

Additional response to  
Competition Commission  
review of Project Kangaroo

**pact.**

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September 2008

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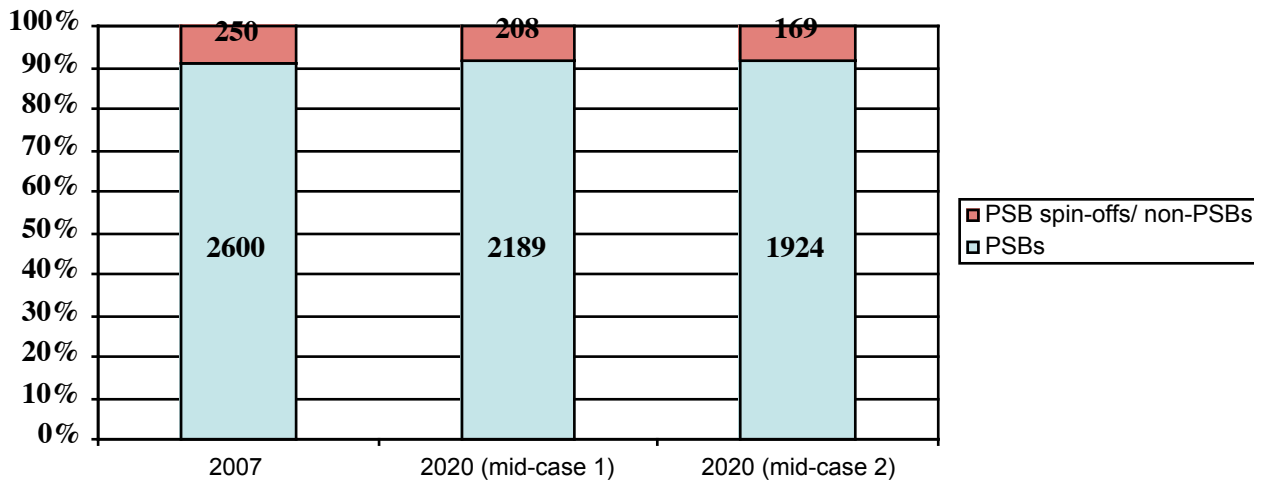
## Introduction

- 1) Pact is the trade association that represents the commercial interests of the independent production sector. We have more than 600 member companies across the entire UK, involved in creating and distributing television, film and interactive content.
- 2) This document is an additional submission to our earlier response to the Competition Commission's review of Project Kangaroo. Our previous submission covers the majority of areas outlined in the Competition Commission's recent issues statement. However, we now outline in greater detail our suggestions on a potential remedy, as the Commission has referred to potential solutions in its issues paper.
- 3) In addition to our previous submission, we have already sent the Commission an analysis of the VOD market commissioned by Pact from Oliver & Ohlbaum Associates, and a breakdown of the Terms of Trade for each of the Public Service Broadcasters (BBC, ITV1, Channel 4 and Five).
- 4) If you require further information please contact Adam Minns ([adam@pact.co.uk](mailto:adam@pact.co.uk)).

### The VOD market

- 1) As we have outlined in our earlier submission to the Competition Commission, film and television programmes in Pact's view form two separate and complementary markets within the overall VOD market. Within the VOD market for television programmes, individual programmes, whether they are made in the UK or the US, are likely to be only weak substitutes within a sub genre (such as drama) and complements across different genres.
- 2) Demand for specific VOD titles is driven by the broadcast market, with programmes building consumer awareness by airing on linear television. The UK market for the supply of VOD television content is thereby closely linked with the market for the supply of programmes for UK television programmes - the VOD market is secondary to the television market.
- 3) Consumers come to VOD retailers as shoppers come to high-street retailers – for the breadth and depth of programmes on offer. To succeed as a retailer, VOD services need a critical mass of leading programme titles familiar to the UK audience (i.e. content that has built awareness through the broadcast window).
- 4) The so-called Public Service Broadcasters (PSBs) – the BBC channels, ITV1, Channel 4 and Five – control the premium VOD rights to the majority of high profile UK content. As we have detailed in our previous submission to the Competition Commission, the PSBs account for 90% of investment in creating new UK content (both in-house and external). This is predicted to continue well into the future, as illustrated below.

