



Response to Public Consultation on Content Online in the Single Market

October 2006

Executive summary

- 1) Pact is the UK trade association representing independent content creators for television, film and interactive media. The line between these forms of old and new media is increasingly blurred. Endemol UK's Big Brother is truly cross platform, with dedicated online and mobile content services. Interactivity is at its heart, with viewers voting for housemates through interactive television and online services.
- 2) Other Pact members working primarily in television are also creating content that is wholly for online. AOL has invested around £250,000 in Jamie Oliver's 45-minute live show Home Cooking Day, from Oliver's independent production company Fresh One Productions. We understand that this marks the first time AOL has commissioned its own exclusive video content in UK.
- 3) For other Pact companies, stand-alone new media content production - primarily for the internet but also for other interactive formats and mobile - represents the core of their business. Examples include Illumina Digital's interactive, web-based soap opera Wannabes for the BBC and Stagework, Illumina's website for the National Theatre. Another member, Cimex, designed and built children's site, need2know, which was nominated as Best Government Web Site of 2006 for the leading international honour, The Webby Awards.
- 4) As these business models develop, online services represent an opportunity on a global level for European content creators, as well as a way of increasing choice in how the public engages with content. While a hit television show such as Coronation Street will register around 10 million viewers in the UK, online platforms offer a potential worldwide audience of hundreds of millions.
- 5) Fundamental to this is creating an environment that encourages innovation. And key to this is incentivising creative businesses while allowing them the flexibility to take risks developing new services.
- 6) In broadcasting, the analogue model has allowed a small number of broadcasters to dominate the market, and this dominance is likely to continue to a large extent in the digital era.
- 7) The UK Communications Act 2003 introduced Codes of Practice that counteracted this market dominance by calling for rights to content to be 'unbundled.' The ensuing terms of trade which Pact negotiated with broadcasters allowed producers to have more control over certain rights,

- including new media rights, and thus benefit from the exploitation of the intellectual property that they created.
- 8) These terms of trade have contributed to strong and sustained year-on-year growth in the independent production sector. The sector now generates £1.28 billion of television-related revenue a year and is predicted to grow at almost 7% a year in nominal terms to 2010.¹
 - 9) To encourage the growth of the online content creation sector it is vital that companies are also allowed to benefit from a share of the revenues from the intellectual property that they create.
 - 10) Pact is currently negotiating further terms of trade with broadcasters that seek to address online and other new media exploitation for television content. These terms are aimed at allowing content to reach consumers quickly and by a variety of means – by, for example, cutting back on broadcasters' holdbacks.
 - 11) However, content that is not intended for television broadcast will not fall under such terms of trade. There remains a need to ensure that producers of content made purely for online services can benefit from revenues generated by the intellectual property they create.
 - 12) Alongside this, it is important to allow creative businesses as much flexibility as possible in this rapidly evolving sector. Extending Television without Frontiers to include non-linear services will potentially stifle the ability of companies to innovate in new media. As far as Pact is aware, no other trade bloc is considering such regulation, which would leave European content creation businesses as a significant competitive disadvantage.
 - 13) The additional layer of regulation created would add to compliance and reporting costs. In online content creation, budgets are far lower than for television production and additional compliance costs would therefore be proportionately higher.
 - 14) Just as importantly, the proposed criteria for defining whether services are linear or non-linear bear little resemblance to the realities of the sector. The online world is highly fluid. Unlike traditional broadcasting, the nature of online content sites and services is not set in stone at point of delivery. Services evolve, changing from a private weblog to a public site, or from non-commercial to commercial. PVRs and IPTV mean that, even

¹ Prospects for Independent UK Production to 2010, Olver & Ohlbaum Associates, Sept 2006.

though the media service provider decides on a schedule, the viewer decides when to view the content.

- 15) The way forward should be to incentivise businesses by allowing them to share in the success of the content they create, as well as ensuring they have the flexibility to innovate and develop new services. Doing so will create an environment that puts Europe at the forefront of developing new services, while encouraging the development of sustainable new media content creation businesses, as it has successfully done in the television production sector.

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

- 1) Pact represents independent content creators for television, film and interactive media. The line between these forms of old and new media is increasingly blurred. Endemol UK's Big Brother is truly cross platform, with dedicated online and mobile content services. Interactivity is at its heart, with viewers voting for housemates through interactive television and online services. Other hugely successful television programmes such as Wall To Wall's Who Do You Think You Are?, Kudos Film and Television's Spooks, and Celador Productions' Who Wants To be A Millionaire? are enhanced through interactivity.
- 2) For companies involved in television production, new media is an increasingly important part of their business models. The BBC is commissioning more and more for multi-platform formats, which it dubs "360-degree" commissions. RDF Media, an established independent television production company, recently won the BBC's first major 360-degree commission with The Verdict, a courtroom drama with distinct content for BBC2, BBC3 and new media platforms.
- 3) Other Pact members working primarily in television are also creating content that is wholly for online. AOL has invested around £250,000 in Jamie Oliver's 45-minute live show Home Cooking Day, from Oliver's independent production company Fresh One Productions. We understand that this marks the first time AOL has commissioned its own exclusive video content in UK. Audiences will be able to take part in a moderated online chat with the celebrity chef, find recipes, access a podcast and, after the live event is over, download 15-minute segments of the programme to view.
- 4) For other Pact companies, stand-alone new media content production - primarily for the internet but also for other interactive formats and mobile - represents the core of their business. Examples include Illumina Digital's interactive, web-based teen soap opera Wannabes for the BBC and Stagework, Illumina's website for the National Theatre. Another member, Cimex, designed and built children's site, need2know, which was nominated as Best Government Web Site of 2006 for the leading international honour, The Webby Awards. Additionally, independent production company Magic Lantern was behind Channel 4's FourDocs,

which used user-generated content to allow the public to engage with documentary filmmaking.

