

Submission to European Commission  
Review of Creative Content Online  
in the Single Market

**pact.**

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## Executive summary

- 1) Pact's fundamental position is that content should be made available to the public as quickly and conveniently as possible in a way that incentivises business to take risks, innovate and invest in content creation and new services.
- 2) Allowing content creators to own a share of the rights to the intellectual property (IP) that they create can help achieve this. This was reflected in the UK by the Communications Act 2003, which introduced Codes of Practice that called for different rights to content to be 'unbundled', or disaggregated. Instead of commissioning broadcasters controlling all the rights to content, third-party, independent content creators commissioned to make programmes for broadcasters were allowed to retain a share of rights in secondary or ancillary windows, such as online. 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 IP that they created.
- 3) The independent sector is now showing a compound annual growth rate of over 15%, according to Pact's annual census. Much of this growth has come in areas directly linked to the new terms of trade. At the same time, independent content creators are looking to develop new forms of delivery, such as the online portal for comedy content currently being launched by RDF Media, a leading UK independent producer (and now an online aggregator as well).
- 4) We welcome the intent to develop a framework for ensuring content is made available quickly to the public. There is no option but to deliver to people what they want, when they want it, on a commercial basis. If we do not, developments in technology indicate they will find an alternative way to obtain that content anyway, as the example of the music industry illustrates.
- 5) However, we caution that this should not undermine the delicate ecology of rights exploitation. Content creators must be able to monetise the distribution of their content in order to raise investment for creating the content in the first place. It is therefore vital to consider the impact of one distribution window on another. For example, on-demand distribution online can have a substantial knock-on effect on rights holders' ability to generate revenues from DVD exploitation.

- 6) In terms of the Commission's specific proposals, we agree that the standardisation of DRM systems should be considered to address technical interoperability issues. It should be stressed, however, that the owners of IP rights must still have the ability to choose the windows and distribution platforms where their content is made available. Otherwise, the business models of many companies in the creative industries will be threatened.
- 7) For the same reason, we are concerned that imposing a blanket multi-territory licence, even in a secondary window capacity, will undermine rights owners ability to generate revenues from their content. The question of one rights window impacting on another is not limited to primary vs secondary exploitation. Within the secondary window, one form of delivery can potentially damage the value of another. This is quite apart from the practical difficulties of securing rights clearances on such an all-encompassing basis.
- 8) In Pact's view, the way forward is not to impose blanket licences or undermine rights owners ability to generate income. Instead, the Commission should consider where barriers that stop companies from being able to promptly exploit rights can be removed. Key to this will be ensuring that IP rights are appropriately disaggregated, and that content creators are able to retain a share of those rights that they can then exploit. This will allow new entrants to content distribution, such as internet service providers, telecommunications companies, and content creators turned aggregators, to secure IP rights and stimulate competition in developing new way of offering content to the public.

## Introduction

- 1) Pact is the trade association that represents the commercial interests of the independent production sector. We have more than 700 member companies across the entire UK, involved in creating and distributing television, film and interactive content.
- 2) The independent production sector is showing strong growth. Turnover has risen from £1.6 billion in 2005 to more than £2 billion currently. This represents a total increase over three years of approx 26.6% in real terms.<sup>1</sup>

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

## Response to issues for consultation

### Digital Rights Management

**1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?**

- 1) Pact agrees that the standardisation of DRM systems should be considered to address technical interoperability issues. In the UK, for example, we have supported the BBC's efforts to make on-demand film and television content available through its iPlayer service on both PCs and Macs, providing appropriate DRM solutions are developed to protect IP owners' rights.
- 2) It should be stressed, however, that the owners of IP rights must still have the ability to choose the windows and distribution platforms where their content is made available. This is so rights holders are able to generate revenues from a range of different platforms and means of delivery – these revenues typically being necessary to fund the costs of creating the content in the first place. This was reflected in the UK by the Communications Act 2003, with Codes of Practice that called for different 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 IP that they created.
- 3) From an IP owners' point of view, prompt exploitation of those rights across different platforms is imperative as a way to meet consumer demand (and provide legitimate, commercial alternatives to illegal downloading). However, the way different means of exploitation are interlinked can directly impact on the value of rights to the intellectual property that our members create. For example, the timing of when content is made available over the internet on-demand can have a substantial effect on the potential to generate revenues from DVD sales.

**2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What**

**could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?**

- 1) We would agree that consumer information should be simplified and standardised wherever possible.
- 2) One area worth clarifying for consumers is the difference between technological protection systems and management systems that encompass identification and licensing. 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.

**3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?**

- 1) DRM systems and EULAs are widely used, but would benefit from greater clarity in explaining to consumers the terms and conditions attached to the licensed or authorised use of copyright materials.
- 2) One practice worth considering for wider application is 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, while allowing the public a high level of flexibility in how they access content.

**4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?**

- 1) Alternatives to court litigation, in particular arbitration and mediation, allow parties to avoid many disadvantages, and to sidestep the complicated private international law issues of determining a competent jurisdiction and the applicable law. Arbitration and mediation provide a single international forum for resolving disputes – regardless of its territorial links; they can be tailored to fit the efficiency demands of parties, as well as their confidentiality concerns; and they allow parties to select expert arbitrators or mediators.

**5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?**

- 1) Many of Pact's members are SMEs but we not aware of any discriminatory practices in accessing DRM solutions.

## Multi-territory rights licensing

### **6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?**

- 1) No. This should be a longer term consideration for the Content Platform. The concept of Europe-wide or multi-territory licensing may become appropriate as new services emerge, but should be driven by rights owners making the choice about how best to license their rights to reach their primary and secondary markets effectively. Currently, implementing a multi-territory licence in film and television content is hugely impractical, Only rights holders can establish clearances, for areas such as talent, music rights, and underlying rights to source material. These are sometimes specific to individual territories or uses, for which rights owners may often remain responsible, as well as for individual rights window within each market.
- 2) Such a blanket licence would also risk damaging the business model for the content creation sector, not just because of the difficulties in arranging clearances but also in the restrictions this would place on developing new services. As we mentioned in response to the above questions on DRM, rights holders generate revenues from a range of different platforms and means of delivery – these revenues typically being necessary to fund the costs of creating the content in the first place. The ecology of such interlinking distribution windows is delicate. From an IP owners' point of view, prompt exploitation of rights across different platforms is imperative as a way to meet consumer demand (and provide legitimate, commercial alternatives to illegal downloading). However, way in which content is made available by different means of exploitation can directly impact on the value of rights to the intellectual property that our members create. For example, the timing of when content is made available over the internet on-demand can have a substantial effect on the potential to generate revenues from DVD sales.
- 3) 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 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.

- 4) In our view, the way to develop the market is by allowing the prompt exploitation of rights via diverse services in a way that rewards, and therefore incentivises, producers and distributors.

**7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?**

- 1) Imposing a multi-territory licensing standard even in a secondary window capacity remains in our view impractical, at least in the short to medium term. As noted above, Over time, however, it is possible that the market may move towards such a framework. 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, rights holders risk losing potential revenue streams, or encouraging people to seek alternative, illegal means of accessing content.

**8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long Tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?**

- 1) Yes, although we see practical difficulties in implementing this proposal. Having rights to a wider group of territories would facilitate an online aggregator's international roll out. However, broadcasters in many territories still require primary window television rights that are exclusive against online, and selling those primary broadcast rights can be crucial to raising funding for the production of creative content in the first place.
- 2) It is also be worth considering that some broadcast content has an extended lifespan, with one series following another for example. This means that the

value of that content can be building over several years and may only level off or decline at a period after the final programme or series is made.

## **Legal offers and piracy**

### **9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?**

- 1) Codes of Conduct may be useful in providing consumers with clarity on their rights, but should not substitute for ensuring that Member State legislation is adequate in dealing with unauthorised uploading.

### **10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to be followed?**

- 1) The results of this Memorandum should be carefully monitored and it should be adopted if judged to be effective through consultation. To aid this, the independent government body created in the Memorandum will publish monthly results of its anti-piracy actions.

### **11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?**

- 1) Yes. The Internet's gatekeepers, the ISPs, have a responsibility to help control copyright-infringing traffic on their networks wherever practical.