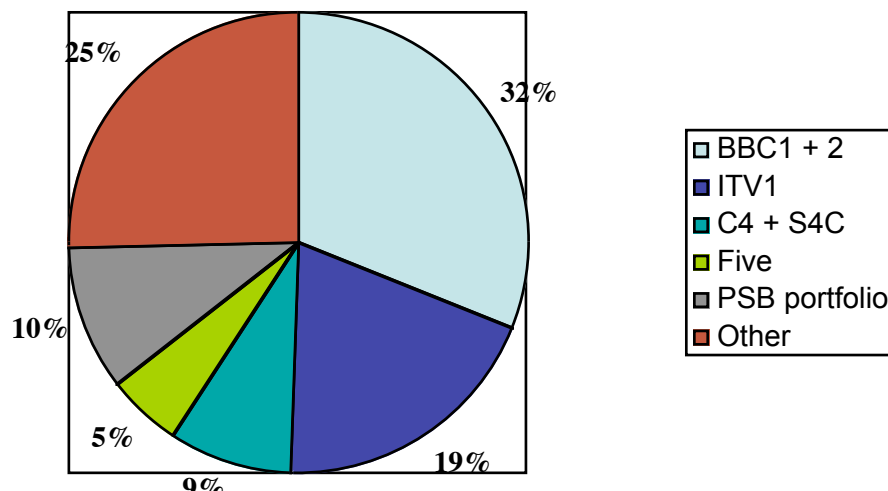
**Current and future investment in UK programmes (£,000s)**



Source: Ofcom PSB Review Phase 1

- 5) The economics of non-PSB broadcasters make it difficult for them to invest in the production of new UK content to any significant level. Even if non-PSB services did invest in their own content, it would be difficult to build consumer awareness of this content due to the PSB broadcasters' majority audience share. The table below details the audience share of the PSB channels and their portfolio services in all homes.

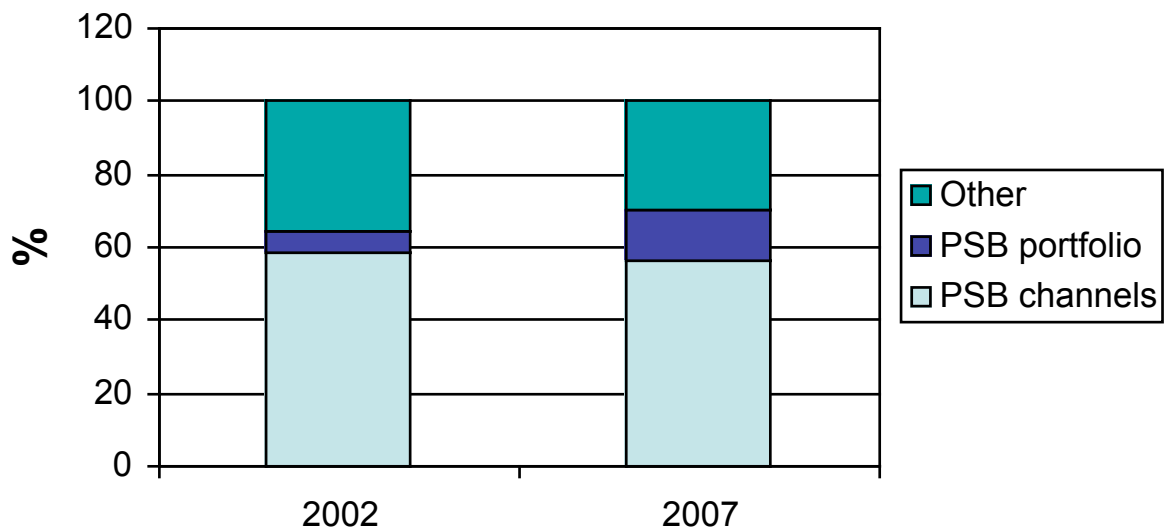
**Audience share of channels (all homes)**



Source: UK Communications Market 2008, Ofcom, page 220, Pact estimates (adjusted data)

- 6) The market power of the PSBs extends into the secondary television market as well as the primary. In multi-channel homes, the combined market share of the PSB main channels and their portfolio channels is now over 70%, and growing. The PSB portfolio services have more than doubled their share of the television market since 2002, as illustrated below.

### PSB and portfolio shares in multi-channel homes



Source: The UK Communications Market 2008, Ofcom, page 152.

- 7) The PSBs' control of the making of, and the broadcasting of, the majority of high profile UK television programmes means they also have the premium VOD rights to that content.
- a. They have exclusive control in perpetuity over VOD rights to television programmes made by ITV and the BBC's in-house production departments; and
  - b. They exercise exclusive control over VOD rights to programming commissioned from and made by independent suppliers before the

introduction of the Codes of Practice/Terms of Trade between broadcasters and producers in the 2003 Communications Act; and

- c. On programmes made by independent suppliers after the Codes of Practice/Terms of Trade, the PSBs exclusively control VOD rights for the period immediately after linear broadcast, which is the most commercially valuable period for VOD exploitation; and they control VOD rights to returning series – the most commercially valuable type of VOD television content – for up to three years on an exclusive basis.
- 8) We have separately supplied the Competition Commission with a detailed breakdown of the Terms of Trade for each PSB and how they affect VOD rights.

