and/or to other parties." See Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers, Ofcom, June 2007, page 19.

- Public Sector Procurement (commissioning of new media content by Government, local government, NGOs or other public bodies);<sup>7</sup> and
- Any content commissioned via the contestable fund proposed by Ofcom and the Digital Britain, whether this is provided by a commercial sector service or a public entity (broadcast and new media).

13) Additionally, if the UK is to fully realise the potential of innovative content creators in the digital world, it is reasonable to expect that all digital channels – including those that do not have direct or indirect public support - should be subject to the same framework, so as to prevent warehousing, foster innovation, and deliver commercial value to the buyer and producer.

14) As we outline in Section 4, there is already a successful digital precedent in the new media rights frameworks adopted by [bbc.co.uk](http://bbc.co.uk).

15) Our other key proposals in this submission include asking Government to consider:

- whether the BBC's successful Window of Creative Competition should be extended to other platforms, particularly online;
- whether further reduction in the commissioning of UK content will make it appropriate to increase the independent quota;
- whether BBC Worldwide's exclusive first-look arrangement with BBC in-house production should be ended in order to stimulate further competition in the export of UK content; and
- We support the two proposals put forward by Digital Britain and Ofcom for public service children's content – a new remit for PSB2/Channel 4 and/or a contestable fund.

16) However, we see a Digital Rights Framework as the most pressing, and potentially most far reaching, intervention in the content sector. Without such an intervention there is a significant danger that certain key constraints of the analogue era could resurface in digital Britain, with PSBs warehousing or otherwise restricting the availability of content. This is already happening in commissioning outside the Terms of Trade.

17) Conversely, by evolving a rights framework for digital Britain, this review can underpin the UK as world-leading content hub, with multiple agents exploiting

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<sup>7</sup> Pact and NESTA are studying commissioning models for online content commissioned under public sector procurement. Initial findings will be available by April 16 and a full report in May.

content at home and around the world, and multiple agents raising investment for the creation of UK content. The end beneficiary will be audiences, able to access high quality, well-funded UK content when and how they want.

## Introduction

- 1) Pact is the trade association that represents the commercial interests of the independent production sector. We have more than 600 member companies across the entire UK, involved in creating and distributing television, film and interactive content.
- 2) The independent production sector creates 49% of all new UK television programmes each year across the BBC, ITV1, Channel 4 and Five.<sup>8</sup>
- 3) The sector has a turnover of more than £2 billion per year<sup>9</sup> and employs 20,950 people – more than the terrestrial broadcasting and the cable and satellite sectors respectively.<sup>10</sup>
- 4) Since the Codes of Practice/Terms of Trade between producers and broadcasters were introduced in the 2003 Communications Act, the independent sector has become an increasingly important source of investment for the creation of UK content. It currently raises around £126m per year for the development and production of television programming.<sup>11</sup>
- 5) This first section of this submission contains a summary of key points made in our March 6th PowerPoint presentation to the Digital Britain steering group. We have provided an electronic version of the full presentation separately.
- 6) The next section of this submission expands on our findings from a survey of the independent sector's role in providing gap funding for the creation of UK content. By gap funding, we mean any investment raised by the producer to meet the gap between the actual costs of production and the price paid by the commissioning broadcaster (the primary licence fee).
- 7) The third section details our arguments why the essential market imbalance between suppliers of UK content and commissioners remains little different to 2003, and how the principles behind the Codes of Practice (disaggregation of rights and ownership/exploitation of intellectual property by the content creator) are as relevant in the digital era as they were when the Codes were introduced. This is supported by initial research commissioned from Oliver & Ohlbaum Associates, which is attached as an Appendix.

<sup>8</sup> Ofcom, communications market report, 2008.

<sup>9</sup> Independent production census 2007/08, Digital-i for Pact.

<sup>10</sup> Employment Census 2006, Skillset.

<sup>11</sup> Pact survey, see section 2 of this submission.

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- 8) The next section provides further details on how the Codes of Practice/Terms of Trade might be evolved as a Digital Rights Framework.
  - 9) The remaining sections outline our position on the proposed Rights Agency; maintaining a healthy commissioning market; public interventions that might boost the global export of UK television content; and children's public service content.
  - 10) A full report by Oliver & Ohlbaum on the programme supply market in the digital era is to follow in April.
  - 11) For further information, please contact Adam Minns at [adam@pact.co.uk](mailto:adam@pact.co.uk) (020 7380 8232).

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## **Section 1: summary of presentation to DBR steering group March 6**

1) In brief, the Pact PowerPoint presentation to the Digital Britain review March 6<sup>th</sup> argued that:

- The Terms of Trade have transformed UK content businesses
- UK indies are driving UK exports and are world leaders
- Indies are reinvesting revenues in UK content creation
- There is no evidence Terms of Trade have materially damaged broadcasters
- The UK commissioning market remains imbalanced, with four PSBs still controlling 90%+ of commission spend
- The Terms of Trade remain crucial to addressing this imbalance
- Removing the Terms of Trade would the destroy success of content sector
- Warehousing is already happening in areas of the online world outside the Terms of Trade
- Indies have proved they can excel at exploiting content when they are able to own/exploit IP rights
- A rights framework for digital Britain based on the high-level principles of the Codes of Practice is crucial to maintain the UK's position as world-leading content hub

### **Presentation part 1: turning creativity into a business**

2) This section presented an overview of how the 2003 Communications Act has transformed indies, enabling them to own and exploit IP rights have.

3) Before the 2003 Communications Act, the independent television sector excelled at making programmes, providing creative competition and diversity in UK programming. But companies in the independent sector were prevented from turning that creativity into viable, sustainable businesses by the structure of the programme supply market.

4) This was because four PSB groups (BBC, ITV, Channel 4 and Five) controlled more than 90% of commissioning investment in new UK television programmes.<sup>12</sup> That

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<sup>12</sup> Ofcom.

market power enabled the PSB groups to demand all rights to programmes when commissioning them, with independents essentially working for hire. As a result, content was widely warehoused (withheld by the PSB broadcaster from the rest of the market in order to protect a market position).

- 5) Two key interventions changed the independent sector. The BBC's Window of Creative Competition opened up a further 25% of BBC commissioning to external suppliers, on top of the minimum 25% independent quota. This built on the 2003 Communications Act, which maintained the 25% independent quotas across all PSB broadcasters and introduced the Codes of Practice.
- 6) The Codes of Practice enabled the independent sector to own and exploit the Intellectual Property (IP) in its programmes, making independents investable. This led to a growth in the scale of companies: in 2003, the top seven companies in the independent sector accounted for a turnover of £460m; by 2007, this had risen to £1.1 billion.<sup>13</sup>
- 7) Nevertheless, it is important to bear in mind that the primary broadcast commission (which stems predominantly from PSBs) remains important, representing 66% of sector turnover (and 75% of TV turnover).
- 8) Has this success come at the expense of broadcasters? Channel 4's annual profits from rights exploitation in 2002, the last full year before the 2003 Communications Act, amounted to just £10.9m, which represented just 1.4% of the broadcasters total turnover.<sup>14</sup> We estimate that Channel 4's 15% share of indie exploitation of content overseas could potentially be comparable to this £10.9m. For its part, ITV can make up to 75% of its programmes in-house, with full ownership of rights, if it chooses. Meanwhile, BBC Worldwide is flourishing, having announced year-on-year profits up 17% in its last annual results.

## **Presentation part 2: driving global value**

- 9) This section shows how indies have used those IP rights to become leading global exporters. Since the Terms of Trade were introduced, UK exports of TV programmes have risen by nearly 39%. The main areas of growth have been largely driven by indies, particularly formats (up 95%) and sales to the US (up 20%).

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<sup>13</sup> Broadcast annual survey of independent sector.

<sup>14</sup> Channel 4 annual report 2002.

### **Presentation part 3: investing in UK content**

10) This section looked at how indies are reinvesting the revenues from those exports into the creation of UK content. In 2008, the independent sector invested £126m in UK production and development.<sup>15</sup> The comparable figure from BBC Worldwide was £88m.<sup>16</sup>

### **Presentation part 4: great content for digital Britain**

- 11) This section considered how to evolve IP ownership and exploitation in the digital era. The essential imbalance in the relationship between the producer and the broadcaster is forecast to remain largely unaltered in the digital era. Overall broadcaster investment in UK content may decline, but the four current PSBs are predicted to control more than 90% through to 2020 - an identical proportion of overall commissioning to 2003.<sup>17</sup> This may in the future be spent across multiple platforms and services, but there will remain fundamentally four gatekeepers who will control 90% of broadcaster spending.
- 12) A rights framework for the PSBs and other commissioners – on whatever platform or service they commission – is therefore essential to avoid warehousing and other restrictive practices in the digital era.
- 13) The BBC has already acknowledged the principle of a rights framework in the digital era by agreeing a new media framework with Pact. This is working successfully, enabling the BBC to secure the rights it needs to deliver its public service commitments online, while allowing the content creator to own and exploit appropriate rights.

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<sup>15</sup> Pact survey, see Section 2 of this submission.

<sup>16</sup> BBC annual accounts.

<sup>17</sup> Ofcom, Second PSB review.

## **Section 2: indie investment in UK content**

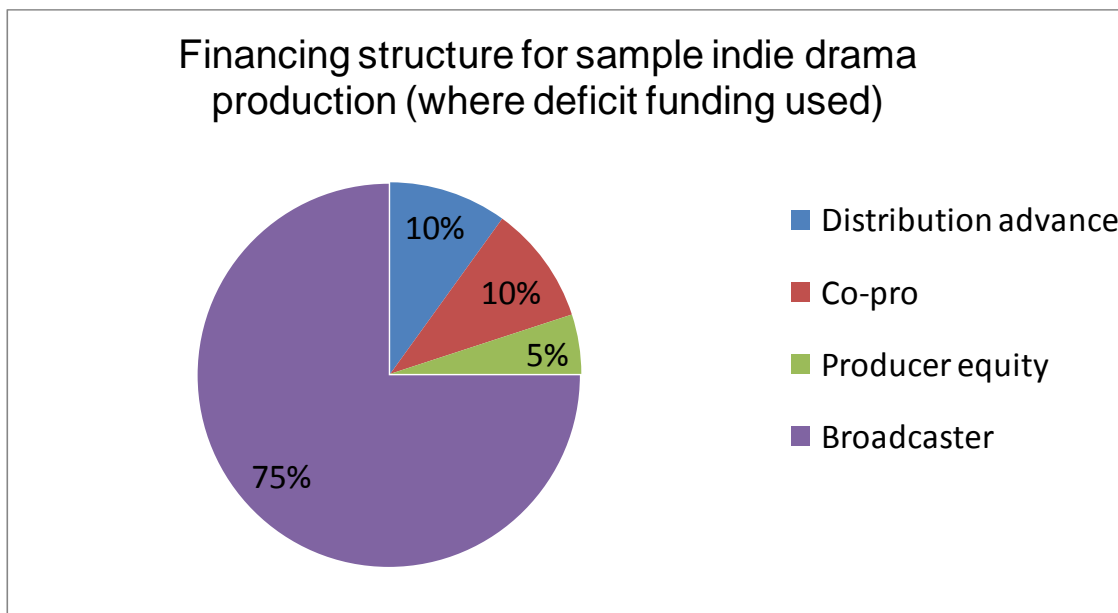
- 1) The headline results of Pact's survey of the independent sector are that in 2008 the independent sector invested £126m in UK production and development, comprising:
  - £105m investment in production
  - £21m in development (non-recouped from primary commission)
- 2) The comparable figure from BBC Worldwide was £88m.<sup>18</sup>
- 3) Whenever potential secondary/ancillary revenues allow, indies typically raise circa 20% of a budget for high end content such as drama. Outside drama, indies typically raise up to 10% of a budget, again when secondary/ancillary markets permit.
- 4) Drama and children's were the genres where indies appeared to be most active in raising investment in 2008, although we were cited examples in factual entertainment, factual and comedy as well.
- 5) Indies are raising investment for programmes for all PSB broadcasters, including the BBC, ITV, Channel 4 and Five. A few examples of recent programmes where indies' raised deficit funding include the IT Crowd, an Emmy-winning comedy sitcom for Channel 4; Howard Goodall's How Music Works, which is a Channel 4 factual commission; and dramas such as Robin Hood (BBC), Minder (Five), The Devil's Whore (Channel 4); and Secret Diary of A Call Girl (ITV).



### **The Devil's Whore: indie raised gap funding**

<sup>18</sup> BBC annual accounts.

- 6) The most common source of gap investment was a distribution advance (where a production company secures a loan from a distributor, or its own distribution division, based on projected returns from subsequent exploitation of secondary/ancillary rights in the UK and/or overseas). Other common ways of raising investment include a co-production deal, involving the sale of overseas rights to production partner and/or accessing soft money such as tax breaks. Producers also invest their own company cash into productions.
- 7) In the case study of a drama production below, the primary licence fee from the commissioning broadcaster left a gap in the production budget of around 25%. This was raised by the producer through a distribution advance and a co-production deal, topped up by investing the company's own funds.



- 8) Crucially, the interim report from Oliver & Ohlbaum Associates for Pact (See Appendix) cautions against any attempts by PSBs to respond to current economic challenges through a significant and rapid move to extract a sudden increase in indie gap financing (i.e. setting primary prices well below the costs of production), as this: “would force too much risk too quickly on to content producers who are already facing increased risks.”
- 9) The O&O analysis suggests that this might lead to a contraction in the UK content sector, or to independent producers being forced to sell secondary and ancillary rights back to the broadcasters to stay solvent, effectively transferring the rights back

to the broadcasters who would then focus on using them to influence upstream competition in the domestic market.

- 10) Gap funding raised by indies is not their only contribution to production expenditure. Under the Terms of Trade, broadcasters receive between 15% and 50% of any revenues generated by indie exploitation of content, which broadcasters may then reinvest in their programme budgets if they choose.

### **A note on methodology**

- 11) For the Digital Britain review, Pact surveyed leading independent companies to gauge the level of gap investment in UK television programme development and production they are raising. Respondents accounted for a total turnover in primary commissioning of more than £700m in 2008, representing 52% of total primary commission turnover across the independent sector. Results were averaged across the entire sector, with a scaling of -10% for most companies with annual turnover (all income) of less than £50m to reflect the assumption that those companies generate a lower proportion of income from secondary/ancillary rights exploitation.
- 12) To be clear, in estimating the total cost of production, we have included the relevant contribution to an indie's profit margin that is included in the production cost. It is standard industry practice to include a contribution to the producer margin as part of the cost of making the production. Across the independent production sector, average total profit margin (derived from all income streams, including secondary/ancillary) is approximately 9%, according to the most recent Pact census.

### **Section 3: market imbalance in the digital era**

**“ITV and Channel 4 account for nearly nine of every ten pounds that commercial TV invests in British content, other than news and sport.”**

Andy Duncan, March 2009<sup>19</sup>

- 1) Pact appreciates that commercially-funded broadcasters are facing severe financial problems due to both cyclical and structural pressures. This is also increasingly the case for the production sector, as broadcasters reduce commissioning budgets and increase downward pressure on the licence fee they pay when commissioning independent producers. Long established indie production companies specialising in core public service genres such as drama, factual and children’s programmes are already downsizing or have closed, while larger scale companies are also restructuring in response to market conditions.
- 2) As we noted in our presentation to the Digital Britain steering group, while indies have grown revenues from secondary/ancillary rights in recent years, the primary commission from broadcasters still accounts for 66% of indie sector revenues (and 75% of television revenues). Any reduction in primary commissioning will therefore have a pronounced impact on the independent sector. The full impact of reduced commissioning spend on the independent sector is, however, unlikely to be evident until 12 months after the initial cuts in commissioning spend, as the delay between commissioning and delivery means producers are still working on programmes that were commissioned in the previous commissioning round.

#### **Market imbalance remains at 2003 levels**

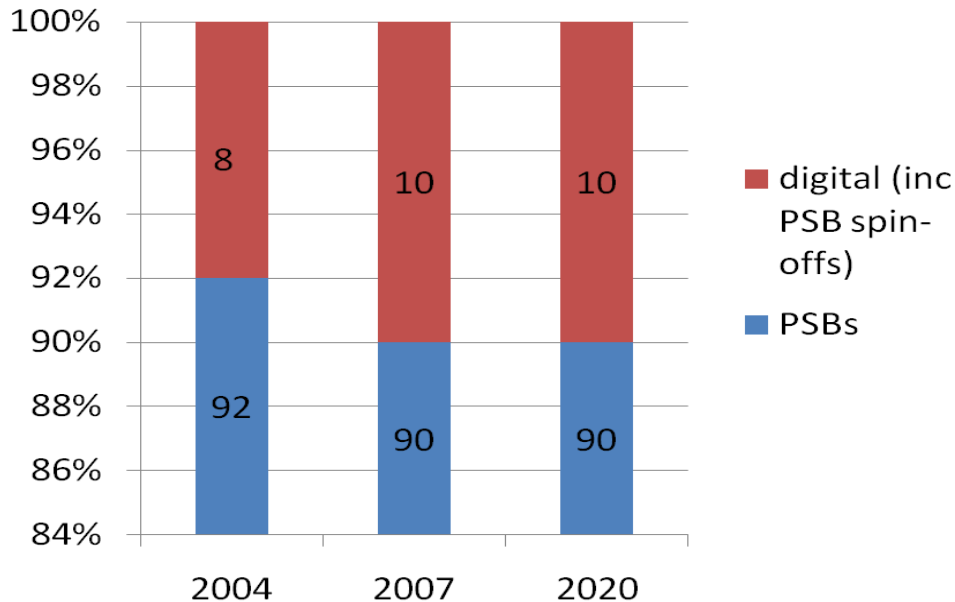
- 3) Despite the financial problems facing the commercial PSB broadcasters, and despite the growth of larger companies in the independent sector, the fundamental market imbalance between buyers and suppliers has not materially changed since the 2003 Communications Act. Then, more than 90% of commissioning spend for new UK television content was funnelled through four PSB groups, according to Ofcom. That remains the case today, and on the most recent available forecasts, again from Ofcom, is predicted to remain the case through to 2020.<sup>20</sup> As illustrated below, although overall spend by broadcasters

<sup>19</sup> Speech to FT Digital Media & Broadcasting Conference.

<sup>20</sup> Ofcom 2<sup>nd</sup> PSB Review, consultation paper.

may decline, the PSB groups will continue to control the vast majority of the commissioning market.

### Proportion of broadcaster commissioning spend on first-run originations



Source: Ofcom's Second PSB Review

- 4) This means that the essential imbalance in the programme supply market is likely to continue into the digital era. Even if a reduced commissioning spend is spread across more channels and platforms, those channels and platforms are likely to be part of a handful of PSB groups.
- 5) We note that, in the recent review of Project Kangaroo, the proposed TV on demand joint venture between ITV, Channel 4 and BBC Worldwide, the Competition Commission found that the three parties together controlled most of the catch up and on demand rights for UK commissioned programming. The Competition Commission ruled that access to UK content was probably essential to the success of any on demand TV service, and that the joint venture parties had clear incentives to use the control of their on demand rights to restrict competition in the on demand retail market.
- 6) The interim report for Pact from Oliver & Ohlbaum Associates (O&O), attached as an Appendix, supports the view that there remains a market imbalance between buyer and supplier, concluding that "significant buyer power remains," that

broadcasters are still incentivised “to warehouse or restrict rights,” and that some form of regulated Terms of Trade therefore remains necessary.

- 7) Indeed, with total broadcaster commissioning spend on UK content falling, the likelihood is that the PSBs will have an even greater level of market influence. Pact is already seeing widespread pressure from PSB broadcasters on producers to accept lower primary licence fees and/or significantly worse rights/revenue positions.
- 8) This imbalance in the buyer-supplier relationship is expected to continue despite the growth of large scale companies within the independent sector. As we outlined to Ofcom during its last PSB review, and in our first submission to Digital Britain, independent companies have grown across genres and across broadcasters, largely due to a desire to spread their risk.

**“No producer has sufficient influence over the programme supply chain to leverage an increase in prices.”**

Oliver & Ohlbaum, 2007

- 9) As a result of diversifying across genre and broadcaster, only one producer group accounted for more than 20% of the total commission spending of any of the main commissioning channels in 2008, according to O&O’s latest analysis for Pact. This situation has remained largely unchanged over the last three years despite consolidation in the supply sector, according to O&O. This supports O&O’s conclusion from its previous 2007 report for Pact that:

"This would suggest that no producer has sufficient influence over the programme supply chain - either in general or over a specific commissioning channel - to leverage an increase in prices."<sup>21</sup>

- 10) Independents are now raising production investment themselves. However, the primary commission still accounts for the majority of sector revenues (66% of all revenues and 75% of television revenues), as we have noted previously, and indies’ ability to raise a relatively small minority of the production budget themselves (circa 10% of the production budget on productions where gap funding is used) is unlikely to materially alter the buyer-supplier imbalance.

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<sup>21</sup> Channel 4 and Independent Production: Vertical integration and the future funding of Channel 4, O&O Associates, page 3.

11) Were large-scale independents able to secure significant rights to programmes without the need for the Codes of Practice/Terms of Trade, we would expect to see them doing so when winning commissions from non-PSB broadcasters, where the Terms of Trade do not apply. This is not evident to any significant degree. Even the biggest independents in the sector report that they are typically unable to retain any significant rights outside the Terms of Trade, and frequently retain none at all.

### **No sign of independents driving up broadcaster costs – opposite more likely**

12) The best available evidence suggests that independents are continuing to offer broadcasters value for money content, and that there is no sign of any supposed market influence enabling large-scale independents to drive up prices (although hits and access to key talent command a premium). Ofcom's cost per hour figures indicate that the opposite may be happening, with the cost per hour of programmes dropping by 10% since 2005, the year the terms of Trade were finally in place (although this may in part at least reflect a shift to cheaper genres).<sup>22</sup>

13) PKF's 2006 research for the Department for Culture, Media and Sport as part of the BBC Charter review process supported the view that independents were providing good value for money. In fact PKF concluded that there remained a potential for a reduction in costs for the BBC as a result of increased commissioning from independents.<sup>23</sup>

14) PKF also suggested that independents were likely to remain a cost effective source of programming despite consolidation in the production sector. Rather than enabling independents to dictate commissioning terms, as broadcasters have suggested, PKF found that consolidation in the independent sector may yield further efficiencies. The report added: "Taken together this may offer the opportunity to reduce costs."<sup>24</sup>

15) PKF's conclusions were supported by LEK's research for Ofcom's recent review of Channel 4, which agreed that independents provided a cost-efficient source of programming. LEK's report found that Channel 4, as a publisher broadcaster, was often paying less for commissions than broadcasters with in-house capacity.<sup>25</sup>

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<sup>22</sup> Ofcom communications market report 2008.

<sup>23</sup> Review of the BBC Value for Money and Efficiency Programmes, PKF for DCMS, April 2006, page 20.

<sup>24</sup> Ibid.

<sup>25</sup> Ofcom Financial Review of Channel 4, LEK Consulting, page 51.

## **No constraint on PSBs developing new services**

16) Nor have the Terms of Trade restricted broadcasters from developing new services. When broadcasters have developed new services that are not included in the primary package under the Terms of Trade, Pact has negotiated arrangements to ensure that they have access to the necessary rights. With the iPlayer, for example, the BBC did not incur any additional upfront costs in acquiring rights.

## **No evidence of material impact on PSB businesses**

17) Indeed, there is no evidence that the Terms of Trade have had any negative impact on PSB's businesses. As we outlined in our presentation, Channel 4's pre Terms of Trade annual profit from IP exploitation was just £10.9m. We estimate that its 15% share of indie exploitation of Channel 4-commissioned content overseas could potentially be comparable to this £10.9m. ITV can make 75% of its schedule in-house, with complete ownership of rights, if it chooses, while BBC Worldwide is flourishing despite the Terms of Trade and the WOCC, posting a rise in year-on-year profits last year of 17%.

**“Transferring rights would not solve the [Channel 4] funding issue.”**

Kevin Lygo, January 2009

18) This year, Channel 4's Kevin Lygo stated: “Transferring rights would not solve the funding issue. The current system can work for us, for you, and more importantly for the wider economic growth of the creative industries.”<sup>26</sup>

19) This followed Ofcom's conclusion in its PSB review that indie commissions were not a significant opportunity cost to ITV. The regulator stated that: “We believe commissions from independent producers add diversity to ITV's schedule and do not agree that this represents a significant opportunity cost to ITV plc.”<sup>27</sup>

**“Commissions from independent producers do not represent a significant opportunity cost to ITV plc.”**

Ofcom, 2008

<sup>26</sup> Kevin Lygo speech to Television from the Nations and Regions conference, Salford, January 2009.

<sup>27</sup> Ofcom's Second Public Service Broadcasting Review – Phase 2: preparing for the Digital Future, Section 7.7, page 114.

- 20) The Terms of Trade therefore remain crucial to independents' ability to own and exploit rights. We have already noted how even large-scale indies report that they are able to retain at best limited rights when winning commissioning from non PSB broadcasters outside the Terms of Trade. Similarly, we are seeing excessively restrictive deals on new media platforms. Channel 4 has for example taken an exclusive seven-year licence when commissioning online content. Channel 4's approach to rights ownership is particularly significant given that its 4iP initiative is funded by consolidating funding from the UK's various screen agencies, thereby reducing alternative routes to finance for external content creators.
- 21) Furthermore, given the pace of technological change and consumer expectations, some aspects of the current Terms of Trade are already out of date, such as the 5-month blackout period on VOD rights during which no party is able to exploit content.

**“None of us wants to see the development of the indie sector injured in any way by a change of the rules.”**

Andy Burnham, March 2009

- 22) It is clear that material changes to the Terms of Trade will have profound negative consequences for the independent sector, conflicting with the Secretary of State for Culture, Media & Sport's recent statement that: “Having seen how the independent production sector has developed, none of us wants to see that development injured in any way by a change of the rules.”<sup>28</sup>
- 23) The overriding issue here is not the development of the independent sector for its own sake but the fact that the Terms of Trade have increased opportunities for the exploitation of content in secondary/ancillary markets in the UK and worldwide. This has resulted in more choice for the UK consumer in how content is accessed, and in the ability of UK indies to generate investment from global revenues that is being used to fund UK content.
- 24) Digital technology is creating more and more opportunities for exploiting content, increasing consumer choice and raising investment for content from the exploitation of rights. Over the last few years, independents have proven that they are best incentivised to drive the exploitation of the content they create.

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<sup>28</sup> The Times, Friday March 6 2009, page 57, “The British are coming...”

They have no channels of their own to protect, and every incentive to extract the maximum possible returns from the content that they create. Having driven exports of UK content around the world, independents are now driving innovation on new media platforms. Companies such as RDF Media and Hattrick have developed and launched VOD services before the PSB broadcasters. Endemol has forged new business models for investing in and exploiting content with O2, MSN and Bebo.

25) However, the independent sector, and independents' ability to exploit new markets, would be fatally undermined if indies were unable to retain ownership the IP to the content they create. This would not be possible without the Terms of Trade, or a rights framework for the digital era that achieves the same underlying principles of preventing warehousing and enabling the producer to own and exploit IP. We outline our proposals for such a framework in the next section.

#### **Section 4: a rights framework for digital Britain**

- 1) We have argued in this submission and our presentation to the steering group that there is a significant danger that the constraints of the analogue era could resurface in digital Britain without intervention. As we outlined to the Digital Britain steering group, we therefore see a need for intervention to ensure that the fundamental principles underlying the Codes of Practice/Terms of Trade are present in the commissioning of UK content in the digital era (to be clear, like the Codes of Practice/Terms of Trade, this is intervention that is additional to UK copyright legislation).
- 2) This intervention would focus on preventing the warehousing of content, or other practices that unduly restrict the exploitation of content, so that it can be made available to the public as quickly and by as many means as possible. As with the Codes of Practice, this could be ensured by requiring an appropriate clarity about the different categories of rights that are being acquired by the commissioning entity.<sup>29</sup> This could be enshrined by acknowledging that rights belong to the producer unless licensed to the commissioning entity or another party.<sup>30</sup>
- 3) This would be the underlying principle for a “Digital Rights Framework” that should in our view be applied, in varying forms, to as much commissioning of UK content as is possible, given the availability of appropriate legislative or regulatory levers. In the first instance, we see a clear case for such a framework at the very least whenever services benefit from public support, either direct or indirect.
- 4) Specifically, a Digital Rights Framework should apply to all UK content commissioning, whether broadcast, online or other digital platform, by:
  - a. All BBC services;
  - b. PSB2/Channel 4;
  - c. All licensed commercial PSB broadcasters/providers;

<sup>29</sup> Communications Act 2003, Part 3, Section 285 (3) (b).

<sup>30</sup> Ofcom's guidance notes on the Codes of Practice state that: "A key principle underlying Ofcom's approach to the Codes of Practice is that producers should retain rights in the programmes unless these are explicitly sold to a PSB and/or to other parties." See Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers, Ofcom, June 2007, page 19.

- d. Public Sector Procurement (commissioning of new media content by Government, local government, NGOs or other public bodies),<sup>31</sup> and
  - e. Any content commissioned via the contestable fund proposed by Ofcom and the Digital Britain, whether this is provided by a commercial sector service or a public entity.
- 5) However, if the UK is to fully realise the potential of innovative content creators in the digital world, it is reasonable to expect that all digital channels should be subject to the same framework, so as to prevent warehousing, foster innovation, and deliver commercial value to the buyer and producer. If this were to be achieved, the UK could quickly become one of the most dynamic markets for the creation and exploitation of digital content, leading to greater international success and the development of new companies of scale.

#### **A successful digital precedent**

- 6) In 2007, the BBC and Pact agreed a new media rights framework for non-TV content commissioned by BBC for new media platforms. The BBC/Pact new media frameworks are aimed at ensuring the BBC can deliver public service commitments while enabling suppliers to retain and exploit IP rights where appropriate. There are five “frameworks” which each apply to different types of content.
- 7) This model is already working successfully for BBC online commissions. DESQ, an online content creation company, states: “Our commission under the BBC new media rights framework is the first time we have ever been able to own and exploit content that we have made for the BBC.”
- 8) We are not proposing that the BBC new media frameworks should be adopted wholesale for each digital service. It is highly likely that our proposed Digital Rights Framework would vary for each service, just as the details of the individual Terms of Trade agreements between Pact and each of the PSB broadcasters can vary.
- 9) Initially, the Digital Rights Framework would need to be framed in terms of high-level principles calling for rights disaggregation, as we have outlined above. The details of the various Frameworks could then be negotiated by the market, under the auspices and guidance of Ofcom and/or Government,

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<sup>31</sup> Pact and NESTA are studying commissioning models for online content commissioned under public sector procurement. Initial findings will be available by April 16 and a full report in May.

and/or Digital Britain's proposed Rights Agency, as we outline in the next section.

- 10) This would replicate the successful implementation process of the Codes of Practice in the 2003 Communications Act, which set high-level principles. Ofcom then issued guidance, with the market, i.e. Pact and the PSB broadcasters, negotiating agreements. The principles for a Digital Rights Framework could similarly be enshrined in legislation, with Ofcom and/or the Rights Agency developing guidance.
- 11) However, if new legislation is not practicable in this instance, the channels and services that we have specified above as benefiting from public support are regulated by existing frameworks, such as the BBC Trust, PSB service licences and programme agreements and the Office of Government Commerce (OGC), that may appropriately provide policy levers. We stress, however, that we see a need for the high-level principles behind a Digital Rights Framework to be made clear as quickly as possible – possibly in the Digital Britain final report - in order for regulatory bodies such as Ofcom and/or the Rights Agency to work effectively with the market to implement them.
- 12) Digital Britain might also consider whether a Digital Rights Framework for public sector commissioning could generate revenues for the proposed contestable fund. Under the current Terms of Trade, the commissioning PSB broadcaster receives a share of any revenues generated by the indie producer from subsequent exploitation. In the case of public sector procurement, revenues due to the commissioning entity, i.e. the Government or public agency, could flow instead into a contestable fund for commissioning public service content.

### **Examples of warehousing/restrictive practices in the digital world**

#### **On demand services**

Under the current Terms of Trade, content can go into blackout for five months, during which time it cannot be made available to the public (by legitimate means).

For returning series, the most popular and commercially valuable type of VOD TV content, the PSB's exclusive period is up to 3 years.

**Channel 4 online**

When commissioning online, Channel 4 can have an exclusive licence of seven years. This is particularly significant given that Channel 4's 4iP initiative consolidates funding from the UK's various screen agencies, thereby reducing alternative routes to finance for external content creators.

**Public Sector Procurement**

Get Into Games is a new media package commissioned by Yorkshire education initiative to help students from the north of England enter local games industry. There is potential to exploit this content in rest of UK and internationally, but the IP is locked up by the local authority.

CLICT is a software package for helping teachers use IT in the classroom. The production company was approached by a leading international education trust, CFBT, to licence the right, but it is warehoused by the local authority.

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### **Section 5: Pact position on Rights Agency**

- 1) Pact welcomes Digital Britain's focus on IP theft and the statement in the interim report that the most important step in tackling IP theft is to make content available to consumers in the way that they want. Content must be available commercially to the public as quickly and as conveniently as possible. This can only be achieved by ensuring that there is an open market for IP rights similar to that under the Terms of Trade.
- 2) Pact supports the creation of a Digital Rights Agency funded by rights holders, including independent producers, as an opportunity to bring the industry together in order to develop a strategic approach to tackling IP theft.
- 3) Given that ensuring that there is an open market for IP exploitation is crucial to Digital Britain's stated goal of making content available to consumers in the way that want, we also see a potential role for the Rights Agency in developing the Digital Rights Frameworks that we have proposed for the digital era.
- 4) Additionally, the Rights Agency may have a potential role as a collecting agency for micro payments, with a remit that might encompass retransmission payments.

## **Section 6: proposals for a healthy commissioning market**

**“It is in the interests of the licence payer that the licence fee investment should go to the best ideas and the best talent.”**

Mark Thompson<sup>32</sup>

- 1) Alongside an open market for IP rights, one of Pact’s guiding principles is that there must be genuine competition in the content supply sector, so that the best ideas can secure investment, no matter where they come from. Ensuring a level playing field in commissioning is relevant in two areas: competition between in-house production departments at broadcasters and external suppliers; and competition between suppliers based in London as opposed to the nations and regions.
- 2) This competition has been one of the defining qualities of the independent production sector, where there are hundreds of companies competing with each other, with in-house departments of broadcasters, and with overseas suppliers. This competition is crucial to keeping all UK content (indie and in-house) at the top of its game.
- 3) Historically, there have been two major barriers to competition in the production sector. Firstly, broadcasters unduly favour their in-house departments, due to the need to manage overheads and the close relationships between members of the same company. Analysis commissioned by Pact from Oliver & Ohlbaum Associates for this review concludes that “vertical integration still provides incentives to restrict or warehouse rights.”<sup>33</sup>
- 4) Secondly, out of London content suppliers have traditionally not been able to compete on a level playing field with London companies, and have struggled to win large-scale commissions which they can use to develop their businesses. 85% of indies with an annual turnover of more than £10m are in London.<sup>34</sup>

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<sup>32</sup> Mark Thompson oral evidence to House of Lords Select Committee on the BBC Charter Review, First Report, Section 255.

<sup>33</sup> See Appendix.

<sup>34</sup> Pact annual independent production census.

- 5) These are analogue era problems, but they will continue into the digital era unless we apply and evolve certain regulations.

### **Indie quota and WOCC in the digital Britain**

- 6) The independent quota is vital to ensuring independent suppliers can compete on a level playing field with in-house departments. In the digital era, it should be extended across all digital channels and online services that have public service remits.
- 7) We therefore welcome Digital Britain's statement in its interim report that plural public service provision should deliver: "Guaranteed levels of investment in independent production to ensure the delivery of the best creative ideas and the healthy development of this vital creative sector, similarly secured through quotas."<sup>35</sup>
- 8) As we have noted already, primary commissions account for 75% of all indie sector television revenues, and a decline in original commissioning is likely to have a serious negative impact on the sector. If the amount of funding available for investing in original UK content declines even more dramatically, it may be appropriate for the Government to consider appropriate measures to ensure diversity in the production ecology, including a higher quota on PSBs who have in-house production.
- 9) Additionally, the BBC's Window of Creative Competition (WOCC) has been a significant success in opening up commissioning at the BBC. The BBC Trust has welcomed it following its review of BBC commissioning, while the PKF report in 2006 concluded that there were significant cost savings that could potentially be made by increasing independent commissioning through the WOCC.<sup>36</sup>
- 10) Like the indie quota, we therefore propose that the WOCC should be extended to other BBC services and platforms, particularly in this case online commissioning. Without a WOCC, bbc.co.uk lags considerably behind the rest of the BBC in its policy towards the external supply market.
- 11) It must be stressed that creating a WOCC for online commissioning would do no more than simply help ensure the implementation of the recommendations of the Philip Graf report on BBC new media services, and the subsequent agreed policy by BBC Governors. Graf made it clear that a 25% indie quota should be regarded as a minimum, as did the Governors when accepting the recommendation. As in broadcasting before the introduction of the WOCC,

<sup>35</sup> Digital Britain, interim report, page 46.

<sup>36</sup> Review of the BBC Value for Money and Efficiency Programmes, PKF for DCMS, April 2006.

the reality has been that indie commissioning has hovered around the minimum mark, sometimes even falling short. As in television, a WOCC would simply create the conditions to encourage a change in attitude within the BBC, spurring competition. Under the WOCC, a window of 25% should be open to all competition, from in-house and all external suppliers. If ideas from the independent sector are not good enough, or the supply base cannot cope (both suggestions which Pact rejects), the level of commissioning from in-house would remain at around 75%.

- 12) Graf's review on the BBC online services argued strongly that greater openness in commissioning from external suppliers would both fulfil the BBC's remit of stimulating creativity and the creative industries as a whole, and provide competition for BBC in-house in order to heighten the quality and diversity of content offered to licence fee payers. The Graf review concluded that the BBC's online services should be opened to external supplies as:

"A higher level of contribution from external suppliers will promote the diversity, plurality and quality of content offered by BBC Online, and will help drive innovation and creativity, much as it has done in the TV sector."<sup>37</sup>

- 13) In turn, as the success of the independent television production sector has shown, there is every chance that this investment into the external supply sector will enable new media content creators to flourish, building the scale and capacity of the sector as a whole. Graf's review concluded that opening up BBC commissioning to the external supply sector would have the result of: "encouraging the development of the wider UK internet sector - in particular the online production sector."

### **Out of London commissioning**

- 14) The BBC has pledged to spend 50% of qualifying content outside London over the next decade. As the BBC is single biggest commissioner for indies this is a significant move, particularly as investment from advertiser-funded broadcasters is likely to shrink (ITV has already secured permission to cut its quota from 50% to 35%).
- 15) This means that the BBC is likely to become increasingly dominant as a source of commissioning investment for indies outside London. In terms of developing sustainable companies in the devolved Nations and English regions, it is therefore more important than ever that the Terms of Trade, as well as the indie quota, apply to BBC commissions, as well as to commissions from PSB2/C4 and other public service commissioners. Only by being able to

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<sup>37</sup> Report of the independent review of BBC Online, Philip Graf for DCMS, page 77.

own and exploit rights to their content can companies outside London build viable businesses.

## **Section 7: maximising the UK's export potential**

- 1) Pact has been asked by the Digital Britain steering committee to outline potential interventions for stimulating exports of UK content. As we have detailed to the committee in our presentation, to maintain and build on recent growth in worldwide exports it is essential to enable independents to continue to own and exploit international rights to the content they create. This has led to increased competition in the export market, and the opening up of new markets such as formats and US production.
- 2) In addition to rights ownership, it would further stimulate competition in the exports market, and potentially generate additional investment for the creation of UK content, for the BBC to end its exclusive first-look arrangement with BBC Worldwide. BBC Worldwide currently has an automatic and exclusive “first look” to buy all programmes made by BBC in-house production departments. It then exploits these programmes commercially (for example, by selling Doctor Who to broadcasters and BBC Worldwide’s own wholly-owned channels in other countries), returning a share of profits to the BBC. However, many companies in the private sector perform the same function as BBC Worldwide with regard to programmes outside the BBC’s in-house production departments. Many of these third-party distributors would bid against BBC Worldwide for the right to license programmes made by BBC in-house if the BBC allowed them to, and the resulting competition for rights to BBC shows might well yield a higher return for the BBC. When high profile television shows are auctioned on the open market, it is not uncommon for bidding wars to take place. This has occurred when the BBC has commissioned programming from external suppliers, who have then auctioned the international rights to the show to the market, with the result that private sector distributors have outbid BBC Worldwide.<sup>38</sup>
- 3) Opening up in-house programming to such competition could potentially generate significant additional income for the BBC, which could then be reinvested in public service programme-making. The BBC invests £800m in in-house production a year, compared to around £400m on external programming. Much of this will comprise high profile shows that are highly attractive to the market, given that they will have built audience awareness on BBC1 and BBC2, two of the UK channels with the highest audience share.

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<sup>38</sup> Under the Codes of Practice/Terms of Trade introduced in the 2003 Communications Act, and regulated by Ofcom, independent suppliers retain control of certain secondary rights to programmes that they create, including the overseas exploitation rights. The BBC, as primary commissioning broadcaster, will receive a share of any revenues generated from subsequent exploitation.

- 4) Just as importantly, without auctioning programmes on the open market, the BBC cannot be confident that it is realising the maximum possible added value on its assets. This is one area where the BBC's regulations are inadequate. Under the Fair Trading Guidelines, the BBC is required to charge BBC Worldwide prices that are in line with the market for its programmes; yet, for the majority of in-house programmes, the BBC has no way of accurately knowing the market rate as it has never tested what the market is willing to pay. To ascertain the correct market rate, the Fair Trading Guidelines merely task the BBC with occasionally benchmarking prices. This is a wholly unsatisfactory way to gauge prices for television programmes, which are not homogenous, exist in a fast-changing market, and may be subject to commercial confidentiality. It means that, under the current system, the BBC cannot guarantee that it is securing the maximum possible added value from its programme assets when it passes them on to BBC Worldwide.
- 5) The BBC has previously objected to an open auction system, whereby it would offer a programme to the market so that private sector companies could compete for it alongside BBC Worldwide, on the grounds of efficiency. We reject this: distributors in the commercial sector routinely conduct such auctions to sell programmes, as has the BBC itself in other areas.
- 6) We have recently outlined these concerns in our submission to the current review of the House of Commons' Culture, Media & Sport Committee, which is expected to deliver a report to Government in the coming weeks. We ask Digital Britain to also consider this issue and, if it agrees with our argument, recommend that government requires the BBC Trust to address this issue on the grounds that it is a breach of Fair Trading Guidelines.

## **Section 8: Pact position on children’s public service content**

- 1) Pact welcomes the commitment in the Digital Britain interim report to “plural public service provision of high quality, original UK programming for children.”<sup>39</sup> This follows and builds on Ofcom’s conclusion in its PSB review that “UK programming for school age children is one area of particular concern.”<sup>40</sup>
- 2) While Digital Britain highlighted children 10+ as being particularly underserved, Ofcom outlined a wider problem affecting children aged 6-14, and called for additional services for this entire range.<sup>41</sup> All children should have a plurality of dedicated UK content, and we urge Digital Britain to address the full failure in provision that Ofcom has highlighted, down to children aged 6-7+
- 3) With that caveat, both proposals put forward by Ofcom and Digital Britain – an enhanced remit for PSB2/Channel 4 and for contestable funding for a further service – could serve children well.
- 4) Pact’s position is that PSB2/Channel 4 should focus on programming for children 10+, while contestable funding should be made available for existing services and market entrants to bid for funding to provide a further service for children aged 6-9. We see these age ranges as a natural fit with industry norms. 10+ marks a distinct base for a service for older children between 10 and 14, which would fit well with Channel 4’s younger demographic. Meanwhile, 6-9 is the age ranged currently served with predominantly US and imported shows by digital-only services such as Nickelodeon, who have publicly stated that they would be interested in bidding for contestable funding to provide a service for this age range. Dividing age groups in this way would also minimise any state aid concerns that might potentially be raised as a result of a new PSB2/Channel 4 service.
- 5) We stress however that these services are not mutually exclusive, nor should PSB2/Channel 4 or a contestable service be necessarily constrained to these age ranges.

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<sup>39</sup> Digital Britain, interim report, page 48.

<sup>40</sup> Ofcom’s Second Public Service Broadcasting Review: Putting Viewers First, page 11.

<sup>41</sup> Ofcom’s PSB2 review, Putting Viewers First, page 109, states: “We have concluded that there is a significant reason to be concerned about the provision of a range of high quality, original programming for children, particularly among older children (primary school age and above), and young teens.”

- 6) We also note Channel 4's recent proposal for a children's HD service with S4C. We have not seen sufficient details about the proposed age range the service intends to support, nor the scope of its children's provision, to support such a proposal. Assuming the children's service is English-language, that it is widely available for UK audiences, and that it commissions a wide range of UK children's content for an appropriate age-range of children, such a proposal could have merits. However, we note that its proposed children's provision is subject to additional funding, and will therefore not happen without Government intervention.
- 7) Pact has previously highlighted Channel 4's historically strong presence in children's and animation, before it pulled out of the genre in the 90s. The channel's children's offering was highly innovative and engaging.
- 8) However, Channel 4's recent re-entrance into children's as a pilot scheme has been unsuccessful, and production has already stopped. This failure underlines the need to ensure that children's is clearly a part of PSB2/Channel 4's core remit in the future, and that its service licence agreement with Ofcom encompasses a commitment to provide an appropriate number of hours (however those hours are provided, be they on digital-only channels or new media platforms in the PSB2/Channel 4 group).
- 9) This is a crucial point: unless children's provision is enshrined in PSB2/Channel 4's remit at legislative level, recent experience must inevitably raise a question mark over the channel's longterm commitment to building a service.
- 10) While it would be for PSB2/Channel 4, Ofcom and/or Government to agree the details of any such service, we would assume that it would involve a dedicated children's commissioner and a ringfenced children's budget, as is industry standard.
- 11) We would also like to highlight the valuable role of indie children's producers in raising investment for this core public service genre. Children's producers are amongst the most active independent producers in raising production investment through the exploitation of the secondary and ancillary rights granted to them under the Terms of Trade. Pre-school producers, particularly in animation, routinely raise 75% of the production costs, with the primary licence fee providing just 25% (and often considerably less). However, even producers of programmes for older children can at times provide 5-10% of production costs through distribution advances against projected income from the secondary and ancillary exploitation of their rights, or co-production.

Although even raising investment of 5-10% of production costs is difficult in core public service children's genres, producers do achieve such levels when secondary/ancillary markets permit.

- 12) Moreover, producers are now developing new markets for exploiting live action content for older children - RDF has for example recently sold international format rights for children's content. Other potential markets include multi-platform games for children.
- 13) Without access to secondary and ancillary rights under the Terms of Trade, however, producers would not be able to raise a large part of this investment, and broadcasters would have to fund 100% of the production costs, increasing their cost per hour. It is highly unlikely in the current climate that would do so, and more likely that they would seek lower quality content or move to cheaper genres.
- 14) We also note that Five has stated in the press that a children's channel would be a part of any merged Five-Channel 4 entity. While we welcome this commitment, we note that Five's current service, Milkshake, provides only a minority of the production costs in exchange for the primary licence, with the producer raising the majority. This is possible in the pre-school genre, where opportunities for secondary and ancillary exploitation are more common, but could not be replicated for older children's programming. A service for older children as part of a merged Five-Channel 4 would need to commit a far greater proportion of the production budget than Five currently does.
- 15) In terms of the platform on which children's programming should be made available by either PSB2/Channel 4 or contestable funding, Pact's priority is that such a service must have significant reach and impact. Where content is subject to linear scheduling, this would include ensuring that it is available at a time when an appropriate number of children are able to watch it. We note the BBC Trust recently found that BBC children's audiences declined when it moved children's programming on its mainstream channels to an earlier slot, and has required the BBC executive to rectify this.
- 16) We have previously stated that Channel 4's public service remit should be extended to its wholly-owned services on digital channels and online, providing that it also adopts Terms of Trade and other appropriate public service duties for these platforms.

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17) We also note safety concerns raised by various campaign groups over children online, and urge Digital Britain to consider this factor in its review. We welcome Dr Tanya Byron comments at Pact's presentation to the Digital Britain steering committee that children's content commissioned by public service providers that is then made available online is a way of offering "regulated content in an unregulated space". Children's content commissioned by broadcasters can thereby make a contribution to increasing child safety online. However, producers are not able to do this unless they are able to own and exploit rights in secondary/ancillary markets.

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## Appendix

### THE ECONOMICS OF UK TV CONTENT SUPPLY – AN INTERIM REPORT

Oliver & Ohlbaum Associates

March 12<sup>th</sup>, 2009

#### INTRODUCTION

The £3.5 billion UK TV content sector is changing rapidly due to the impact of fragmenting TV audiences, new platform developments, increased globalisation, supplier consolidation, changing project risk profiles and business/financing dynamics.

Leading independent producers have been at the forefront of many of these changes exploiting formats globally, breaking into the US first run network commission market, raising capital to acquire and exploit rights and consolidating to achieve the scale and scope to compete in a global market place.

But some factors in the UK remain relatively unchanged. New commission income still accounts for 80 per cent of the TV content sector's revenues, and the main four UK commissioning organisations still account for over 90 per cent of such spending and also exert significant influence over the UK's secondary and ancillary rights outlets – DVD labels, emerging on demand platforms, thematic TV channels etc.

Looking forward, the UK TV content sector faces new challenges as the growth of the internet and greater TV audience and revenue fragmentation threaten to: reduce overall investment in content for the first time since commercial TV began; make the overall business of TV content investment more risky; and erode the competitive advantages of UK suppliers derived in part from a strong and plural public service TV sector.

A new set of market interventions may be necessary to enable the sector to prosper in the on demand, Web 2.0. age.

PACT has commissioned Oliver & Ohlbaum Associates (O&O) to review the current state of the UK content sector (and the independents within the sector), and the future economic and policy challenges ahead. O&O's final report will be produced in April 2009, will draw upon two new surveys of the independent sector – an issues survey and the 2008/09 sector Census, and develop its analysis of the likely future challenges to the UK content sector and the types of interventions that might be needed for it to prosper in the digital age.

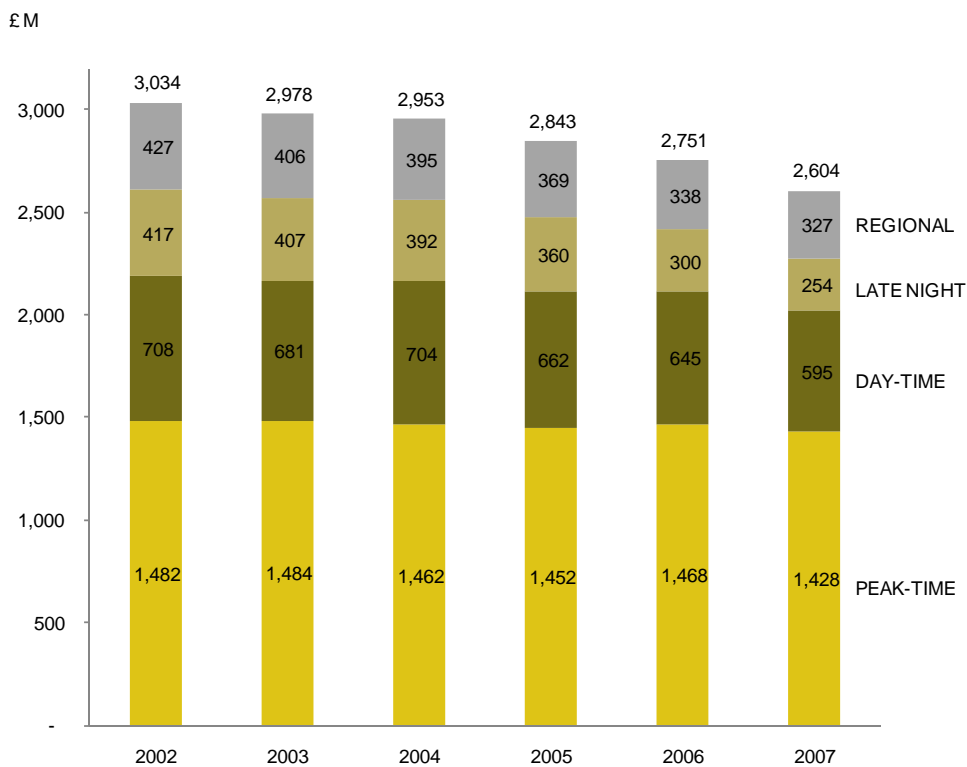
This interim report forms part of PACT's official submission to the Digital Britain Review.

## A. THE STORY SO FAR – TRENDS TO 2008

### *The Most Developed TV Content Sector in the World*

The £3.5 billion UK TV content sector has the highest investment per head in the world – even higher than the USA. A combination of a well financed licence fee broadcaster – the BBC – and commercial public service broadcasters with a traditionally significant commitment to originated output – plus a reasonably well developed secondary and ancillary market for content rights – from the UK and overseas – has helped the UK build the world’s third largest content sector (behind the USA and Japan) and the largest in proportion to GDP globally.

**Figure 1: Spend on first-run originated output on the five main networks, 2002-2007**



Source: Ofcom

### *Signs of Strain*

However, increased competition in the UK TV market and the fragmentation of audiences and advertising revenues that has occurred as a consequence, combined with the structural challenge to TV advertising from the internet have caused the total spending on new TV content commissioning by the five main networks in the UK to decline over the last 5 years (according to official Ofcom figures).

Overall TV content sector growth has only been sustained by a growth in commissioning by thematic and spin off channels albeit from a low base (from £360m in 2004 to £440m in 2007),

a rising contribution of secondary and ancillary rights income, and the recent growth in new commissions from outside the UK (often through overseas subsidiaries). Overall, the UK based TV content sector has still been growing by 2 to 3 per cent a year over the last 3 years, but the traditional main engine of growth – new UK TV channel commission spend – has been in decline.

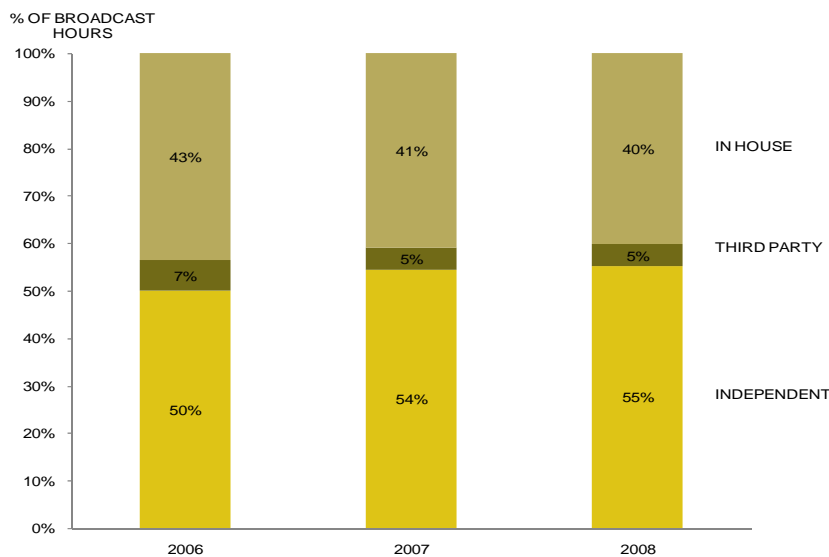
Going forward the decline in new UK commissions is likely to feed through to the future availability of secondary and ancillary rights for exploitation, which could cause the whole sector to move into decline sometime over the next 5 years. The current economic recession could well exacerbate these trends with recent announced one off cutbacks in ITV and Channel 4 programming budgets adding pressure to an already slowing commissioning market. A prosperous UK TV content sector could be heading into a “perfect storm”.

### *Independents – A Growing Share of a Slowing Market*

So far the independent sector has been protected from the overall slowdown in the UK commissioning market by taking a growing share of the UK commissioning market, leading the UK assault on the global TV market, and by the aggressive exploitation of rights gained under the 2003 terms of trade.

Independent producer share of commissions on the five main UK networks has risen from about 30 per cent in 2000, to 43 per cent in 2003 and 55 per cent in 2008. Growth of the independent sector has been largely at the expense of ITV and BBC In-house production sourcing. The most significant recent gains have been within ITV1 and BBC 2, as ITV1 has increasingly sought formats and ideas from independent producers to contain its audience decline and as the BBC has opened up more of its schedule through its Window of Creative Competition (the WOCC), which has effectively made another 25 per cent of BBC output (beyond the 25 per cent subject to the statutory quota) open to head to head competition between BBC in house producers and external suppliers.

**Figure 2: Independent share of Network originated output (in broadcast hrs), 2006-2008**



Source: Oliver & Ohlbaum, Attentional, BARB

This gain in output share from the main networks plus growth in the level of commissioning by thematic channels helped increase independent UK primary commission income from approximately £0.8 billion in 2002, to £1.15 billion in 2005 to £1.35 billion on 2008. Changes in terms of trade for new commissions from 2003 onwards (which effectively gave independents control of rights previously held by Channel 4 and the BBC – ITV had always ceded these rights), has helped increase independent producer's secondary and ancillary UK rights income from £103m in 2005 to £146m in 2008.

### ***A More Globalised UK TV Content Sector***

The last 10 years have seen significant changes in overall TV content IP global trade flows. Up to the late 1990s the international TV market was characterised by one major international trade flow – the sale of USA originated ready-made TV programmes (mostly drama and comedy) and feature films to TV channels around the world accompanied by a few locally made US originated TV formats – most games and quiz shows such as *The Price is Right*, *Family Feud* etc.

The only other significant trade flows were the sale of UK programming to the US and other parts of the world, albeit on a much smaller scale than the US material, and co-production activity – mostly between the US and UK, and between France, Germany and Italy covering major drama projects and some top end natural history and history documentary series.<sup>42</sup>

The last 10 years has seen a dramatic change in the level and direction of trade flows. Network broadcasters around the world began to seek local content (which audiences prefer) but with lower costs and risks of failure than had historically been the case - as audiences tired of a diet of mainly US drama and comedy material.

Networks in many markets moved away from US acquisitions, and away from costly and risky new home grown content designed for just one market, towards the remaking of local versions of pre-existing and proven successful entertainment, reality, factual entertainment and, more recently, drama formats. Effectively, TV networks began to share the risk of new IP development between markets as they found competitive pressures in their home market made it more and more difficult to take on all the risk themselves in just one market.

At first, this trend tended to be most marked in countries that could not afford expensive home grown output (i.e. national and linguistic markets being just too small) but it then spread to larger markets as leading networks came under more competitive pressure. Most importantly, the success of the *Who Wants to be a Millionaire ?* and the *Survivor* formats on US network television and the ever escalating cost of home grown drama and comedy began to open up the US market – the traditional powerhouse of the global TV industry, to ideas and formats from outside the USA.

This international format revolution was initially led by leading independents – such as Endemol and Celador (and long before that companies like Reg Grundy) – who were focused on maximising income from their IP rather than using IP to control upstream

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<sup>42</sup> One notable exception was Reg Grundy – an Australian – who went to the leading commercial broadcasters in the late 1980s when most European countries started to allow commercial networks for the first time and sold them soap and game show formats. Reg Grundy's company eventually became the core of Fremantle Media, one of the leading exponents of format television in 2009.

competition in domestic broadcasting markets. Leading independents were then again at the forefront of the opening up of the all important US network and leading cable net market at the start of this century.

In 2008, as much as 20 per cent of the peak time schedules (more than 30 per cent of non news and sport programming) of leading broadcast networks in major European territories is accounted for by local versions of formats that have been exploited in several other markets – games shows (*Deal Or No Deal*), reality shows (*Big Brother*), talent shows (*Idol*), factual entertainment (*Supernanny*), lifestyle shows (*Queer Eye For the Straight Guy*), telenovelas (*Ugly Betty*), and drama (*Law and Order*).

The largest source country for international formats is the UK, and the largest providers of such formats from the UK are independent producers. This is probably no accident. First, the UK's public service broadcasting ecology helps seed more new and innovative programme formats per year than any other national market. In short, it acts as a nursery for the global TV content sector. Second, the growth of the independent sector and the new terms of trade in 2003 created a sector incentivised to exploit this innovation on a global scale, rather than one focused on controlling the use of rights to sustain and protect traditional broadcasting businesses.

### ***A More Risky TV Content Sector?***

While the UK TV content sector has benefited from the opening up of world markets to pre-existing formats it is important to note this trend has been driven by networks seeking to reduce the costs, and more importantly, reduce the risks, of developing new IP for their home markets. Effectively, the networks have been shifting the risk of new IP development from their own one country TV broadcasting businesses to international producers.

Furthermore, as the TV content market becomes more global it is likely that programme title performance will polarise. Rather than success and failure being distributed fairly "normally" (i.e. a few great successes, a few failures and most programmes having an average level of success), it will become more "fractal" or "asymmetric" (some huge global successes, a lot of failures, with not much in the middle). In short, the TV content sector will become more "hit and miss" based like the film and games sectors on higher levels of project specific risk.

Future growth for international production companies – including UK based producers – will therefore, also come with more risk. To take on these risks producers need fair access to global markets, unrestricted access to capital, and fair access to the secondary and ancillary rights income streams that accrue to a successful production and a fair price for their initial primary commissions.

For the UK to keep its competitive advantage in these markets it needs to ensure the UK public service system still seeds a large number of innovative IP projects each and every year, that its production sector has unrestricted access to capital, has support in opening up global TV markets and a fair share of primary, secondary and ancillary rights values (both in terms of the share of accrued revenue vis a vis broadcasters, and, in terms of ensuring that new – more open platforms - pay a fair price for use of IP and respect the copyright they are using to grow their own businesses).

## B. CURRENT MARKET STRUCTURE ISSUES

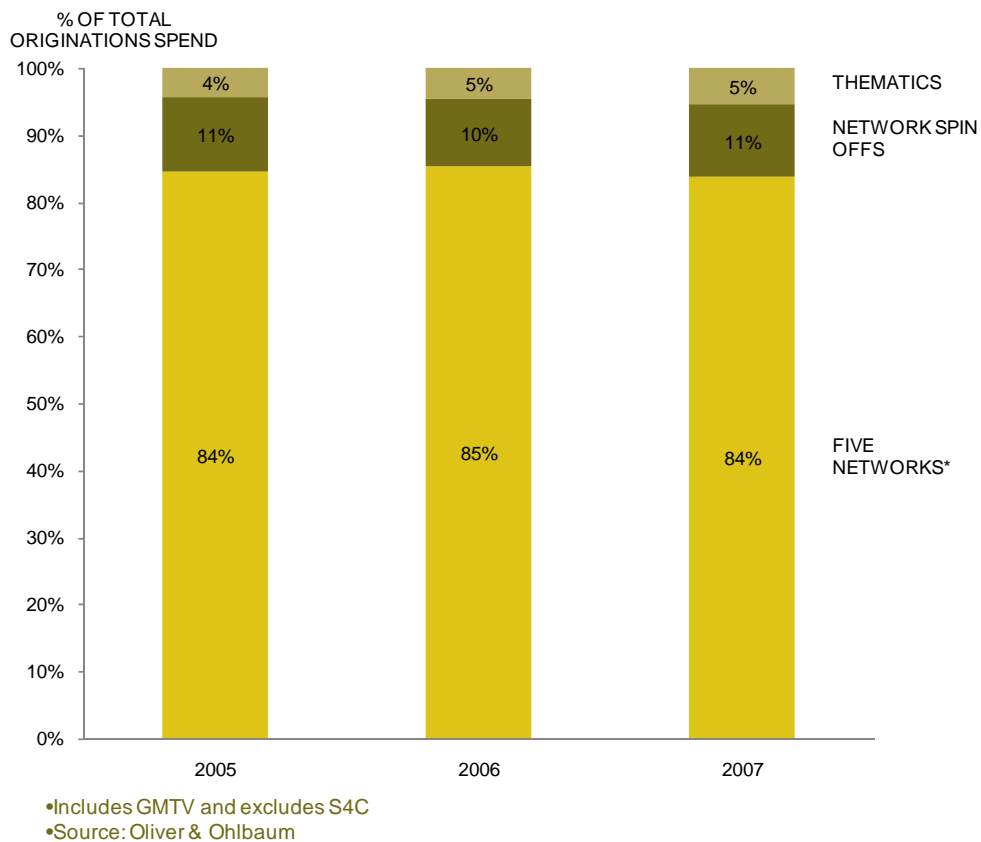
### Significant Buyer Power Remains

The main five networks still account for approximately 84 per cent of all new programming spend in the UK. In addition, the network spin off channels, provide another 11 per cent of all estimated new content spend, which leaves the main 4 UK commissioners – the BBC, ITV plc, Channel 4 and FIVE – accounting for 95 per cent of all spending on new programming in the UK.

A similar picture emerges across independent commissioned production, with the five networks accounting for 78 per cent of all commissioned spend on independent production in the UK, and their spin off channels accounting for another 10 per cent of all commissioning.

While independent thematic channels do have a greater propensity to use independent producers than channels owned by the main network groups, they still represent a relatively small alternative outlet for producers, and even then mainly for lower budget and higher volume commissions.

**Figure 3: Share of Originations spend by networks, spin offs and thematics, 2005-2007**

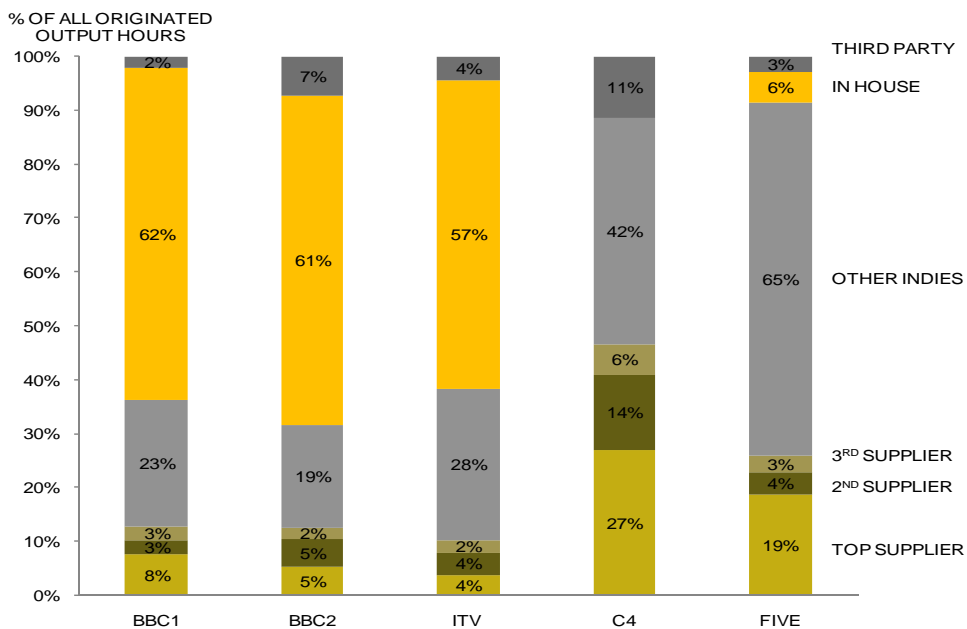


While the main network commissioning channels do occasionally go head to head for given programme formats or key talent, for the most part the UK networks are sufficiently differentiated in their mood, demographic focus and genre mix to avoid the need for head to head competition for individual programmes. Direct competition among buyers within the network market for commissions and re-commissions is therefore, for the most part, quite limited. Within many sub-genres there are only effectively two potential buyers, each of whom has a different set of audience and slot priorities at any given time.

Furthermore, while independents are playing a role in raising investment for new production nearly all TV projects (outside of children’s animation and a handful of major drama and documentary projects) need a UK commissioning broadcast contract to underwrite at least 90 per cent of the programme’s budget in order to proceed – and most still require at least 100 per cent of the budget. The limited competition between buyers combined with any specific project’s dependency on the initial commission for financing gives leading commissioners at the leading networks significant power within any initial commission negotiation.

Across the UK content market as a whole, about 80 per cent of the total £3.5 billion content income comes from primary commissions, about 8 per cent comes from UK secondary and ancillary rights income exploitation and 12 per cent from international secondary and ancillary rights related exploitation (including format sales, and net income from the overseas production of formats).

**Figure 4: Top Three independent suppliers in output hours by broadcaster, 2008**



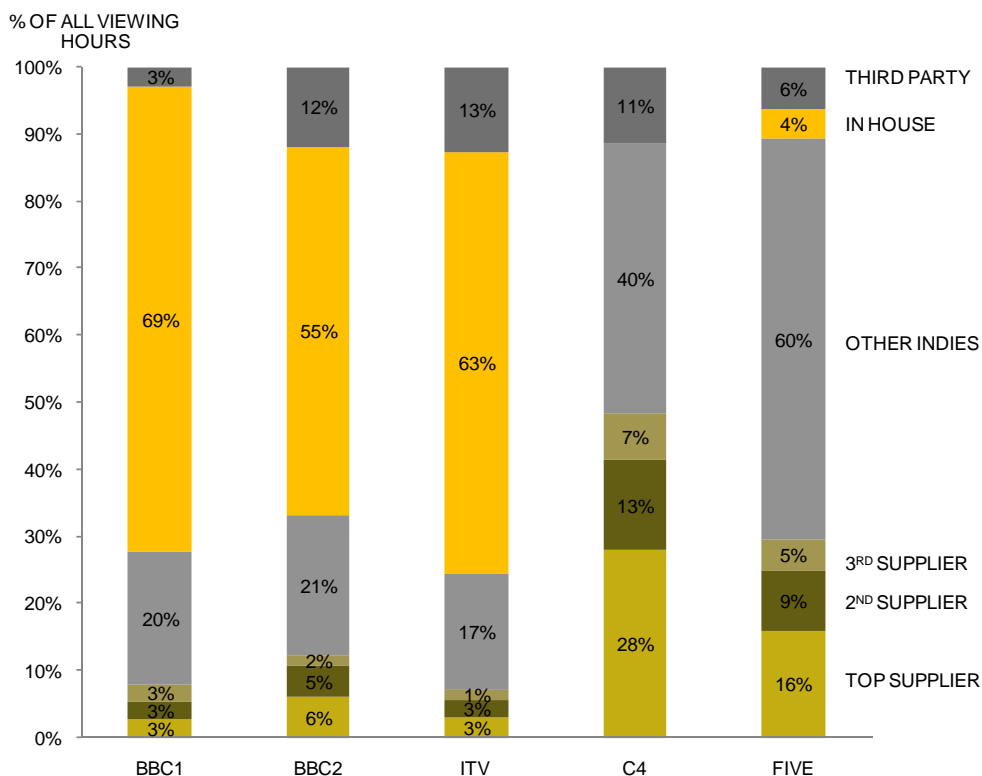
\*Excludes news and sport  
Source: Oliver & Ohlbaum, Attentional, BARB

While secondary and ancillary rights make a much greater contribution to profits than total revenue (as marginal exploitation costs are relatively low), monies from rights exploitation are

still contingent on the original commission as a project cannot be financed without the original commission.

In contrast to continued buyer power in the commissioning market, only one external supplier to the main network channels accounted for more than 20 per cent of their commissioned output (excl sport and news) in 2008 (Endemol for Channel 4) – a situation that has remained largely unchanged over the last 3 years despite independent sector consolidation.

**Figure 5: Top Three independent suppliers in viewing hours by broadcaster, 2008**



\*Excludes news and sport

Source: Oliver & Ohlbaum, Attentional, BARB

### *Vertical Integration Still Provides Incentives to Restrict or Warehouse Rights*

UK traditional network broadcasters face increasing competition for audiences and revenues in the UK TV market both through the full transition to digital multichannel linear TV by 2012 (across DSat, cable and DTT platforms) and the growth in on demand TV delivery (to the TV, to the PC and through the PC to the TV set).

These broadcasters still have clear incentives to slow, stop or, perhaps, skew the nature of competition they might face on these new platforms through any control of the secondary and ancillary rights to their commissioned programming they might secure from terms of trade with suppliers.

Furthermore, broadcasters with significant in-house production activities (the BBC and ITV plc) have an added incentive to squeeze independent producer terms of trade and/or divert key programming to their own in-house activities in order to both weaken the independent sector as a whole (and its appeal to top off screen and on screen talent) and to secure key secondary and ancillary rights to all programming – in-house and independent – to slow down competition on new platforms.

These incentives to use control over rights to influence up stream competition (through restricting supply and/or warehousing) rather than to maximise income from these rights (through sales to third parties) are just as strong in 2009 as they were back in 2001 when linear thematic TV channels were beginning to become a serious threat to the networks.

In the recent review of the Project Kangaroo proposed TV on demand joint venture between ITV, Channel 4 and BBC Worldwide, the Competition Commission found that the three parties together controlled most of the catch up and on demand rights for UK commissioned programming, that access to UK content was probably essential to the success of any on demand TV service and that the joint venture parties had clear incentives to use the control of their on demand rights to restrict competition in the on demand retail market.

#### ***On Demand Terms of Trade May Not Reflect the Realities of TV Consumption***

The initial terms of trade negotiated in 2003 focused on the windowing of content in the linear TV world. The commissioning broadcaster in return for their funding of the initial commission had exclusive broadcast rights on its main networks and spin off channels – with a specified number of repeats, for a 5 year period. Independent producers retained format, international and home entertainment rights (with a revenue share to the commissioning broadcaster). If the broadcaster wanted more repeats on their own channels than initially permitted they would pay an agreed fee – often a percentage of the agreed commissioning budget – to the independent producer.

The most difficult area to agree upon within initial terms of trade negotiations was the sale of programmes into the thematic TV channel market – pay and free to air channels.

While initially the main commissioning broadcasters held to their 5 year exclusivity, the realities of the multichannel market, and the main commissioning networks' involvement in new thematic channels, led to a shortening of the initial commissioning broadcaster exclusive window to just 2 years. As a consequence, a significant amount of UK content became available to third party (non network owned) thematic TV channels in the UK, who had previously relied heavily on US content.

But the availability and consumption of TV content moved on rapidly between 2003 and 2006, when on demand TV, first through the PVR, and then through PC based services (such as i-Player and ITV.com) and TV services – such as Sky Anytime, and Virgin on Demand, began to develop. It was clear that by the time a programme was available for secondary exploitation on linear TV channels viewers could have had numerous opportunities to stream, record and/or download the programmes through broadcaster led services and/or leading pay TV platforms.

At the same time, thematic channels who had purchased linear TV rights from independent producers were asking for the use of those programmes on non linear platforms within the same licence window.

On demand terms of trade were agreed in 2006 to reflect this new reality, to give consumers what they wanted but to try and respect both the initial commissioning broadcasters' need to recoup their investment and the independent producer's need to retain rights of value. The broadcaster was to be given an exclusive 30 day period after first transmission to utilise the programme across on demand platforms. Thereafter, if no commercial agreement was reached between broadcaster and producer, there would be a five month period where the programme was, in on demand terms, in "black-out," unavailable for any exploitation. After 6 months the programme could be exploited by both the broadcaster and the independent producer on a non exclusive basis.

While this may superficially seem a reasonable split of rights between the original commissioning channel and the producer, three major problems have arisen. First, there is a "life of series" clause in the on demand terms for returning series. This effectively means that rather than the rights becoming available after 6 months to the independent producer on a non exclusive basis, for all programme titles which have been re-commissioned for further series (most of the successful programming) the effective hold back is still up to three years. Second, it is clear that the period from 30 days after first showing and 6 months could be a lucrative window for on demand programming. Broadcasters have used their ability to block any such usage during the period to negotiate use for themselves on favourable terms,

Third, the majority of "on demand" consumption in the UK is still through viewers use of the PVR – now in 25 per cent of UK homes. Neither the independent producer nor the broadcaster receives any specific rights fees for such use, but while the broadcaster is still effectively selling advertising impacts within that programming when re-shown (and protecting its share of all impacts), the producer sees no direct benefit. At the same time the value of subsequent exploitation windows on linear and non linear platforms is reduced (i.e. viewers already have the programme stored on their PVR).

As on demand consumption becomes a larger proportion of all TV viewing over the next 5 to 10 years, commissioning networks are effectively being given more opportunities to recoup their investment, and producers are being given less opportunity. (For example, producers will probably receive less network repeat fees – often 3 to 5 per cent of original budget, if the programme is available for 6 months or more on a variety of on demand platforms or on individual PVRs).

There is already a pressing need for terms of trade to be updated to recognised the realities of on demand TV consumption as it grows.

### ***Open Web 2.0. Platforms Are Already Leading to "Free Rider", "Value Leakage" and/or Piracy Issues***

On demand TV is not just about services such as the i-Player, Sky Player or ITV.com, or i-Tunes which allow legitimate re-use of programming within a controlled environment. On demand TV is also about the availability of material on services such as YouTube (often alongside user generated content (UGC)) and the availability on illegal P2P file sharing sites.

These developments are beginning to raise serious long term issues for the future of the UK content sector, not dissimilar to those faced by the music sector for the past 5 years. Three interrelated issues have arisen.

First, and in many ways the simplest issue conceptually, is piracy. Despite the efforts of content providers to use Digital Rights Management (DRM) software to copy protect digital versions of TV programmes, determined hackers are likely to be able to crack these protections – or even make copies from non protected free to air transmissions, and then make them available on the internet.

Owners of premium TV content rights, such as the FA Premier League are already expending significant amounts of time and money pursuing organisations that take encrypted TV video streams in one country and then make them available globally across the internet. However, so far piracy has had less impact on the TV sector than music for a number of reasons:

- video files are larger and take longer to download than a music file;
- unprotected digital copies of TV programmes are not widely available (music CDs were not copy protected allowing anyone to transfer their entire CD library to a PC and then make it available on the internet – DVDs are copy protected): and,
- a large proportion of new TV content is already available free of charge (either licence fee funded or through advertising) reducing the financial gains from using pirated material.

The main impetus behind TV programme piracy at the moment is not necessarily financial but rather frustration with the international windowing of programming (i.e. getting the latest US series when it is shown in the USA rather than waiting for it to appear on domestic TV screens, or getting to see the Saturday 3pm FAPL matches in the UK – currently only available outside the UK).

Although piracy may have less direct immediate financial impact on the TV sector than the music sector it does still raise significant issues for the future funding of TV content.

- how content owners are to monetise consumption that is currently through illegitimate sites (if at all)?
- the implications for any future funding of content through windows that rely upon consumer payments - either primary or secondary windows (i.e. the future of DVD or pay “download to own” models)?
- impact on global windowing and licensing –i.e. will broadcasters in the US still pay for UK content if it is already available in the US 3 months earlier through the PC?

Second, beyond clearly illegitimate use of TV content, is the related issue of availability through legitimate aggregation sites such as You Tube. While YouTube does offer content owners ways of benefiting financially from having content on their site – whether that content was posted by the content owner or an individual user copying the content – this

may not adequately compensate for the content owner while undermining more formal business models that do adequately compensate content owners.

Aggregation sites such as YouTube generate income not just from advertising within the video stream (which they take a share of) but also advertising as users search for a video stream or move between video streams. This can mean that only a small proportion of the value generated through the availability of content on the site actually goes to content owners through any revenue sharing deal. Furthermore, by establishing the advertising model as the dominant form of funding for internet video and not respecting the windowing strategies of content owners they undermine any attempt by content owners to develop more value added forms of access to their content.

While the consumer may benefit from open access through YouTube and similar sites in the short term, the value “leakage” involved in such a business model, and the “free rider” nature of the content aggregation model could eventually undermine the funding and supply of content. The refusal of aggregation sites to offer a business model other than one based on a share of only directly attributable revenue to content owners is likely to store up significant problems for the long term funding of new TV content.

***Private Re-Use of TV Content May have to be reassessed in the digital age.***

The posting of content by individuals on aggregation sites is only one example of how old principles of private use of copyright (the permission for users of IP to make limited copies for their own private use) can quickly undermine the entire business model for content in the digital age – where a private copy can become a global copy in seconds.

The PVR provides another example of how the ability of people to use a VCR or recordable DVD player to record a TV programme for viewing at a later date has quickly become the ability to build up a private library of 30 to 40 hours of programming (likely to be 100s of hours in the near future) for constant re-use.

Again, the ability to make, distribute and store copies brings many advantages to consumers, and if users were not allowed to do this legitimately one might argue this would simply encourage illegitimate use. However, unless ways are found of monetizing this use in some way over the next 10 years, such value leakage could eventually undermine the whole funding model of content as it has to move away from relying mainly on the original commissioning broadcasters who are under increasing revenue pressure (often partly brought about by the same growth in the internet that has ushered in changes in the impact of private use).

### **C. POTENTIAL FUTURE CHALLENGES TO THE SECTOR**

***Maintaining the PSB Ecology is Essential to the Global Success of the UK TV Content Sector***

The success of the UK TV content sector in the global TV market is probably in part due to long term UK traditions of storytelling (novels and plays) and language (especially in the USA). But is also probably strongly linked to the public service broadcasting system in the UK and how it has evolved over the last 50 years. UK public service broadcasters – like others across

Europe – have been encouraged to produce very domestically focused output often in less popular subject areas such as religion, arts and current affairs. This, on the face of it, is not necessarily the best basis for building a globally successful content sector.

However, public service broadcasters in the UK – unlike many others across Europe- have also been encouraged to engage with the mass audience and younger audiences rather than avoid them, take risks, innovate constantly and cover the full range of genres and programme types. This second type of approach to public service broadcasting has also been well funded, through the BBC, and until recently, the leading commercial networks.

This more general approach to public service broadcasting has made the UK TV market one that makes more new types of TV IP (re-commissioned and newly commissioned individual programme strands) per year than any other market.<sup>43</sup>

It follows that any reversal of this public service broadcasting ecology would be likely to reduce the through put and range of new IP through UK based producers to the global market.

In addition, any significant reduction in overall levels of funding provided by PSB broadcasters (over and above that which can be absorbed by content producers from rising secondary and ancillary rights revenue) and/or significant reduction in risk taking and innovation by PSB broadcasters, is likely to reduce the competitive advantages of UK based content markers in the global market place.

Whatever, the eventual solution to reinforcing commercial PSB in the UK (merger of C4 and BBC Worldwide, merger of FIVE and Channel 4, some use of the “digital surplus”, direct funding or even tax incentives for investment), its main impact on the UK content sector will be the degree to continues to sustain risk taking across a range of popular programme genres and, thereby, seed the UK content sector’s assault on the global market place.

### ***Regulated Terms of Trade are Still Required***

Leading UK broadcasters still enjoy both the buying power and vertical incentives to squeeze the independent sector as commercial pressures on their business models intensify (as covered in the previous section of this report).

Leading UK commissioning broadcasters might well respond to current economic challenges with a significant and rapid move to deficit financing (i.e. setting primary prices well below the costs of production across a range of programmes). This would force too much risk too quickly on to content producers who are already facing increased risks from a global move to “winner takes all” rewards. The result could well be a reversal in the global development of UK based producers, an eventual contraction in the availability of new content overall and the contraction of the independent sector – possibly at the expense of in-house

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<sup>43</sup> The US market – tends to develop more ideas than the UK market as pilot shows – but then only develops a small proportion as actual commissions, where it then commissions 20 plus shows. The UK market tends to commission lots of strands for initial short runs – 3 to 7 episodes, then upping them to 10 to 13 episodes when successful. This means that the UK has more individual programme commissions per year (tested across a season with audiences) than any other market.

producers who would be cushioned by access to future re-established profits from broadcasting – and/or acquired content from the US.

Alternatively, independent producers would be forced to sell secondary and ancillary rights back to the broadcasters to stay solvent, effectively transferring the rights back to the broadcasters who would then focus on using them to influence upstream competition in the domestic market.

***On Demand Terms of Trade Need to Be Aligned with the Actual Consumption***

Current on demand terms of trade – especially the “life of series” stipulations for returning series, hand most of the on demand value of a TV programme to the UK commissioning broadcasters. As this window of consumption expands at the expense of secondary linear broadcasting consumption, independent producers will see their share of the full life value of a programme title fall.

If this happens on a large scale, and if the uplift in the total full life value of a programme is not sufficient to compensate for the independent’s declining share of value (as may well be the case if open on demand platforms also bring about a great deal of “value leakage”), independent producers are likely to make losses and have to contract.

***New Media Platforms May Require New Approaches to Copyright Protections and Exploitation***

While several factors may prevent new media platforms having as rapid a harmful impact on the TV sector as the music sector, long term and serious harm is a real prospect if a new copyright and rights exploitation framework for the Web 2.0. age is not developed.

Consideration needs to be given to modifications to private use rules, and the possibility of private use levies and/or collection society type models able to extract fair and relevant revenue shares from open platforms (as is happening with music publishing).

This is particularly important to the commercial content sector (broadcasters as well as content owners). The BBC’s licence fee funding protects it from many of the problems faced by the commercial sector. Indeed, the BBC’s enthusiasm to embrace many of these platforms to achieve universal reach and availability before a suitable commercial model has been found for gaining fair revenue shares may be undermining the rest of the sector’s ability to strike reasonable terms.

ENDS