- 5) A poll of Pact's Interactive Media Policy Group - which is made up of both television-interactive hybrid companies and specialist interactive media content production companies - showed that revenues from new media content creation broke down as follows:
- broadcasting-related: 20-80%;
 - new media (education/learning): 20-80%;
 - new media (corporate): 0-30%;
 - new media (public sector): 10-20%.

2. Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.

- 1) Content created for and commissioned by government services and public agencies is an important element in the independent online production sector and should be recognised as such.
- 2) As noted in response to question 1, a straw pole of members of Pact's Interactive Media Policy Group indicated that content made for such public sector services constituted 10-20% of average company turnover.

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

- 1) Pact's most serious concern about the development of online content services concerns anti-competitive structures in the business environment. In broadcasting, the analogue model has allowed a small number of broadcasters to dominate the market, and this dominance is likely to continue to a large extent in the digital era. The main networks,

along with their spin-off channels, currently account for 79% per cent of all viewing and 95% of new non-news commissioning spend.²

- 2) This bargaining power has traditionally allowed broadcasters to seek an array of additional rights to be 'bundled' into the price they pay for the primary licence for no additional cost. There is a long history of the incumbent broadcasters using their dominant position to stifle secondary markets by so-called warehousing, ie not exploiting secondary rights to deny new entrants to the market access to content, or restricting the producer's ability to sell on programming through 'hold-backs', which allow a broadcaster to veto sales to a third party.
- 3) The Communications Act 2003 introduced Codes of Practice that counteracted this market dominance by calling for rights to be 'unbundled.' The ensuing terms of trade which Pact negotiated with broadcasters allowed producers to have more control over certain rights, including new media rights, and thus benefit from the exploitation of the intellectual property that they created.
- 4) These terms of trade have contributed to strong and sustained year-on-year growth in the independent production sector. The sector now generates £1.28 billion of television-related revenue a year and is predicted to grow at almost 7% a year in nominal terms to 2010.³
- 5) Online services represent a significant opportunity for Europe's content creators, offering a gateway to worldwide audiences, as we detail in response to question 8, as well as dramatically increased choice in how those audiences access their content. However, to encourage the growth of the online content creation sector it is vital that companies are allowed to benefit from a share of the revenues from the exploitation of the intellectual property that they create.
- 6) Pact is currently negotiating further terms of trade with broadcasters that seek to address online and other new media exploitation for television content. These terms are aimed at allowing content to reach consumers quickly and by a variety of means – by, for example, cutting back on broadcasters' holdbacks.
- 7) However, content that is not intended for television broadcast will not fall under such terms of trade. There remains a need to ensure that producers of content made purely for online services can benefit from

² UK TV Content in the Digital Age – Opportunities and Challenges, Oliver & Ohlbaum Associates, page 3.

³ Prospects for Independent UK Production to 2010, Olver & Ohlbaum Associates, Sept 2006.

revenues generated by the intellectual property they create. Doing so will create an environment that encourages the development of sustainable new media content creation businesses, as it has successfully done in the television production sector.

- 8) Pact is therefore working with broadcasters such as the BBC and public sector commissioners to develop best practice in commissioning content from the independent sector and a set of frameworks for new media rights. We have also successfully lobbied for the BBC to increase commissioning from external new media suppliers, as it has done for television suppliers.
- 9) In terms of the legal regime, Pact members generally trust the current copyright framework to protect the content they create. Regulations work with ease, clarity, and the flexibility that is needed in the digital era. In particular, the way in which copyright is recognised, without the need for formal registration, helps support this innovation and creativity, as well as the way the regime allows creators to choose how they licence the content they create. We have outlined our views in this area in more detail in our response to the Gowers' Review of Intellectual Property.
- 10) From the public's point of view, Ofcom's research into take-up of the internet suggests that security is the chief concern amongst people identified as internet enthusiasts (13% of all adults had this attitude).⁴
- 11) However, a recent poll by ICM for the British Internet Broadcasting Co, focusing specifically on online content rather than on the internet generally, produced a far wider variety of concerns, and security did not figure at all. In the ICM survey, UK consumers identified the main barriers to downloading as quality (39%), limited platforms for viewing (35%), cost (33%), lack of variety (33%) and concern over losing downloads (31%).

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

- 1) The existing copyright regime has enabled rights owners to choose whether they wish to license the use of their works by means of sharing licences, and should be maintained.

⁴ Communications Market: Special Report – Consumer Engagement with Digital Communications Services, Ofcom.