#### **Kangaroo's market power**

- 9) A VOD retailer might be able to succeed without one (or even perhaps two) of the programming libraries of the PSBs, but they would probably need access to at least two of these sources to offer a reasonable service. The broadcasters associated with Kangaroo will together control the libraries of three of the four PSBs.<sup>1</sup> Five, the one PSB outside the joint venture, is the smallest commissioner of new UK television content and has the smallest audience share out of all the PSBs.
- 10) Kangaroo will therefore have the ability to deny rival services access to VOD rights to enough compelling content to build critical mass, or to push up the wholesale price of this offering to others.
- 11) There is a precedent for this in the linear broadcast market. The PSBs were previously able to restrict the growth of rival cable and satellite

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<sup>1</sup> We note that BBC Worldwide is not itself a primary commissioner of television programming. However, it has privileged access to television programming made by BBC in-house production departments and by independent suppliers.

services by refusing to licence the use of their content to third parties, with the resulting restriction in choice for the consumer. The Codes of Practice introduced in the Communications Act addressed this by requiring each PSB to draw up Terms of Trade for commissioning programmes from independent suppliers. The Terms of Trade call for the various rights for a programme to be clearly disaggregated, and a share of those rights to remain with the independent producer, who can then licence them to third-party services.

12) The market power of the broadcasters associated with Kangaroo in primary and secondary television is therefore likely to be extended into the VOD market. If this were to occur then the ability of Pact and production companies to negotiate Terms of Trade for VOD rights would be severely curtailed. The current agreements with individual broadcasters were agreed in light of the VOD market at the time and the fact that the broadcasters in question would be operating distinct services. The Kangaroo joint venture will cut across these agreements with individual services.

### **The role of independent content**

13) Unlocking the VOD rights to content created by independent production companies would ensure that a substantial level of popular content is available to the wider market. Independent production companies create approximately half of the new UK television programming commissioned by UK broadcasters. Of the £2.75 billion invested in in-house and external network television originations per year,<sup>2</sup> the independent production sector accounts for £1.35 billion.<sup>3</sup> Most of this content will premiere on the PSB channels – as they are the main commissioners of new UK television programmes, as already noted - and will therefore have a high consumer awareness.

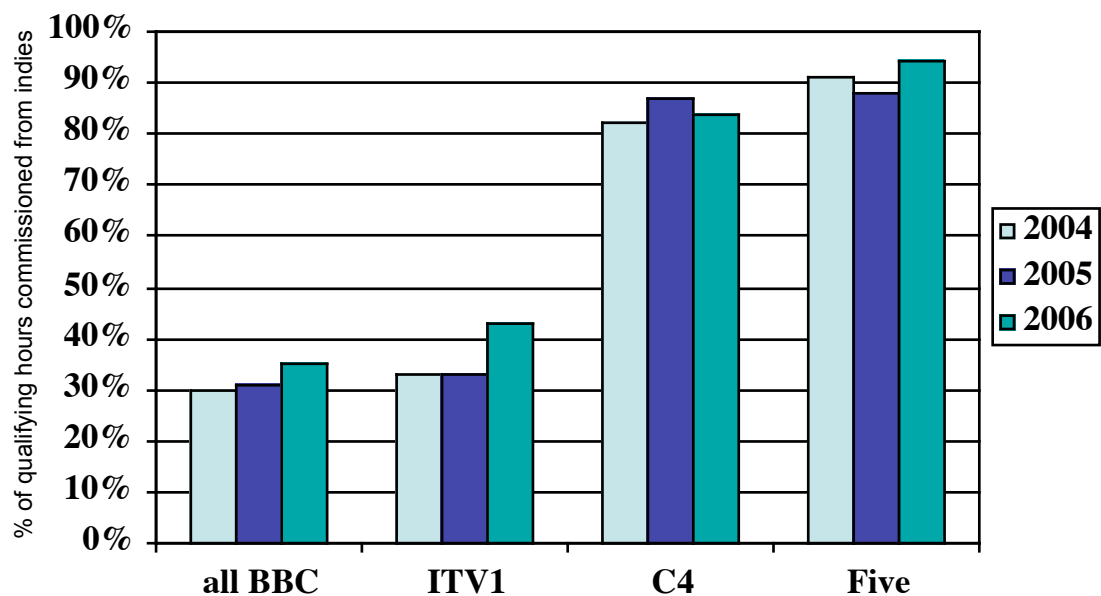
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<sup>2</sup> PSB Review Phase 1: The Digital Opportunity, Ofcom, page 56.

<sup>3</sup> Independent production census 2007/08, Digital-i for Pact, page 18.

14) This independent programming encompasses a broad mix of content by both broadcaster and genre. In terms of the former, television content made by independents accounts for more than 40% of all qualifying BBC and ITV1 content, and more than 80% of all Channel 4 and Five programming.<sup>4</sup>

#### Independent content by broadcaster

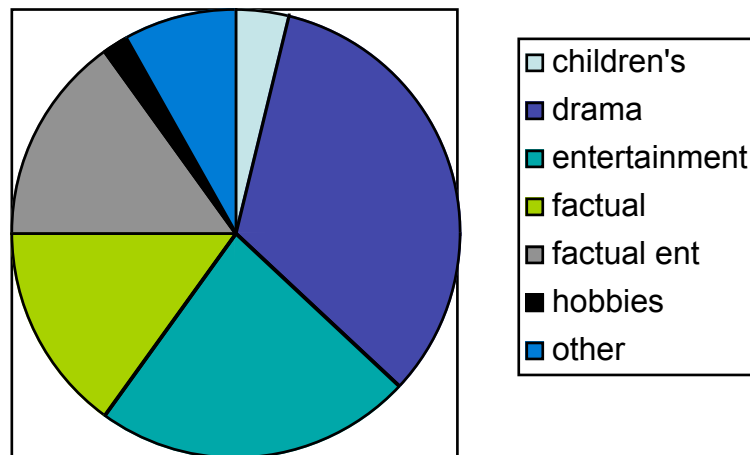


Source: Ofcom

15) Independently-made content is also prevalent in range of genres, as the following table illustrates.

<sup>4</sup> Communications Market report 2007, Ofcom, page 142. BBC figure according to separate data from BBC.

### Distribution of independent commissions by genre



Source: Independent Production Census, 2007/08, Digital-i for Pact, page 21

16) Independent content therefore comprises a broad range of high profile programmes from across all PSBs. Were VOD rights to this content available to the wider market shortly after first transmission on linear television, this would substantially help VOD providers competing with the services run by PSBs to build critical mass.

### Possible solutions

17) Pact supports the development of a healthy, competitive VOD market that can offer UK consumers greater choice and innovation in how they access UK content. We see VOD as one of the key markets that are emerging as a result of digital convergence. Moreover, if popular content is not made available to the public on a commercial basis in a manner that is convenient for them on a broad range of services, the likelihood increases of consumers resorting to illegal downloading or other forms of IP theft.

18) As we have outlined in this submission, content made by UK independent producers can play an important role in helping the VOD market to

develop. Independently-made content accounts for approximately half the market in new UK television programmes, and access to the VOD rights to those programmes will be crucial in enabling a competitive range of VOD services to build critical mass.

19) We see three potential ways to permit Kangaroo to proceed while enabling a substantial level of VOD rights to high profile, independently-made content to be made available to other VOD providers at an earlier stage in the release cycle. This would allow new entrants to acquire VOD rights to a significant amount of high profile content, enabling them to build critical mass and drive competition and innovation, with the resulting benefits to the consumer, who will have a choice of competing VOD services. We outline the merits of the three ways of achieving this below:

**Option 1: Allowing Kangaroo to proceed but mandating that it makes its material available to others at a fair, reasonable and non discriminatory price.**

20) This would require significant ongoing regulatory scrutiny of what is an emerging market. Such a solution could lead to the sector as a whole becoming involved in a series of cases to determine a fair and reasonable price (which is itself difficult to determine in a new market).

**Option 2: Allowing Kangaroo to proceed as long as the provisions for separate rights acquisition promised by the parties are adhered to.**

21) This would not be sufficient to prevent Kangaroo squeezing other operators, nor is it relevant to much of the programming Kangaroo will offer. As we have explained, the broadcasters associated with Kangaroo do not need to separately acquire the rights to most television programming made in the UK on the open market. Those broadcasters will have access to exclusive VOD rights to content made by their in-house production departments; exclusive VOD right to independent programming made before the Codes of Practice/Terms of Trade; and

substantial exclusive VOD rights to new independently-made content as part of the initial primary television commission and applicable Terms of Trade with independent suppliers.

**Option 3: Permitting Kangaroo and requiring that VOD rights after an initial catch-up window be returned to the producer exclusively.**

22) This is our strongly preferred option. If the joint venture were to proceed, the broadcaster partners associated with Kangaroo should not be able to automatically retain exclusive VOD rights for independently-made content as part of the primary commission, particularly returning series (the most commercially valuable type of VOD television content). Each broadcaster is entitled to a catch-up window in support of its initial broadcast, but this should be a limited period of seven days. Any subsequent VOD use beyond this catch-up window should be controlled by the independent producer on an exclusive basis. The producer could then make the VOD rights available to a wide range of competing services, including Kangaroo.

23) We see this option as a relatively straightforward intervention that would incentivise the sector as a whole to find ways to develop the VOD market, maximising the potential for growth and innovation, and so delivering choice for the consumer.