

Impact of the 2003 Communications Act on UK Indie Producers

Report presented to the CMPA
by Olsberg•SPI



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1. GLOSSARY

Broadcaster – an organisation that broadcasts television or radio programmes.

Codes of Practice and Terms of Trade – section 285 of the Communications Act 2003. It is a regulatory mandate by which Ofcom must ensure that the provider of every licensed PSB channel draws up, and from time to time revises, a code of practice setting out the principles it will apply when commissioning independent productions. Terms of Trade with independent producers are negotiated within the framework set out by these codes.

Communications Act 2003 (or, the 2003 Act) – a UK act of parliament that conferred functions on the Office of Communications (now known by its acronym Ofcom). Coming into force in 2003, it superseded the 1984 Telecommunications Act and made provisions about the regulation and usage of electronic communications networks and services and of the use of the electro-magnetic spectrum. It also provided for the regulation of broadcasting and of television and radio services.

DCMS – Department for Culture, Media, and Sport; the Secretary of State for this department is known as the Secretary of State for Culture, Media, and Sport, or the Culture Secretary.

Format – The overriding style and layout of a TV show that can be sold and re-packaged in different territories around the world.

Holdback – The right of a broadcaster to prevent a producer exploiting secondary rights – such as home video – within a specific period of time, often 5 years after initial broadcast.

IBA – Independent Broadcasting Authority, predecessor of the ITC and later Ofcom.

Independent production quota – section 277 of the 2003 Act provides that Ofcom must ensure that, in each year, not less than 25 per cent of the total amount of time allocated to the broadcasting of qualifying programmes included in every licensed PSB channel is allocated to the broadcasting of a range and diversity of independent productions.

Indie – Independent Production Company, a producer of television programmes (and other audio visual content) that does not have a shareholding greater than 25 per cent in a broadcaster or be a body corporate in which a broadcaster has a shareholding of more than 25 per cent.

In-house production – the departments within a broadcaster responsible for making programmes.

IP – Intellectual Property, including the original programme content and the underlying secondary and ancillary content, such as the ideas and formats behind the programme.

ITC – Independent Television Commission, the predecessor to Ofcom.

Ofcom (originally, the Office of Communications) – the communications regulator in the UK, responsible for regulating the TV and radio sectors, fixed line telecoms, mobiles, postal services, plus the airwaves over which wireless devices operate; historically the acronym was presented as OFCOM.

OFT – Office of Fair Trading, the competition regulator.

Pact – The Producers Alliance for Cinema and Television, a trade association in the UK representing independent television, feature film, animation and new media companies.

Post – Post-production

Primary Transmission – The initial broadcast of a television programme.

Producer – General term for production company, independent or otherwise.

PSB (Public Service Broadcaster) – an organisation that produces and/or publishes/distributes television programmes that are broadcast for the public benefit rather than for purely commercial purposes.

Super Indie – a production company or holding company with more than £70m of UK commission income. Generally, these companies own several other, usually smaller, production companies.

The Royal Charter – the constitutional basis for the British Broadcasting Corporation (BBC). It sets out the public purposes of the BBC, guarantees its independence, and outlines the duties of the BBC Trust and the Executive Board. The current Charter runs until 31 December 2016.

VoD – Video on Demand

WOCC – Window of Creative Competition – The WOCC exists to encourage the BBC to “commission the best programme ideas for its audiences regardless of source” and accounts for around 25 per cent of all BBC network television hours. Both the BBC's in-house teams and independent producers can compete ('pitch') for those hours on equal terms. The WOCC works in addition to the 50 per cent BBC in-house guarantee (currently being revised) and 25 per cent set aside solely for Indies as part of the Independent production quota.

2. EXECUTIVE SUMMARY

The UK's independent television production sector is one of the biggest and most successful in the world. Built on a foundation of almost unrivalled creative ideas and programme making-talent, it has benefitted from a number of regulatory interventions that have helped it to grow from a cottage industry in the 1980s to a global superpower. In so doing, a sector has been created that is now worth more than £3 billion (CA\$ 5.67 billion) a year and makes a major contribution to the UK creative economy and exports.¹

Amongst the most crucial of these interventions was the UK government's 2003 Act which established formal Codes of Practice for how each of the country's PSBs (BBC, ITV, Channel 4, and Channel 5) should commission programmes from indies. The implementation of these Codes of Practice led to the introduction of negotiated Terms of Trade, with each PSB having its own agreement.

Under these new Terms of Trade, Indies were able to retain secondary and ancillary rights to IP for the first time, allowing them to exploit them globally. Previously, UK broadcasters owned all the rights to the content that they commissioned from Indies.

The transference of rights to the Indies – on what are described as “reasonable and transparent terms”² – made the production companies more attractive to capital investment and has led to increased market consolidation and significant growth. Some 10 years later, the sector has more than doubled in size to £3bn (CA\$ 5.67bn) annually and – despite a recession between 2008 and 2013 – has an average year-on-year growth rate of 6.6 per cent.³ Exports are now worth more than £1bn (CA\$ 1.89bn) a year and the Indie share of the UK TV production market is 50 per cent.

This report provides further detail on the impact of the Terms of Trade, looking closely at how they were introduced and how they affected Indies, broadcasters and also UK television viewers. It will also consider how Ofcom's ongoing involvement has been crucial to the realisation of these successes.

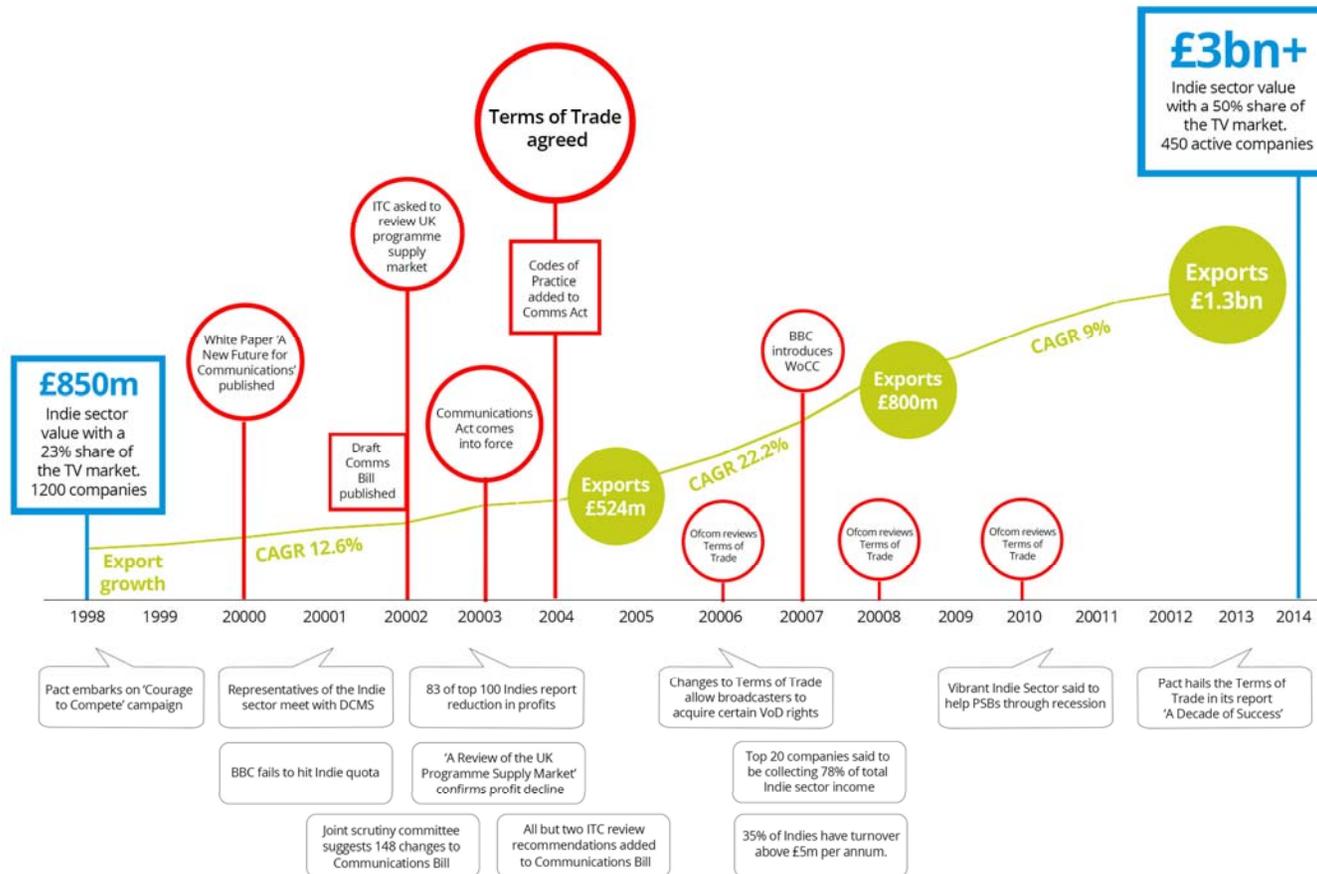
¹ *Pact Census Independent Production Sector Financial Census and Survey 2013*, Oliver & Ohlbaum Associates Ltd (July 2014)

² *A New Age Of UK TV Content Creation And A New Role For The BBC, A Report For Pact*, By Oliver & Ohlbaum Associates Ltd (August 2014)

³ *Pact Census 2013*

2.1. Timeline – Evolution of Terms of Trade, 1998-2014

The evolution of indie-broadcaster Terms of Trade 1998-2014



3. INTRODUCTION

Olsberg•SPI has been asked by the Canadian Media Production Association to produce a report that details the economic performance and contribution of the UK's independent television production sector following the agreement of Terms of Trade, a government intervention included within the 2003 Act. We have also looked at how Ofcom's ongoing involvement has been crucial to realising the benefits of these Terms of Trade for both producers and the PSBs.

The Terms of Trade, a series of agreements negotiated by the four PSBs with Pact, came into force in 2004. They specify how programme commissioning and rights ownership is dealt with when UK independent producers and PSBs work together. Because the PSBs are required by legislation to adhere to these Terms of Trade, they have been a significant contributory factor in the growth of the Indie sector in the years that followed their introduction.

4. CONDITIONS BEFORE 2003

This section considers the conditions for independent producers before the 2003 Act – how they profited from productions, what their relationship with the broadcasters was, and what exports looked like.

4.1. Early days of Indie market 1982-1998

The advent of publisher-broadcaster Channel 4 in 1982, with its committed policy of acquiring or commissioning programmes from a wide range of external sources – rather than producing them itself – marked the beginnings of the Indie sector in the UK.⁴ By commissioning 80 per cent of its output from Indies, Channel 4 gave producers the chance to make television programmes without the need to own or operate a broadcasting licence or be employed by a broadcaster.

While it is fair to say that Channel 4 was the catalyst for a new wave of Indie companies, its inauguration also pioneered the owning of copyright and distribution rights by Channel 4 of the programmes it aired. This limited the participation of Indies to a production fee and overheads while Channel 4 retained the rights for repeat and onward distribution to other broadcasters.⁵

Mirroring the US as it operates today, the UK television production supply market throughout the 1980s and 1990s was very much based on this principle of 'work for hire', whereby a PSB would pay the cost of making the programme, plus a small margin of between 5 per cent and 15 per cent on top. This 'costs plus' business model was sufficient to enable a programme to be produced but it made investment and expansion difficult for Indies.⁶ Efforts to encourage the Indie sector, including government intervention, could be seen throughout this period, but none had the impact of the 2003 Act.

In 1986, the market was given a boost when a government-prompted review on *Financing the BBC* by the Peacock Committee recommended that both the BBC and ITV should be required to increase their proportion of programmes supplied by Indies. The initial proposal was for 40 per cent of programmes to be produced externally in order to act as competition for in-house production. After lobbying from both broadcasters, a final figure of 25 per cent was agreed upon. At first voluntary, this 'independent production quota' became a regulatory requirement for all PSBs in 1993 following the Broadcasting Act 1990.

In 1998 an 'out-of-London' quota was added in order to encourage production in the Nations and Regions of the UK. Although these interventions opened up the market for independent production, the sector remained fragmented with some 1200 production companies – including many hundreds of small, one or two person firms – all operating on very low profit margins.⁷

These first years after the launch of Channel 4 were a difficult period to be an indie producer with Pact stating that at this time: "budgets were micro managed, voluntary agreements ignored and an oligopoly had emerged with the four PSBs being the main buyers dictating

⁴ ITC Notes, *Independent Production*, ITC (2003)

⁵ *The Role Of Terms of Trade In The Development Of The UK Independent Production Sector*, Pact (2011)

⁶ *Ibid*

⁷ *The tipping point: How much is broadcast creativity at risk? An independent report commissioned by the BBC*, The Work Foundation (July 2005)

terms.”⁸ In addition, the BBC and ITV both continued to retain large and dominant in-house production divisions.

The squeeze on Indies during the latter part of the 1990s was compounded by the growing propensity for broadcasters to commission programmes from broadcasters’ related production arms, such as Granada and Fremantle Media.⁹ As such, while the Indie quotas were sufficient to maintain a market, they were widely considered inadequate by themselves to allow production companies to grow as genuinely ‘independent’ businesses.

As Pact states in 2013’s *A Decade of Success* report:

*“The strategies of the integrated producer / broadcasters at this time were relatively clear. For the BBC, there was a strong incentive to retain and defend the scale of its in-house production activities. As a result, its use of the independent sector was designed to meet the regulated quota for qualifying programming (25 per cent of qualifying hours) but not to substantially exceed it. For ITV there was potentially a dual motivation, as retaining a large in-house production division also benefited it in picking up 3rd party commissions from other UK broadcasters. This combination of incentives meant that independent producers were limited in their market share, had few opportunities to grow revenues beyond the mandated PSB quotas and found it difficult to grow basic production margins beyond the industry standard fees of 5 per cent-10 per cent.”*¹⁰

At this time, UK broadcasters owned all the rights to the content that they commissioned, but often didn’t – or couldn’t – exploit them in secondary markets or internationally; this reflected the limited value these rights could generate in comparison to their overall revenue streams. Because the Indies were wholly dependent on commissions from the PSBs for the majority of their income, it was the PSBs that held much of the negotiating power when it came to dictating terms. As such, there was very little scope to discuss production fees or take strong positions in the back end rights, such as post primary transmission.

While the outlook was therefore bleak, there were nonetheless opportunities for producers who were willing to take risks. During the late 1990s, UK producers were seeing increasing success in placing UK developed formats with overseas broadcasters, particularly in the US. It was felt that this was seen as a trend that could be exploited if market conditions were improved.

4.2. The quality of productions being generated in the UK before the 2003 Act

While the quality of British television programmes has never been in question, the Indie production sector’s ability to make the most of the talent and ideas was an issue prior to the adoption of the 2003 Act and the negotiation of Terms of Trade agreements. Prior to the 2003 Act, the Indie sector in the UK was valued at £850m and had a 23 per cent share of the TV market.¹¹ In the five years prior to the Act, the reported revenue derived from UK TV exports grew by an average of 12.6 per cent annually.¹²

⁸ The independent TV production sector: a British success story, Pact 2014

⁹ *The Role of Terms of Trade*

¹⁰ *A Decade of Success, a report commissioned by Pact*, Oliver & Ohlbaum Associates (2013)

¹¹ *Ibid*

¹² *The Role of Terms of Trade*

These unexceptional figures do not, however, reveal the true story. In 2002, two reports highlighted an ongoing malaise. According to a 2002 survey of the financial health of the UK top 100 Indies entitled *Trouble at the Top*, as many as 83 of the top 100 companies in the UK indie production sector saw their financial performance slip between 1999 and 2002, with 36 losing money and 20 of the largest players said to be "heading for trouble."¹³ This was happening in spite of the sustained boom of the late-1990s/early 2000s, a fact underlined by Ofcom's 2006 *Review of the Television Sector*, which highlighted that "changes in the Terms of Trade appear to have made investors more confident about the asset bases of production companies, and external finance has started flowing into the sector."¹⁴ This implies, of course, that such transactions were unusual before the 2003 Act, as the asset bases of the production companies were not secure.

Another report from the same year blamed a lack of professionalism within television production for the indie sector's failure to exploit its obvious creative talent. Grant Thornton's *What Happened Next?* report suggested that poor business and financial management were to blame for the slowdown. That was refuted by one industry spokesperson who said: "I would defy a financial genius to make money out of a UK-focused independent TV production business in current market conditions."¹⁵

Many producers were overtly not happy with the state of affairs in the early-2000s. RDF Media chief executive David Frank said: "the financial state of the independent sector is a disgrace considering how important it is perceived to be in terms of bringing hits to the screen. The sector's fragility is such that it wouldn't take much for some of the biggest players to go under."¹⁶ Jeff Foulser, chief executive of The Television Corporation, which owned Mentorn and Sunset & Vine, added: "as a public company we face a very different issue: we have to try to grow our business 15 to 20 per cent a year and there is no way we can do so in the UK, which is why we have expanded into international areas and make programmes that can travel the world."¹⁷

In 2000, British TV Exports were valued at less than 10m, reflecting the limited value broadcasters generated from exports during their period of content ownership; exports have accelerated massively since this point.¹⁸ The data from O&O's 2013 report, *A Decade of Success*, clearly show the impact of Terms of Trade in addressing this challenge: between 2004 and 2008, the compound annual growth rate of exports was 22.2%, a significant increase from the growth rate before this period which, as noted above, was 12.6% in the five years prior to the adoption of the 2003 Act.

¹³ *Trouble at the Top*, Plimsoll Publishing (2002)

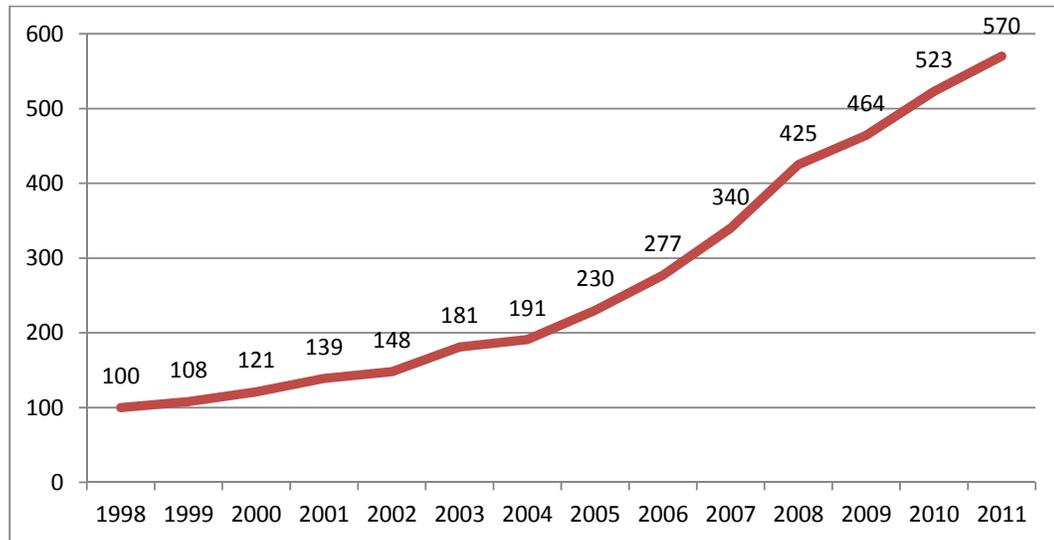
¹⁴ *Review of the television production sector*, Ofcom (2006) p.68

¹⁵ "Independent Production - Indies' bad trip", in *Broadcast* (November 2002)

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ *A Decade of Success*; it is not clear from our investigations why the PSBs' focus on exports was so low, as further value might have been generated from these IP

Figure 1 - Growth in UK TV Exports, Indexed 1998-2011 (1998=100)

Source: A Decade of Success, p. 11

4.3. Who did what to change this?

Some lobbying work took place prior to 2000, including a Pact campaign called *Courage to Compete*, built around a document, published in November 1998, that suggested to the OFT that broadcasters had “excessive power” in programme supply deals.¹⁹ However, this had little impact, and on 12 December 2000 the Government published its White Paper – *A New Future for Communications*, a main policy proposal of which was the establishment of a single regulator to govern across the communications sector: Ofcom.

The Secretary of State for Culture, Media and Sport Chris Smith said in Parliament in response to this White Paper that: “we need to update the framework of regulation, and put in place a system that recognises the current fast-changing picture and can cope with the inevitability of change in years to come. The White Paper prepares us for that future, and will set up modern regulation for a modern world.”²⁰

One of the White Paper’s main thrusts was that it was designed “to make the United Kingdom home to the most dynamic and competitive communications and media market in the world.”²¹ However, no mention was made of the struggling independent production sector.

In May 2002, the Secretary of State for Trade and Industry, Patricia Hewitt, and the Culture Secretary, Tessa Jowell, jointly published a draft of the Communications Bill. While the independent production sector was included – with production quotas safeguarded – no other mention of the sector was made.

Pact chief executive John McVay said at the time that the needs of content producers had been overlooked. He stated: “the problem is that production is regarded as little more than a service industry for broadcasting and this draft bill does nothing to guarantee the viability of

¹⁹ “Pact allays quota fears”, in *Broadcast* (2001)

²⁰ Communications White Paper, HC Deb 12 December 2000 vol 359 cc480-94, Oral answers to questions

²¹ *A New Future for Communications*, Ofcom White Paper (December 2000)

producers – in-house or independent. Revisions to the bill need to clarify Ofcom's role in promoting competitiveness within the industry.”²²

Pact wasn't alone in its disappointment. Endemol UK chairman Peter Bazalgette added that the government was obsessed with distribution rather than programme-making itself, stating that “if she (Tessa Jowell) wants real competition, the bill should look at the programming supply market as much as competition between broadcasters.”²³

Pact, through McVay and its then chairperson Eileen Gallagher, forcefully advocated throughout 2002 and 2003 for a fairer deal for producers. In large part thanks to their efforts, a major breakthrough came in the summer of 2002, when a Joint Scrutiny Committee, chaired by Lord David Puttnam came up with 148 recommended changes. These followed three months of discussion and included the need to examine and bolster the programme supply market, and in particular, the BBC's role within it.

Pact welcomed the committee's findings with Gallagher, stating: “what the committee is proposing in terms of content regulation is historic. Regulation to date has failed to spot a very real problem in the UK content supply market – that there is no market. Now we could see a new era where we all work together.”²⁴

Just weeks after Lord Puttnam's recommendations were published, in August 2002, the now-Culture Secretary Tessa Jowell, asked the ITC to review the overall economic health of the UK programme supply market.²⁵ Published in November 2002, the ITC's *A Review of the UK Programme Supply Market* confirmed that the long-term growth of the UK independent sector had reversed between 1998 and 2001, with combined profits of the top 50 independent producers in the market declining from £8.2m in 1998 to £3.5m in 2001.²⁶

The report stated: “unfair pricing and lack of rights retention in turn limits the ability of independent producers to raise capital, and stops them from gaining the scale and scope that might eventually give them equal bargaining power to major broadcasters in areas other than where they control some key talent – in which case most of the returns end up with the talent.”²⁷ It also agreed that Indie quotas were deemed vital but insufficient in terms of intervention.

Gallagher added retrospectively: “the 25 per cent independent production quota was being used cynically as a ceiling on independent ambitions rather than the safety-net floor it was intended to be.”²⁸ At this time, it was also revealed that the BBC did not hit its legally-defined indie quota of 25% between financial years 2000/01 and 2002/03.²⁹

The ITC programme supply review suggested various “measures to strengthen the longer term viability and growth potential of the independent production sector”, including that:

“All public service broadcasters to develop Codes of Practice to provide a clear high-level framework for their dealings with independent producers, and Ofcom to take forward the

²² “Getting a piece of the action”, in *Broadcast* (May 2002)

²³ *ibid*

²⁴ “Pact chair Gallagher applauds Puttnam report”, in *Broadcast* (July 2002)

²⁵ *ITC Notes, Independent Production*

²⁶ *A Review of the UK Programme Supply Market*, ITC (2002)

²⁷ *ibid*

²⁸ “In my view - Eileen Gallagher”, in *Broadcast* (February 2003)

²⁹ *The Tipping Point*

investigation into the programme supply market and determine remedies to address competition concerns, likely to include:

- *"Primary rights to be bought separately from all other rights*
- *"An indicative tariff for different programme genres*
- *"Distributors connected with broadcasters to bid on an arm's length basis for any secondary or tertiary rights from independent producers"³⁰*

Tessa Jowell took "very seriously" the suggestions for strengthening the hand of Indies, and added that: "I will make sure that after considering the report and hearing the reaction from industry and Parliament, we will bring forward any changes at the appropriate point in committee."³¹

³⁰ Independent Television Commission. A Review of the UK Programme Supply Market, London, 2002

³¹ Broadcasting and the Communications Bill (Bill 6 2002-03) (29 November 2002)

5. PASSAGE OF THE 2003 COMMUNICATION ACT

5.1. Amendments to the 2003 Act to strengthen the Indie sector

In January of 2003, Culture Secretary Jowell accepted all but two of the recommendations made by the ITC in its programme supply review. This meant a total of 61 amendments were made to the Communications Bill, all being designed to bolster the indie market.³²

Announcing her decisions, Jowell said: "I am recognising the essential role that the independent sector will have to play in the future of broadcasting in this country. I want to provide the help that the independent sector needs to grow and flourish. I want to protect it, but not mollycoddle it. As far as the BBC is concerned, I want to make sure that the licence fee really does become venture capital for this important sector of broadcasting."³³

Pact's John McVay told *Broadcast* magazine: "this is what we wanted. It means a much fairer system for an indie community that has been hampered for years by broadcasters believing that all the value of programmes should reside with them."³⁴

The intervention from Jowell prompted discussions on Terms of Trade that, after much wrangling, came into force in the summer of 2004. These followed the initial involvement from Ofcom with regard to the Codes of Practice outlined in the 2003 Act.

5.2. Ofcom and the 2003 Act

Ofcom's role within the management of the Codes of Practice was outlined through section 285 of the 2003 Act, *Code relating to programming commissioning*. This required that codes setting out the principles to be adopted during the commissioning of independent productions were to be developed by each PSB as part of their licence terms, and that Ofcom was given the role of ensuring that:

- Such codes were appropriate for the conditions of the licence;
- These codes were complied with by the PSB; and,
- They were revised according to guidance issued by Ofcom as required.

Within this framework, Ofcom was given a variety of specific tasks, including:

"(a) that a reasonable timetable is applied to negotiations for the commissioning of an independent production and for the conclusion of a binding agreement; ☐

"(b) that there is what appears to OFCOM to be sufficient clarity, when an independent production is commissioned, about the different categories of rights to broadcast or otherwise to make use of or exploit the commissioned production that are being disposed of;

"(c) that there is what appears to OFCOM to be sufficient transparency about the amounts to be paid in respect of each category of rights; ☐

"(d) that what appear to OFCOM to be satisfactory arrangements are made ☐ about the duration and exclusivity of those rights; ☐

³² *In my view - Eileen Gallagher*, *Broadcast* magazine, February 2003

³³ "Jowell backs indies", in *Broadcast* (January 2003)

³⁴ "Pact claims victory in fight for rights", in *Broadcast* (January 2004)

"(e) that procedures exist for reviewing the arrangements adopted in accordance with the code and for demonstrating compliance with it; 2

"(f) that those procedures include requirements for the monitoring of the application of the code and for the making of reports to OFCOM; 2

"(g) that provision is made for resolving disputes arising in respect of the provisions of the code (by independent arbitration or otherwise) in a manner that appears to OFCOM to be appropriate."³⁵

Ofcom's governance in this regard was to follow its general duties as set out in section 3 of the 2003 Act, including the development of competition, the promotion and use of effective self-regulation, and the encouraging of investment and innovation.

Though it was not guaranteed that Terms of Trade were developed as a result of the Codes of Practice framework the legislation mandated, the negotiation process led to this being the best outcome for achieving the frameworks required through the legislation.

It is clear, furthermore, that the legislation provided for a strong – though arms-length – regulatory environment within which the PSBs were to operate. Though there was a preference for self-regulation, it was made clear to the PSBs that Codes of Practice were to be a non-negotiable part of their licences, and that if they did not negotiate in good faith, they were to be sanctioned. The requirement for strong oversight had been underlined by the BBC's failure to meet its independent production quota in the three years prior to the 2003 Act, a fact which had taken some years to come to light.

³⁵ Communications Act 2003, §285 (3)

6. SUMMARY OF UK PSB TERMS OF TRADE

The new Terms of Trade “enshrined the principle that by commissioning an Indie to produce a programme, the broadcaster took no ownership over the programme produced.”³⁶ The commission therefore became the purchase of a licence that included a package of primary rights, typically lasting five years, allowing for a defined number of broadcasts. It also specified costs for extra repeats during the licence period. All other rights, including distribution rights, remained with the producer, and all rights reverted to the producer at the end of the licence term.³⁷

Ofcom acts as an independent watchdog and is mandated to engage to break a deadlock where negotiations for the Terms of Trade become stuck, a fact explored in more detail below.

6.1. Ofcom’s role in initial negotiations

Articles written around the time of the initial Terms of Trade negotiations in 2003-2004 underline the active role which Ofcom was expected to play in managing the process. One of the PSBs, ITV, was undergoing a merger at the time the 2003 Act was passed, leading to a delay in the start of negotiations.³⁸ Despite an April 2004 deadline for the conclusion of negotiations, ITV did not even submit its initial documents to Pact until May, and negotiations had not started by late-July.

In this context, John McVay, chief executive of Pact, threatened to make a formal complaint to Ofcom to intervene in the process, suggesting the behind-the-scenes role which Ofcom was to take in the negotiations, in line with its statutory position.³⁹ The nature of this role was also shown days later when it was revealed that Ofcom had intervened on behalf of Pact to sort out ‘fundamental problems’ in the negotiations with the BBC. This intervention was a response both to the delays in the Terms of Trade talks and to the fact that the BBC had missed its legal mandate to have 25% indie productions three years in a row.⁴⁰

In both of these cases, Ofcom ensured that Codes of Practice were developed without directly engaging in the negotiations – its mandate was rather to facilitate (and, where required, force) the PSBs and Pact to negotiate in good faith. It is also notable that, in both of these areas, it was required that a complaint be registered with Ofcom to force their intervention. These examples also clearly show that where negotiations were seen to be stalling, Ofcom would intervene to put them back on track, and took its mandate to ensure that deals were concluded very seriously.

Consultees have advised that this was, indeed, the role Ofcom took – they weren’t involved in the Terms of Trade negotiations themselves, but did issue the Codes of Practice which created the framework for these negotiations.

6.2. Review and renewal

The Terms of Trade have been reviewed periodically since their initial adoption. They were assessed by Ofcom in 2006, 2008 and 2010 and another appraisal is currently ongoing as part

³⁶ *All Grown Up: Cash, Creativity and the Independent Production Sector*, Mediatique Limited, (21 August 2008)

³⁷ *ibid*

³⁸ ITV is used as the title of the broadcaster both before and after the merger, but technically before this it represented a coalition of quasi-independent regional broadcasters; from 2004, ITV plc operated as a single company

³⁹ ‘Pact warns ITV over Terms of Trade’ in *Broadcast* (29th July, 2004)

⁴⁰ ‘Ofcom intervenes in BBC talks’, in *The Guardian* (30th July, 2004)

of the next Ofcom PSB Review. These reviews follow the terms of reference set out in the legislation, above. They have also evolved through market negotiation on a regular basis, while the relevant Ofcom guidance (noted in 5.2, above) is also subject to updates whenever appropriate, also as required in the legislation. This system of review and renewal has led to significant changes in the Terms of Trade for all broadcasters. For example in 2006 when a change enabled broadcasters to acquire certain VoD rights as part of their package of rights.⁴¹

The nature of this regular review process was exemplified through Ofcom's 2006 *Review of the television production sector* report; this stated that, with regard to the Codes of Practice framework (which incorporates Terms of Trade):

- *"We do not seek to present a prescriptive ruling or decision in this document. We will consider the consultation responses on this issue, following which we will set out our conclusions in our policy statement in 2006"*
- *"Specifically, we expect industry stakeholders to inform Ofcom by the end of the consultation period whether they expect to resolve these issues through commercial negotiation – so intervention by Ofcom would not be needed. We would also expect stakeholders to define a reasonable timetable within which these issues will be resolved"*
- *"If, by the end of this consultation period, it is clear that the industry is unable to agree that these issues can be successfully resolved Ofcom will have little choice but to conclude in its policy statement that intervention will be needed through changes to the Codes of Practice. Under this outcome, a separate process will then need to follow"*
- *"Specifically, before the Codes could be changed, Ofcom would need to issue new Codes of Practice guidance. Ofcom would therefore need to run a separate and additional consultation process with stakeholders on any proposed changes to the guidance. Moreover, we highlight that Ofcom's guidance will only contain general guidance – we will not dictate specific terms. If required, we envisage that the initiation of this separate process could coincide with the publication of our policy statement in 2006"*
- *"Amendments to the Terms of Trade between broadcasters and independent producers would only be necessary once any required changes to the Codes of Practice had been completed"⁴²*

This underlines the hands-on approach which Ofcom has taken with regard to the management of the Terms of Trade in the interpretation of their mandate – while there is a preference for parties to negotiate, where such negotiations are not successful, the regulator will act to force the issue.

While Ofcom does not actively manage the Terms of Trade, these are a condition of the PSBs' licence (through the Codes of Practice), and Ofcom are required to respond to any complaints. Such complaints can be made by any producer who feels these Codes have been breached. Where upheld, such complaints can lead to fines and, in cases of major breach, the withdrawal of a PSB's licence.

⁴¹ *The role of regulation / Terms of Trade in the development of the UK Indie sector*, Oliver & Ohlbaum Associates for Pact (2011)

⁴² *Review of the television production sector* (2006) pp. 11-12

A report from the Culture, Media, and Sport Select Committee acknowledged the success of Terms of Trade in “supporting and growing a diverse supply of content production in the UK.” However, it also recognised “claims that there is now too much of an imbalance in the industry in respect of the size and influence of production groups following the recent consolidation and growth in foreign ownership of providers.”⁴³

The report also highlighted that seven of the biggest 12 Indies are now vertically integrated with broadcaster-owning groups that have significant global scale. It noted that “as well as there being a need for continued support for small and medium-sized independent production companies, we recognise the increasing importance that ownership of content is playing for broadcasters given the rise in on-demand viewing and download-to-own services. Such change means the traditional public service broadcasters' business models are changing. We recommend that the Terms of Trade should be reviewed as part of the Charter Review process.”⁴⁴

Pact’s perspective on this has been clear that so long as the production companies meet the definition of Indies, there is no reason for Terms of Trade to be weakened. It is also possible that – given the broader arguments on Charter Review, in particular the scope of the organisation and the future of the licence fee – this represents a tactical intervention regarding the relationship between indies and the BBC.

⁴³ *Culture, Media and Sport - Fourth Report - Future of the BBC* (February 2015)

⁴⁴ *ibid*

7. CHANGES AS A RESULT OF THE MANDATED CODES OF PRACTICE

This section describes what changed in the business model for the broadcasters, and what impact it had on the shape of the sector, particularly in facilitating Indie consolidation.

7.1. Shape of the market

Once typified by a very small handful of strong brands and a long tail of micro companies, the Indie sector went from a “lifestyle” business before 2003 to the heavily professionalised, bigger and more highly consolidated market of companies that it is today.

The change to personnel was particularly marked. Before the 2003 Act, many Indies were owned and staffed by “refugees” from the major broadcasters.⁴⁵ Just ten years later, there are now many senior programme makers whose experience has been gained solely in the independent production sector. There is also a large movement of talent between production companies, where previously it had mainly been from broadcasters to Indies.

With rights exploitation now possible, private sector investors (often generalised as ‘the City’ in UK vernacular) became interested in content-owning Indies, and a number received external investment through both public listings and private equity. The largest single deal affecting the UK market was the purchase of Endemol by a consortium that included its original founder, John de Mol. Backed by the investment bank Goldman Sachs, de Mol paid Telefonica €3.5bn (approximately £2.5bn) to regain ownership. The sale of super Indie All3Media to Permira for £320m was another typical example of a private equity investment following the Terms of Trade agreement.

With external stakeholders seeking consistent top-line growth and improved margins, Indie owners began to see the importance of scale; as such, a flurry of mergers and acquisitions followed. Shine’s purchase of three Indies – Kudos Film and TV, Princess Productions and Firefly – for an aggregated £65m was considered by many to be amongst the most significant.

As Mediatique’s independent review, *All Grown Up: Cash, Creativity and the Independent Production Sector* reported in 2008: “this consolidation can be marked across the 14 years from 1993 to 2007 as the proportion of the market represented by the largest companies steadily increased. In 1993 19 per cent of companies had a turnover greater than £5m per annum. In 2007 that figure was 35 per cent.”⁴⁶ By 2007, it continued, the top 20 companies were collecting 78 per cent of total sector revenues, with 100 of the tracked Indies responsible for 98 per cent of total revenues.

In 2015, following further significant acquisitions and consolidation in the UK production, it is estimated that there are now approximately 450 active Indies. In 2000 there were 1200, generating significantly fewer successful productions, and much lower revenues.⁴⁷

7.2. Impact of Terms of Trade the consolidation of Indies

As a result of this consolidation, the UK Indie market has become somewhat polarized, with a clutch of large companies at the top end and a long tail of small Indies at the other. The ability

⁴⁵ *All Grown Up*

⁴⁶ *ibid*

⁴⁷ *The independent TV production sector: a British success story*, Pact (2014)

of those small Indies to compete effectively is open to some debate. However, with low overheads they are nimble and versatile, and where well managed can survive droughts of work. The more problematic element of consolidation has been the impact on medium-sized companies.

The *Manager Perceptions of the Impact of Consolidation on the UK Independent Television Production Industry* report by North and Oliver, an academic review published in 2009 stated: “our research findings would suggest that medium sized independent production companies with substantial staff and overhead costs, are likely to be most at risk if they are not acquired.”⁴⁸ The research also identified a number of micro factors that drove an increase in acquisition and divesture. It added that “the benefits of size and scale were evident to the Super Indies. The coercive power with television broadcasters that size brings, combined with the leverage of relationships scale provided the broadcasters’ with the ability to de-risk the commissioning process by employing producers, who through scale, could offer security, and access to specialist programme genres.”⁴⁹

By this, the authors underline that Terms of Trade has opened greater possibilities for indies who as a result are now able to develop scale, which includes a shift in the balance of power from the broadcasters to independent producers (at least in some limited aspects.)

7.3. A shift in the balance of power

With rights came the potential for power – whereas in the 1980s and 1990s the broadcasters were considered the dominant force in British television, with the adoption of Terms of Trade agreements, it was predicted there would be a shift. As suggested in 2005 in a report commissioned by the BBC, “independent TV production companies, empowered by their ownership of programme rights that has tipped the balance of power in their favour in relation to broadcasters, are set to become the play-makers of British television.”⁵⁰

Broadcasters were nervous of this potential swing in the balance of power. A senior Channel 4 executive, also speaking in 2005, said: “many independent producers have not yet recognised the degree to which the landscape has changed and the degree to which the current broadcasting system benefits, and will continue to benefit, them.”⁵¹ However, according to the DCMS, by 2009, some five years after the Terms of Trade were agreed, most power still resided with the broadcasters. It argued that a TV show without a commission, and therefore an attached broadcaster, was in most cases nothing more than an idea.⁵²

The DCMS’s 2009 report, *Digital Britain: Assessing the policy framework for Public Service Rights* said that, “it would appear that, while independents are now in a stronger negotiating position than before the passage of the Communications Act in 2003, it is nevertheless still the case that broadcasters have powerful levers available to them: not only the decision to commission in the first place, but also the decision whether or not to relax the hold-back.”⁵³

⁴⁸ “Manager Perceptions of the Impact of Consolidation on the UK Independent Television Production Industry” in *Journal of Media Business Studies* vol. 7, no.2 (2010) p. 34

⁴⁹ *ibid*

⁵⁰ *The Tipping Point*

⁵¹ *ibid*

⁵² *Digital Britain: Assessing the policy framework for Public Service Rights, Scoping and Discussion Document*, Perspective Associates for BIS/DCMS (April 2009)

⁵³ *ibid*, under the Terms of Trade, the broadcaster has a right to a five-year holdback, but can choose to reduce or waive this without impacting the other mandatory elements of the deal

For its part, Pact continues to refute any suggestion of a shift in power. It said in its response to Ofcom's PSB Review in 2015 that, "despite ten years of consolidation, none of the large indie groups has more than a 15 per cent share of annual output hours (BBC in-house has 21 per cent and ITV Studios 18 per cent respectively.)"⁵⁴

7.4. In-house production

The role of in-house production in the face of competition from bigger (and potentially better-placed) Indies is again under scrutiny with the BBC currently considering how best to operate its production departments ahead of the next charter renewal.

Following the introduction of Terms of Trade it was stated in 2005 that: "once the independent production sector is larger than BBC in-house production, with a capacity to produce in every genre and out-producing it in some, the BBC will reach a tipping point at which it will find it very difficult to justify in-house production capacity on even its reduced relative scale. At this juncture the independent producers may well become a powerful lobby to eliminate in-house production altogether."⁵⁵ It is worth noting, though, that the report which stated this was commissioned by the BBC.

Nonetheless, this last point may ultimately come to pass, with the current BBC director general Tony Hall working towards the inauguration of a commercialised BBC Production unit, 'BBC Studios', that can work on the open market for other broadcasters.⁵⁶ This would be undertaken at the same time as a more radical opening of the production environment for the BBC's non-quota programmes, thorough which it is proposed that indie producers will have the right to compete for the majority of BBC production. These two proposals have been made in advance of the 2017 renewal of the BBC's Royal Charter, discussions for which are due to start shortly, following the recent UK General Election.

⁵⁴ *Pact submission to Ofcom's third review of public service broadcasting: Public Service Content in a Connected Society* (February 2015)

⁵⁵ *The Tipping Point*

⁵⁶ "Tony Hall unveils BBC Studios Plans", in *Broadcast* (March 2015)

8. IMPACT OF BRITISH PRODUCTIONS ABROAD

This section examines how Terms of Trade, and other key factors, changed the export potential of British productions.

8.1. Exports

The growth in exports is the biggest single change to the Indie sector since 2003, with a number of key trends evident as a result of the Terms of Trade:

- UK TV exports (independent and in-house) rose 39 per cent between 2003 and 2008 to reach £800m (CA\$ 1.51bn) a year.⁵⁷
- Prior to 2003, revenue from UK television exports grew by 12.6 per cent annually. From 2004 to 2008, annual export trade growth increased by 22.2 per cent year-on-year.⁵⁸
- In 2011, exports of UK television content were worth more than £1.3bn (CA\$ 2.45bn) per year, an increase of 250 per cent on 2004's equivalent figure of £524m (CA\$ 989m).⁵⁹
- Carnival Films' *Downton Abbey*, which airs in America on the PBS channel, is the most watched British import ever. It is also shown in 250 other territories, including Russia, Korea, the UAE and China, with viewing figures in China alone having been estimated at anything up to 100 million.⁶⁰

This exceptional growth in exports is the clearest indication of how the Terms of Trade have "increased competition in the exploitation of UK television IP."⁶¹ Cat Lewis, the chief executive of the indie Nine Lives Media underlines this, stating in 2013 that the introduction of Terms of Trade meant the difference between success and failure for many production companies.

She said: "I set up Nine Lives Media in Manchester in September 2007 and despite the recession I've steadily built the company. I now employ 26 production staff. I couldn't have done any of it without the Terms of Trade. My business has only succeeded because some of the programmes we make sell very well around the world. We use this money to help pay our annual overheads and to invest in development. We now make programmes directly for an American channel, but because the Terms of Trade work so well for TV producers here in the UK it's always our first choice to make programmes for British broadcasters."⁶²

International rights exploitation is so important to Indies that it has been suggested that losing them would lead to "170 profitable independents becoming loss making and therefore at risk – which in terms of turnover would represent the majority of the sector due to a skew towards larger companies."⁶³

8.2. Formats

Following the introduction of Terms of Trade, internationally recyclable TV formats became a major focus. Though there were some notable success before 2003 – with *Who Wants To Be A*

⁵⁷ UKTI/Pact annual exports survey, TRP (2008)

⁵⁸ *The role of regulation / Terms of Trade*

⁵⁹ UKTI/Pact annual exports survey

⁶⁰ "Imperial gogglebox: TV is one of Britain's most successful exports", in *New Statesman* (June 2014)

⁶¹ *The role of regulation / Terms of Trade*

⁶² Speaking at the Royal Society of Arts in London at a Pact event to mark the 10th anniversary of the Communications Act 2003 (July 2013)

⁶³ *Terms of Trade Impact Assessment*, Ingenious Consulting for Pact (2009)

Millionaire? being a prime example – the Terms of Trade accentuated and opened up further opportunities for format sales.

As a result, the UK is currently responsible for more than half of the TV formats in the world, including *The X Factor* (re-versioned in approximately 45 countries), *Strictly Come Dancing* (50) and *MasterChef* (40+). The format for *Who Wants To Be a Millionaire?* has been rolled out in more than 100 territories.⁶⁴ However, although such formats were seen as the “Holy Grail” by many connected to the production sector, the pursuit of success in this area of IP was sometimes to the detriment of domestic programming.

In the 2005 BBC-commissioned report *The tipping point: How much is broadcast creativity at risk?* it was stated that: “while many independents are very small companies representing lifestyle choices, for the larger companies the rights revolution has transformed their incentive structure. Some of the larger independents have actually turned down the opportunity to make one-off films for Channel 4 because they did not feel they had the potential to become returnable formats. The top twelve independents, we were told, now have the power to dictate terms and wanted to make television whose rights would be exploitable internationally.”⁶⁵

Nonetheless, others see the expansion of the formats business as an outcome of UK creativity, and a positive outcome of the Terms of Trade-related obligations established through the 2003 Act.

Liz Murdoch, the founder and chief executive of Shine Group, in her MacTaggart speech at Edinburgh in 2012 illustrated how the Terms of Trade affected the formats business. She said: “UK Indies are inherently a highly efficient and scalable business model. The global format market which burst forth at the turn of the century gave us, almost uniquely in the world, the opportunity to capitalize on our intellectual property and do the one thing this island has proven time and time again that it is brilliantly able to do – to build sustainable financial health through export. The Terms of Trade allowed us to attract the capital to expand our businesses and it proved that rights owners without guaranteed advertising or license fee funding are better at exploiting rights than broadcasters.”⁶⁶

⁶⁴ *Imperial gogglebox*

⁶⁵ *The Tipping Point*

⁶⁶ Video & transcript: Elisabeth Murdoch's MacTaggart Lecture, www.edinburghguide.com (August 2012)

9. IMPACT FOR PSBS

This section describes the impact of Terms of Trade on the PSBs, noting that they were against the changes at the time, but there is a perception that the long-term impacts for broadcasters have been positive.

9.1. Initial Response

The Terms of Trade were never going to sit entirely comfortably with the established broadcasting order. This could be seen before the 2003 Act was passed when, in 2002, then BBC director general Greg Dyke infuriated independent producers by telling Lord Puttnam's scrutiny committee that the corporation did not exist to "make independents rich". He later clarified his stance, stating: "I'm very sorry that I said it wasn't my job to make independents rich. What I should have said [was] it wasn't my job to make you rich, it was your job to make you rich."⁶⁷

The PSBs argued that they were responsible for "creating the initial value enjoyed by Indies through the primary commission, and that the secondary and tertiary value was wholly dependent on this initial investment." Consequently, they were unhappy with rights agreements that allowed independents to exploit IP that would potentially reduce the value of the initial rights window.⁶⁸

The BBC in particular was reticent to accept the changes, citing a need for a change to the definition of 'independent', reflecting the consolidation in the sector which the Terms of Trade created. It has been repeatedly stated – with regard to both Terms of Trade and quotas – that the current definition is "no longer effectively targeting the businesses which need it most and therefore failing to stimulate the growth of SMEs."⁶⁹

Following publication of the ITC's *Review of the UK Programme Supply Market*, the BBC said: "we agree that Ofcom should agree and monitor Codes of Practice which are drafted by the broadcasters themselves. Recommendation to apply quotas to BBC ONE and BBC TWO individually is manageable. Agree that the definition of 'independent' should be amended to include major players owned by companies which don't hold a UK broadcasting licence, such as Endemol. Disappointed that the ITC did not go further to include companies such as Fremantle Media which are being unfairly penalised for attracting investment simply because that investment is coming from a company which has other UK broadcasting interests."⁷⁰

9.2. The BBC reaction to the 2003 Act

One of the BBC's arguments against the Terms of Trade centred on there being no cost advantage to the BBC in sourcing production externally.⁷¹ With only 15 per cent of International rights income now accrued to the BBC following the introduction of Terms of Trade, it was claimed that it was losing access to an otherwise important revenue stream. As such, the only advantage to the BBC was having access to high-quality creative ideas that would otherwise pass them by.

⁶⁷ 'