

Submission to Ofcom's consultation on the
Distribution of BBC public services

pact.

February 2017

Introduction

1. Pact is the UK trade association which represents and promotes the commercial interests of independent feature film, television, digital, children's and animation media companies.
2. The UK independent television sector is one of the biggest in the world. Despite the difficult economic climate, independent television sector revenues have grown to around £3 billion in 2015.¹
3. In 2015, the BBC spent £443 million on commissions from UK external producers. Last year, the BBC commissioned 46% of eligible television content from external producers².
4. BBC Commissions are important for independent producers as they account for 29% of all UK commissions, making the BBC the biggest buyer of content made by independent producers in the UK.³
5. Pact recognises the important role that the BBC plays in the UK television marketplace and how it nurtures and adds to the finely balanced TV production ecology in the UK. We are pleased by the recently renewed charter whereby the license fee has been secured for another 11 years. The BBC is a positive innovator and experimenter in the marketplace and this is often driven by the content which it commissions from independent production companies.

¹ Pact Census 2016

² BBC Annual Report 2015/16

³ Pact Census 2015

1. Overview

- 1.1 Pact welcomes this opportunity to comment on the proposed requirements and guidance on the distribution of BBC public services.
- 1.2 We understand that the BBC has an obligation to ensure that UK citizens and consumers are able to access the UK public services that are intended for them, or elements of their content, in a range of convenient and cost effective ways.
- 1.3 Our overarching interest in distribution decisions is how this will impact licensing arrangements the BBC will have in place with the underlying rights holder.
- 1.4 The interests of third party rights holders are not mentioned in Ofcom's document (or the current BBC trust framework). The BBC is of course required in any case to comply with its legal and contractual obligations with respect to rights holders. That said we would like to bring this to Ofcom's attention so that they can ask the BBC to incorporate it explicitly into their policy that all BBC distribution arrangements must be consistent with the terms of licensing arrangements the BBC has in place with underlying rights holders. We consider that this important in order to ensure the rights issues are front-of mind for the BBC when it negotiates distribution arrangements. Pact has worked closely with the BBC to agree commercial terms in the past in order for it to secure the rights for content produced by third parties to enable it to launch new services, such as BBC Store. As Ofcom has highlighted in light of technological changes and viewer preferences we expect the BBC to continue to innovate its services and in that context we would want third party rights to be considered at the outset of any distribution strategy that it will be developing.
- 1.5 In general, Pact supports the requirements and guidance that Ofcom has placed on the BBC to protect fair and effective competition in relation to how the BBC distributes its public services. However, we have some comments on the detail of the requirements and how they should be applied to BBC distribution as outlined in some of the sections of the consultation, as noted below.

The BBC's distribution approach should aim to serve licence fee payers whilst ensuring that rights holders receive appropriate payment

- 1.6 We we acknowledge that Ofcom will have no role in setting the BBC's distribution strategy. That said we believe Ofcom should establish a principle for the BBC that – whilst aiming to serve licence fee payers by

extending access to platforms and devices through which audiences would expect to access other public information and services – the BBC should be required to ensure that any distribution of third party produced content is “subject to the BBC being able to agree terms with underlying rights holders.”

1.7 It is important for Ofcom to note in this new framework that the BBC will not necessarily have all of the rights required. Pact considers that the distribution requirements and guidance reflect this in the wording of the principles in order to ensure that the need for the BBC to commercially acquire any rights which it needs for distribution is fully understood and prioritised by those involved in developing new arrangements.

Pact questions why the BBC should – as a matter of principle – be required to retain control over content distributed by third parties if they are not the underlying rights holder

1.8 Paragraph 4.15 of the consultation states that: “We recognise that it is legitimate for the BBC to maintain editorial control over the public services and place reasonable restrictions in the terms of supply it negotiates with third parties to achieve this.”

1.9 Again we would like assurances that the principles behind any decisions on distribution arrangements the BBC enters into must be with the rights it has for the content involved. Should the BBC wish to amend its distribution arrangements whilst maintaining editorial control over services, then it would need to negotiate new detail acquisition commercial terms with Pact, on behalf of independent producers and other third parties.

1.10 Pact suggests that, in order to reflect this distinction, the word “controls” should be removed from this paragraph.

1.11 Furthermore, we consider that where the BBC does distribute content which it has commissioned from independent producers through third parties, it should be required to share any information about audience data which it receives with the underlying rights holder.

The BBC must improve the transparency of its reporting on distribution

1.12 In order for third parties to be able to fully assess the extent to which the BBC has met with the terms of the distribution requirements, it is important that it publishes fully transparent reporting about its activities in a manner which is clear and easily accessible.

1.13 Pact calls on Ofcom to require the BBC Executive to publish a full report on the nature and conditions of its distribution activities on a regular basis, going into much greater detail than the current requirement to

publish "a breakdown of its total expenditure on distribution activities and the proportion of overall BBC expenditure that distribution expenditure represents" as outlined in the current trust framework.

Where a third party rights holder thinks that a BBC distribution agreement is to their detriment, they should have the right to opt-out

1.14 Pact would like clarification that where cases of a distribution arrangement are not covered by existing rights there will be an opportunity for individual rights holders to opt out as opposed to a blanket opt out. Pact urges Ofcom to include a paragraph in the requirements to acknowledge that if a third party rights holder considers that a BBC distribution agreement is detrimental to their commercial interests, and then they should have the right to opt-out.

1.15 In addition, it would be useful if the Ofcom was to clarify in the requirements and guidance that all BBC distribution arrangements must be consistent with licensing and third party distribution arrangements.

1.16 Pact would welcome the introduction of a complaints mechanism in this regard so as to make it clear how a third party rights holder is able to raise a complaint to the BBC and Ofcom if they consider that the BBC is not fulfilling its requirements under this distribution framework.

Distribution arrangements linked to digital commissions

1.17 Pact has long advocated that Terms of Trade should also apply to digital and online content as media convergence continues and the lines between linear TV and online viewing merge. Digital content would include BBC 3 online but also digital interactive content, apps, games and use of other digital media including around social media

1.18 Pact welcomes the Government move in the BBC White Paper to open up all digital content commissioning opportunities, as with TV, to the open market. Pact's view is that this will drive quality and diversity of content to the consumer ensuring that the best idea is always commissioned. As Pact has argued before this will have a catalyst effect in the digital economy, we hope in a similar way in which Terms of Trade have done over the last ten years, taking a small cottage industry into a world leader worth around £3 billion since the introduction of the Communications Act in 2003.

1.19 The consultation document itself recognises that 'the BBC's position.....gives it the potential to act as a catalyst for innovation and development in the media sector'

1.20 Pact has asked the BBC for further information as to how it aims to achieve 100% in digital commissioning opportunities by the end of the Charter period as little information is in the public domain at the moment. Further information around the budget available for digital content and Virtual Reality also would be useful. These developments combined with continuing developments of digital platforms, mean that the details of the BBC's distribution arrangements are likely to get more complex – and require closer scrutiny – with respect to rights issues in the future than they have in the past.