- 2) It is of course imperative to provide the increased choice that the public is demanding, but this must not be at the expense of destroying business models in the production sector. Forcing production companies to give away their work for free through sharing licences, such as Creative Commons, would undermine the very businesses that are supposed to provide audiences with an increased range of content in the first place.
- 3) Such types of content sharing licence should instead provide an appropriate financial return for rights owners, unless those owners choose to give away their work for free.
- 4) We take the same view with the BBC's current proposals to offer a seven-day free catch-up window online via its iPlayer. The proposal is rightly being examined at the moment by Ofcom to gauge its market impact, which could be severe in areas such as pay VoD.
- 5) Pact recently commissioned a YouGov survey, which looked at the impact on the market of a free 7-day catch-up window, as the BBC's proposals would offer online and via cable and Homechoice. The results, which have been analysed by Oliver & Ohlbaum Associates, indicate that there was significant consumer interest (over 50%) in taking up pay VoD. However, 58% said they would be less likely - or not willing at all - to pay for a VoD service if a free seven-day catch-up window were available.
- 6) It is therefore crucial that the BBC's proposed services offer an incentive to content creators. To fail to do so would mean effectively 're-bundling' rights that might otherwise have been commercially exploited into the primary package. Such a re-bundling would be contrary to the Codes of Practice laid out in the 2003 Communications Act, which call for clarity about the "different categories of rights" and "the amounts to be paid in respect of each category of rights."⁵
- 7) Some businesses may choose to provide content for free, in order to raise its profile for further sales, for example. However, it is important to allow flexibility in this in order to encourage different types of content creators.
- 8) In many cases, consumers are now increasingly creators, as advances in technology have opened up means of communication traditionally the preserve of those involved in professional copyright work. Many members of the public are not interested in licensing the use of their

⁵ Communications Act 2003, Section 285 (3) (b) and (c).

work. Recoupment is not a driver for them. Instead they may choose to make their works freely available for use by others.

9) For businesses, however, the ability to generate revenues from the content they create is crucial. This need is not incompatible with promoting increased choice for consumer. It is after all in the interests of production businesses to make content available on a commercial basis as soon after initial transmission as possible.

10) This also serves the interests of the consumer: there is mounting evidence that consumers are prepared to pay a reasonable price providing they are receiving increased choice in return. Just as the music industry has developed new revenue streams in online and commercial downloading services, evidence suggests that people will pay for the right kind of content, if it is available by legitimate means where and when they find it most convenient. Average household spend on television 10 years ago was around £20 a month, on the television licence and the average BT bill. Now, over half of UK households are paying five times that for services such as BSkyB, multi-channel, broadband and mobile telephones.

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

1) In addressing technical interoperability issues, Pact would ask regulators to bear in mind the importance of rights holders being able to generate revenues from a range of different platforms and means of delivery. Prompt exploitation across different platforms is imperative as a way to meet consumer demand (and provide legitimate, commercial alternatives to illegal downloading). However, the way different means of exploitation are interlinked can directly impact on the value of rights to the intellectual property that our members create.

2) Pact has commissioned a YouGov survey to look at the interrelationship between different forms of delivery. The results, analysed by media consultancy Oliver & Ohlbaum Associates, indicated that a free catch-up window (ie showing the same programmes at a later date for audiences who missed the programme initially) will impact on the value of the pay VoD market. The survey found that 58% of all respondents would be less

likely to be interested in pay VoD, or would no longer be interested at all, if there were a free seven-day catch-up available.⁶

- 3) In addition, the YouGov research suggests that pay VoD will impact on DVD sales, especially if pay VoD allows consumers to keep the programme indefinitely. If downloads were available to keep, 36% of respondents said they would be less likely to buy or rent DVDs.⁷
- 4) Furthermore, pay VoD will undermine pay TV channel take up, and therefore any likely secondary programme income from these channels. The YouGov research found that 27% of those interested in VoD would reduce their viewing of thematic channels, and 57% might reduce their linear pay TV packages if VoD were available directly.⁸
- 5) Industry must respond to consumer demand for accessing content in different ways, but must minimise the extent to which different windows cannibalise each other's revenues. The way forward is to develop the market by allowing the prompt exploitation of rights via diverse services in a way that rewards, and therefore incentivises, producers and distributors.
- 6) Pact would also support appropriate standardisation of DRM systems. We note that the European Commission's High Level Group on Digital Rights Management highlighted the importance of interoperability across different platforms.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

- 1) Pact supports Ofcom and the Government's efforts to ensure digital and online services are inclusive. However, we do not see cultural diversity as a problem online. Recent research by Ofcom shows that minority ethnic groups figure heavily amongst the most enthusiastic 13% users of technology.
- 2) Instead, attention should be focused on other groups that may be excluded. According to Ofcom's research, women and less affluent

⁶ The Prospects for On-demand TV in the UK: Analysis of the YouGov Consumer Survey, Oliver & Ohlbaum Associates, page 11.

⁷ Ibid, page 9.

⁸ Ibid, page 8.

people are amongst those identified as most likely to be “abstainers”. Ofcom cited a better promotion of benefits, as well as targeting products and pricing, as the key to improving take-up for these groups.⁹

Competitiveness of European online content industry

7.If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

- 1) Extending Television without Frontiers to include non-linear services will potentially stifle the ability of companies to innovate in new media. As far as Pact is aware, no other trade bloc is considering such regulation, which would leave European content creation businesses as a significant competitive disadvantage.
- 2) One of the strengths of the UK online industry is its ability to be flexible and innovate within the current European and national frameworks. The additional layer of regulation created would add to compliance and reporting costs. In online content creation, budgets are far lower than for television production and additional compliance costs would therefore be proportionately higher.
- 3) Just as importantly, the proposed criteria for defining whether services are linear or non-linear bear little resemblance to the realities of the sector. The online world is highly fluid. Unlike traditional broadcasting, the nature of online content sites and services is not set in stone at point of delivery. Services evolve, changing from a private weblog to a public site, or from non-commercial to commercial. PVRs and IPTV mean that, even though the media service provider decides on a schedule, the viewer decides when to view the content.
- 4) The line between linear and non-linear is likely to be further blurred as IPTV platforms evolve and viewers become users, accessing email at the same time as watching the news, for example. Trying to shoehorn services into these definitions may stifle this flexibility.
- 5) Pact supports certain basic restrictions that, for example, protect minors. However, these are already provided by existing laws, either at a national

⁹ Communications Market: Special Report – Consumer Engagement with Digital Communications Services, Ofcom.

level or under the Electronic Commerce (EC Directive) Regulations 2002, and the Directive will not give member states any greater powers in respect of services from outside the European Union. Furthermore, in removing countries' ability under the Electronic Commerce (EC Directive) Regulations to enforce their own standards on non-linear services, the new proposals may impinge on freedom of expression.

- 6) Pact therefore supports non-linear services remaining outside the scope of the Directive, along with certain changes to the existing Directive surrounding product placement.

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

- 1) Online services represent an opportunity on a global level for European content creators, as well as a way of increasing choice in how the public engages with content. While a hit television show such as Coronation Street will register around 10 million viewers in the UK, online platforms offer a potential worldwide audience of hundreds of millions.
- 2) A range of different services is emerging. BSkyB, which has acquired broadband access provider EasyNet, has launched Sky By Broadband, offering on-demand films and sports news clips. Channel 4 has launched paid-for content available via the internet, and is simulcasting its main channel over the internet, while MTV provides free access to music videos online. The BBC is launching its integrated media player (now named BBC iPlayer) and has made its first major commission under its "360" strategy, as outlined in response to question 1.
- 3) Companies from outside the television sector are also entering the market. AOL has partnered with Warner Bros on a film download service, while telecommunications company BT's new service provides video-on-demand programming via broadband and digital television.

- 4) We would also highlight the growth of social networking sites such as MySpace, Bebo, Facebook. This was underlined recently by Google's \$1.65bn acquisition of YouTube, boosting Google's presence in the video sharing market. Additionally, News Corp paid \$580m for MySpace in 2005, and other acquisitions are likely as traditional media companies converge with new media services.
- 5) The potential of these new platforms in terms of the content creation sector is illustrated in the deal struck by Yahoo! over the US version of The Apprentice. Producer Mark Burnett partnered with Yahoo! before taking the show to NBC. NBC were able to pay less for the show; but the advertisers whose products were placed within the show were able to cross-promote and cross-sponsor online. Yahoo! has a worldwide customer base of 400 million people, 200 million of whom are registered, representing a huge opportunity for UK content.
- 6) While the US industry may be more advanced in terms of online companies' involvement in creative content, UK companies are meeting this opportunity by developing online content business. As we have detailed in response to question 1, AOL has invested around £250,000 in Jamie Oliver's 45-minute live show Home Cooking Day, from Oliver's independent production company Fresh One. We understand that this marks the first time AOL has commissioned its own exclusive video content in UK. Audiences will be able to take part in a moderated online chat with the celebrity chef, find recipes, access a podcast and, after the live event is over, download 15-minute segments of the programme to view.
- 7) Tiscali is also developing content activities in the UK. The broadband portal recently showed live music sets from the Reading Festival. Tiscali portal director Richard Ayers recently stated:

“Our traditional job used to be search engines but it has mutated and we want to give customers good value content because differentiation is a key problem. 80% of what we offer is aggregated but 20% is the gold dust sprinkled on the top to make things different.”
- 8) Ofcom reports that the UK availability of television programming over UK broadband platforms increased "significantly" during 2005 and the first half of 2006, and that all major broadcaster now have online strategies.¹⁰ In the stand-alone online content creation sector, Pact's interactive producers are reporting an apparent increase in the sale of online formats internationally.

¹⁰ The Communications Market 2006, Ofcom.

- 9) We expect this growth to continue. We note that the number of broadband households in the UK is growing rapidly and is set to pass 10m well before the end of the year, boosted by the recent spate of "free" fast internet offerings.¹¹ This amounts to 40% of all homes, including those without any internet connection, compared to just 28% of households the year before.
- 10) However, to encourage the growth the online content creation sector it is vital that companies are allowed to benefit from a share of the revenues from the exploitation of the intellectual property that they create.
- 11) As we have detailed in answering question 3, this is currently not the case and there remains a need to ensure that producers of content made purely for online services can benefit from the revenues generated by the exploitation of the intellectual property they create. Doing so will create an environment that encourages the development of sustainable new media content creation businesses, as it has successfully done in the television production sector.

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

- 1) A recent poll, carried out by ICM, indicated that the majority of UK consumers are interested in online delivery.¹² More than two thirds of respondents felt that it would be standard to download content from the web, rather than buy it on the high street, within three years.
- 2) This poll also suggested a readiness to pay for that content. 41% said they would pay between £2 (\$3.79) and £5 (\$9.48) to download a film to own. Just 24% said they would pay nothing.
- 3) The research suggested, however, that UK consumers prefer subscription deals. A leading 36% of those polled said they would go for an all-inclusive monthly fee with unlimited viewing, compared with the 24% who prefer to buy-to-own.
- 4) UK consumers were also willing to accept new platforms, with 66% expressing interest in digital TV integrated with broadband. That interest leapt to 71% of 35-44 year olds.

¹¹ Ibid.

¹² ICM for digital services provider the British Internet Broadcasting Co, September 2006.

10. Are there any technological barriers (eg download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

- 1) The UK public is an advanced consumer in many ways: two thirds of UK households receive digital television; more than 60% of adults buy goods online; and a third of households have broadband.¹³
- 2) However, we note that one concern is that existing networks may not be able to meet consumer demand. Research this year for the Broadband Stakeholder Group concluded that services meeting the highest downstream demands (of around 20Mbit/s) are unlikely to be available to more than 50% of homes by 2012, suggesting that further investment in infrastructure may be required.¹⁴
- 3) We also agree that it is important to consider support for skills development. Ensuring the workforce has the relevant skills is key to the success of the rapidly developing audiovisual content sector.
- 4) The industry should be involved in education initiatives to ensure that skills being taught are relevant. Pact provides this link through its Training Policy Group, which is made up of a cross-section of member companies and informs all of Pact's training work. In addition, Pact's Interactive Media Policy Group, again made up of member companies, is represented on UK sector skills council Skillset's Interactive Media Skills Forum. This forum produced a sector skills agreement for interactive media last year.

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

- 1) Interactive production companies represented by Pact tend to produce content on a commission or fee basis and are therefore, generally, not linked into revenue generation from the sites they produce. As new value-creating processes emerge, it will be vital to incentivise content creators

¹³ Ofcom, as of end 2005.

¹⁴ Predicting UK Future Residential Bandwidth Requirements, Analysys for Broadband Stakeholder Group, May 2006.

by allowing them to benefit from a share of the revenues generated by the intellectual property that they create.

- 2) As we have outlined in response to question 3, doing so will create an environment that encourages the development of sustainable new media content creation businesses, as it has successfully done in the television production sector.
- 3) We note that overall advertising revenues in the television and online sectors are increasing. In television this growth is largely thanks to the increase in the number of channels brought about by new platforms. In 2005, net advertising revenues stood at more than £3.5 billion, the highest year since Ofcom started reporting.¹⁵
- 4) Growth is largely down to digital channels so far but we see no reason why further advertising revenues would not be generated by companies as they expand their online presence. In addition, companies will be able to open up other revenues streams through interactive formats.
- 5) ITV has announced that ITVPlay, its interactive gaming channel, generated a £2m profit in January this year during a test phase (the service did not go to air until March). ITV has also diversified into new media through its acquisition of dating website Friends Reunited, allowing it to access revenues streams from dating and genealogy services, amongst others.

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

- 1) In this rapidly developing sector, payment and pricing systems are subject to change as new services emerge and should be left to the market to develop.
- 2) A range of payment systems for consumers are currently on offer. BSkyB, which has acquired broadband access provider EasyNet, has launched Sky By Broadband, offering on-demand films and sports news clips. Channel 4 has launched paid-for content available via the internet. AOL has partnered with Warner Bros on a film download service, while

¹⁵ The Communications Market 2006, Ofcom.

telecommunications company BT's new service provides video-on-demand programming via broadband and digital television.

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

- 1) As noted in response to question 12, pricing systems are subject to change as new services emerge in this rapidly developing sector. Fundamentally, however, evidence indicates that consumers will pay an appropriate premium for increased flexibility in when and how they access content. In a YouGov poll for Pact looking at on-demand services, almost half of the respondents were interested in a subscription video-on-demand service (at £2.50/month) and slightly less were interested in a pay-as-you-go service at 49p per episode.
- 2) In a recent public poll by ICM for the British Internet Broadcasting Co, 41% said they would pay between £2 (\$3.79) and £5 (\$9.48) to download a film to own. Just 24% said they would pay nothing.

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

- 1) Online services offer the potential to greatly increase choice in how people access and engage with content. It is in rights holders' interests to meet consumer demand for improved choice by ensuring that intellectual property is commercially available to the market as quickly and as conveniently for potential audiences as possible. Otherwise, right holders risk losing potential revenue streams, or encouraging people to seek alternative, illegal means of accessing content.
- 2) It is crucial to recognise that differences exist not only in how consumers from market to market may prefer to access content, but also in the value to rights owners of exploitation in different Member States across the EU. This may be because of language or other cultural differences resulting in

a programme having difference perceived values in the eyes of potential purchasers or licensees in different Member States.

- 3) Allowing rights owners flexibility in how they licence their content is therefore important as a way of incentivising businesses by allowing them to generate effective returns on the content they create, as well as providing consumer choice. Such flexibility encourages creative businesses to develop new ways of delivering content tailored to consumers' preferences in different territories. We note, for example, RDF Media's plans to launch its own online VoD service.
- 4) This flexibility is also key to content creators' ability to secure rights clearances. Only rights holders can establish clearances, sometimes specific to individual territories or uses (whether or not part of a multi-territory contract), for which they may often remain responsible.
- 5) Rights holders should therefore be able to determine whether and how to license for national, Europe-wide or multi-territory distribution. The territorial recognition of copyright underpins this ability.
- 6) The concept of Europe-wide or multi-territory licensing may become appropriate to meet the demands of certain new services, but must be driven by rights owners making the choice about how best to license their rights to reach their primary and secondary markets effectively. Rights owners must be able to choose a route to market, weighting up the practicalities of direct licensing versus the benefits (and costs) to the rights owners of licensing through a collecting society.
- 7) Similarly, forcing businesses to use a centralised point of consumer access across multiple territories or a form of collective administration with a fixed price or subscription system risks damaging the creative economy of the EU by stifling the market-led development of new services. It would echo the restrictions of the analogue broadcasting model, whereby a handful of aggregators were able to dominate the market, with the resulting dampening of competition and choice.
- 8) This is quite apart from the impracticalities of imposing a multi-territory licensing standard, as rights and infringements remain largely subject to a variety of legal regimes.

15.Are there any problems concerning licensing and/or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

- 1) As small or medium-sized companies, independent production companies are often at a disadvantage when they need to negotiate the use of pre-existing copyright material with large rights-holder organisations such as collecting societies or talent unions. This has proved problematic in the past when big organisations try to enforce unfair terms upon producers.
- 2) For example, in 2003 the Screen Actors Guild (SAG), the trade union for US actors, stipulated that all SAG members were only to be engaged on SAG contracts. As these contracts provided for excessive payments it threatened to deter UK producers from using US actors, if this was their preferred choice, and also took away the freedom to negotiate terms with actors individually.
- 3) Similarly, when producers wish to use a piece of music in a production, they have traditionally been reliant upon obtaining relevant licences from a local collecting society, such as the Mechanical Copyright Protection Society in the UK. When such societies have fixed standard licence terms, it is usually impractical on grounds of cost for a production company to challenge such standard terms. This can create an unfair barrier to trade.
- 4) Another difficulty when dealing with the clearance or licensing of orphan works is the lack of any comprehensive database from which information about current owners can be sought – although there are advantages in copyright existing without the need for registration. This issue is being addressed by collecting societies, and much work has been done to improve databases.

16.How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

- 1) Digital Rights Management systems are key to remunerating rights holders, but it is crucial that users understand the difference between technological protection systems and management systems that encompass identification and licensing.

- 2) As this consultation has acknowledged, the first refers to methods that practically limit the way in which a consumer can use a product or service – and are focused on theft prevention. The second type are effectively stock management tools, and tools through which the interests of rights owners can be identified, their uses recorded and, through this, remuneration arranged. Rather than preventing copying, they could, for example, facilitate tracking material during authorised copying. They might also incorporate mechanisms that allow income to be collected as content is copied.

Legal or regulatory barriers

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

- 1) As noted in response to question 7, extending Television without Frontiers to include non-linear services will potentially hamper the development of online content and services. The additional layer of regulation created would add to compliance and reporting costs. In online content creation, budgets are far lower than for television production and additional compliance costs would therefore be proportionately higher.
- 2) Just as importantly, the proposed criteria for defining whether services are linear or non-linear bear little resemblance to the realities of the sector. Pact therefore supports non-broadcast services remaining outside the scope of the Television without Frontiers Directive, along with certain changes to the existing Directive surrounding product placement.
- 3) Generally we find that the copyright regime for intellectual property currently works well, providing enough flexibility to encourage creative innovation while at the same time ensuring that rights holders are able to benefit from commercial success. Pact has previously responded to the Gowers Review of Intellectual Property in this area and asks the Commission to consider the outcome of this review.

18. How does the country you mainly operate in encourage the development of creative online content and services?

- 1) The 2003 Communications Act has helped transform the television production sector, calling for Codes of Practice for broadcasters when commissioning content from producers. The ensuring terms of trade, negotiated between Pact and broadcasters, allowed producers a greater share of revenues from the exploitation of the content they create, including online and other new media exploitation.
- 2) While the Codes of Practice do not refer explicitly to online content, they have cut back on television holdbacks and encouraged the exploitation of rights to content via new media services. Many of those television production companies are at the forefront for providing content for new media services, as we have outlined in response to question 1. In this way, as well stimulating the production sector, the Codes of Practice have increased viewer choice by allowing new services to have access to new, domestically created content at a reasonable cost and with reasonable ease.
- 3) However, as noted in answer to question 3, these Codes of Practice and terms of trade apply to content which is originally commissioned for television broadcast, although it may be later available online. To encourage the growth of the stand-alone online content creation sector it is vital that content creation companies are allowed to benefit from a share of the revenues from the exploitation of the intellectual property that they create.
- 4) Doing so will create an environment that encourages the development of sustainable new media content creation businesses, as it has successfully done in the television production sector.
- 5) Pact is therefore working with broadcasters such as the BBC and public sector commissioners to develop best practice in commissioning content from the independent sector. Public service broadcasters such as the BBC have the potential to create an environment that fosters the development of creative online content and services through the work they commission and also through the creation of new initiatives such as the Innovation Labs and Content 360 development competition.
- 6) As part of this we are developing a set of frameworks for new media rights, including looking at how rights to intellectual property are defined. ITV has for example acquired the online service Friends Reunited. An audiovisual spin-off from this service might classify as part database, part programme.
- 7) Furthermore, there is a need to open up commissioning in some cases where services have in-house production capacity. We have

successfully lobbied for the BBC to increase commissioning from external new media suppliers, as it has done for television suppliers.

- 8) We would also like to highlight that regional development agencies across the UK have a valuable role in promoting development through digital media investment funds and other programmes.

Release windows

19. Are “release windows” applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

- 1) Release windows are important to Pact members’ ability to realise a return on the content they create. As we have highlighted in question 5, the value of such windows is interlinked, and may therefore be affected dramatically by the emergence of online services.
- 2) While it is too early to predict the precise impact, there is a fundamental need to make content commercially available to the public as soon as possible after initial exploitation. Doing so maximises the value of secondary and ancillary rights, and should help counteract the theft of intellectual property by making content readily available on a legitimate, commercial basis.
- 3) In negotiating the current terms of trade with UK broadcasters, Pact has sought to address this need to provide consumers with increased choice. In essence, we have aimed to develop frameworks for more sophisticated rights windows that are better suited to new media. In our view, the models currently being finalised will allow greater flexibility in the ways of delivering content to the public.

Networks

20. The Internet is currently based on the principle of “network neutrality”, with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

- 1) Pact's position is that consumers should be allowed to choose the type of service they prefer and that the industry should be encouraged as far as possible to meet that demand by developing new forms of delivery.

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between "small" and "big" ones?

- 1) Intellectual property theft is a growing threat to the value of the creative industries. The ability to generate revenues from the exploitation of intellectual property is crucial to the business models of the companies that create that content and incentivises such companies to take risks in developing content.
- 2) IP theft undermines this, and is growing rapidly. According to a study last year by Envisional, an internet monitoring company specialising in anti-piracy and trademark and fraud areas, a typical episode of the television series 24 was downloaded 30,000 times globally in 2004; in 2005, that figure had more than tripled, to over 90,000. Envisional estimated that 18% of people involved in the unauthorised file sharing of copies of television programmes were from within the UK, the highest of any country.
- 3) Pact has made submissions to the Gowers Review of Intellectual Property in this area, as well as to the All Party Parliamentary Internet Group's inquiry into Digital Rights Management and the Culture, Media and Sport Select Committee's inquiry into New Media and the Creative Industries. We ask that the Commission takes account of the recommendations from these inquiries.
- 4) In summary, our submissions for the above reviews suggest the following steps in combating IP theft:

Tougher legal measures

- i. In the UK, Trading Standards does not have the duty, power or resources necessary to enforce copyright law. In addition, we regard current UK legislation as inadequate in dealing with

unauthorised uploading, which we view as very damaging to industry. Legal action against software providers behind peer-to-peer services and internet service providers has proved difficult. This is because the secondary infringement provisions of section 26 of the *Copyright, Designs and Patents Act 1988* do not clearly apply when the peer-to-peer software provider or linked provider is merely facilitating unauthorised activity, rather than authorising it.

- ii. This has resulted in the people or companies behind the services making money from the use of services linked to unauthorised use of copyright. The industry has had to focus its attention on members of the public to seek redress from those who upload copyright works for unauthorised communication to the public across networks.
- iii. Pact has therefore recommended the UK confirming a new act of secondary infringement to cover the role of providers of software or network services that are used to infringe copyright. This would be in line with legislation covering those who permit the use of premises, which is an act of secondary infringement and attracts both civil and criminal liability.

Industry's role

- i. Industry should be clearer and more transparent in explaining to consumers the terms and conditions attached to the licensed or authorised use of copyright materials. Such terms are already becoming established in online music services. These services allow consumers to choose from a number of ways in which to access recordings. Price and other conditions then dictate the levels of use to which the consumers are entitled, dependent upon the service to which they choose to sign up.

Education

- i. Education clearly has an important role but this has traditionally taken the form of negative messages, underlining that IP theft is crime. This is important, and should be continued, but should be accompanied by more work to educate people about what IP is and its value to creative industries.

Providing legitimate alternatives

- i. Developing commercial services that get content to the market quickly after the first transmission is key. If the public is prevented from accessing content legitimately, on a commercial basis, there is every reason to suggest many people will do so by illegal means.
 - ii. This was clear from the damage to the music industry from the explosion of unauthorised file sharing enabled by new peer-to-peer technology. By eventually responding to consumer demand, and making music available in a variety of new online subscription, streaming and commercial downloading services, the music industry has now created an increasingly significant revenue stream. Global digital revenues were worth \$1.1 billion in 2005. They are growing rapidly and are now worth 6% of total music industry revenues. Just two years ago, they were worth 0%.
- 5) Pact would not advise any legal distinction between “big” and “small” cases of IP theft. As a matter of principle, any act of private copying that takes place in the UK without the consent of the rights owner is illegal, in the absence of applicable exceptions, limitations or a statutory licensing system. This applies whether copying is made directly or indirectly through agents or intermediaries such as collecting societies.
- 6) However, the law to date has enabled rights owners to choose to take a pragmatic view over enforcing rights, or where enforcement costs would be disproportionate to the damage caused. This does not mean that the rights have been ineffective. Far from it: they have acted as an important safeguard for the interests of rights owners.

22.To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

- 1) As we have noted in answering question 22, education clearly has a role but this has traditionally taken the form of negative messages, underlining that IP theft is crime. This is important, and should be continued, but should be accompanied by more work to educate people about what IP is and its value to creative industries.

23.Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity

and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?

- 1) Peer-to-peer technologies are starting to be used by rights holders on a commercial basis. AOL this year started using a peer-to-peer approach borrowed for delivering high-definition internet video to consumers. Warner Bros, a Time Warner sister company of AOL, announced in May that it would start selling downloads via the internet with Bit Torrent, which uses peer-to-peer technology. Other studios are expected to follow.
- 2) Content under the Warner Bros-Bit Torrent deal will be protected by users only being able to view the film or show on the initial computer that was used to make the download.
- 3) We understand that users will be able to buy downloads of films and TV shows on the same day they become available on DVD, with pricing about the same as a DVD for film and as little as a dollar for a television show.

Rating or classification

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

- 1) We have not been informed by our members of any problems arising from different national practices. A level of standard classification is provided for under the Electronic Commerce (EC Directive) Regulations 2002, which stipulates, for example, that commercial communications must be clearly identifiable as such.¹⁶ However, we agree with the Broadband Stakeholders Group that it is unclear that a harmonised content rating or classification system would be desirable, given cultural diversity across the internal market.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property

¹⁶ Electronic Commerce (EC Directive) Regulations 2002, Section 7 (a).

rights. While DRMs are essentially technologies that provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

- 1) Pact members often use DRM technology and Pact considers such systems an appropriate way of both protecting intellectual property from theft and managing rights and payment. We have outlined our views on DRM systems in response to the All Party Parliamentary Internet Group inquiry into Digital Rights Management (Dec 21 2005).

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

- 1) Pact members do have access to adequate DRM systems. DRM is a crucial safeguard against IP theft, enabling content creators to secure a return on the successful intellectual property they generate and thereby encouraging risk taking and creativity in new online markets.

27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

- 1) DRM systems are widely used but the system would benefit from greater clarity in explaining to consumers the terms and conditions attached to the licensed or authorised use of copyright materials.
- 2) Such terms are already becoming established in online music services. These services allow consumers to choose from a number of ways in which to access recordings. Price and other conditions then dictate the levels of use to which the consumers are entitled, dependent upon the service to which they choose to sign up.
- 3) Such a model will also help empower rights owners to choose the extent to which they authorise private, non-commercial copying.

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

- 1) Publishers have often used encryption, such as CSS on DVDs. PACT is not aware of other businesses within the sector being unwilling to accept such measures. In the public arena, the television and film production has succeeded in avoiding controversies that dogged the music industry's attempts to protect its intellectual property, partly by taking a pragmatic approach over when to enforce their rights.

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability? Complementing commercial offers with non-commercial services

- 1) Effective DRM is important in sustaining growth in the production sector. Creators rely on the revenues generated by the exploitation of the intellectual property they create. DRM systems are vital as they protect that IP, allowing it to be exploited on a commercial basis.
- 2) Developing DRM systems is therefore of utmost concern to the industry, and should therefore be left to industry rather than conducted through regulation. Companies developing technical protection measures will seek to ensure that new products are tested to avoid unintended consequences. General consumer protection rules should provide the route to recourse without changes to the law.

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in? What role for equipment and software manufacturers?

- 1) The existing copyright regime has enabled rights owners to choose whether they wish to license the use of their works by means of sharing licences, and should be maintained.
- 2) It is of course imperative to provide the increased choice that the public is demanding, but this must not be at the expense of destroying business models in the production sector. Forcing production companies to give away their work for free through sharing licences, such as Creative Commons, would undermine the very businesses that

are supposed to provide audiences with an increased range of content in the first place.

- 3) Such types of content sharing licence should instead provide an appropriate financial return for rights owners, unless those owners choose to give away their work for free.
- 4) We take the same view with the BBC's current proposals to offer a seven-day free catch-up window online via its so-called iPlayer. The proposal is rightly being examined at the moment by Ofcom to gauge its market impact, which could be severe in areas such as pay VoD.
- 5) Pact recently commissioned a YouGov survey, which looked at the impact on the market of a free 7-day catch-up window, as the BBC's proposals would offer online and via cable and Homechoice. The results, which have been analysed by Oliver & Ohlbaum Associates, indicate that there was significant consumer interest (over 50%) in taking up pay VoD. However, 58% said they would be less likely - or not willing at all - to pay for a VoD service if a free seven-day catch-up window were available.
- 6) It is therefore crucial that the BBC's proposed services offer an incentive to content creators. To fail to do so would mean effectively re-bundling rights that might otherwise have been commercially exploited into the primary package. Such a re-bundling would be contrary to the Codes of Practice laid out in the 2003 Communications Act, which call for clarity about the "different categories of rights" and "the amounts to be paid in respect of each category of rights."¹⁷
- 7) Some businesses may choose to provide content for free, in order to raise its profile for further sales, for example. However, it is important to allow flexibility in this in order to encourage different types of content creators.
- 8) In many cases, consumers are now increasingly creators, as advances in technology have opened up means of communication traditionally the preserve of those involved in professional copyright work. Many members of the public are not interested in licensing the use of their work. Recoupment is not a driver for them. Instead they may choose to make their works freely available for use by others.
- 9) For businesses, however, the ability to generate revenues from the content they create is crucial. This need is not incompatible with

¹⁷ Communications Act 2003, Section 285 (3) (b) and (c).

promoting increased choice for consumer. It is after all in the interests of production businesses to make content available on a commercial basis as soon after initial transmission as possible.

- 10) This also serves the interests of the consumer: there is mounting evidence that consumers are prepared to pay a reasonable price providing they are receiving increased choice in return, as we have noted in response to question 4.

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)? What role for public authorities?

- 1) As we have noted in response to question 29, DRM systems are of utmost importance to the development of the creative content businesses. Industry should be allowed to develop such systems itself, without limitations imposed by changes to the law.

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

- 1) New services are adequately regulated by existing legislation such as the Electronic Commerce (EC Directive) Regulation 2002 and national laws. This framework should be maintained, rather than an additional layer of regulations being introduced on a European level, as we have argued in answer to question 7.
- 2) In addition, national governments and regulators have a role in promoting media literacy and digital inclusion.

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

- 1) In terms of current proposals to revise the Television without Frontiers Directive, Pact supports non-broadcast services remaining outside the scope of the Directive, along with certain changes to the existing Directive to permit product placement.

- 2) Pact has also called for the removal of the “where practicable” clauses for European works and independent productions in Television without Frontiers. The “where practicable” clauses in the existing version of Television without Frontiers have allowed broadcasters to avoid fulfilling current quotas regarding European and independent works.¹⁸ This has severely limited the impact of the current Television without Frontiers in raising levels of European and independent content on traditional broadcaster services in the UK and Pact would call for its removal in the new Directive.

¹⁸ Directive 89/552/EEC, Article 4.1.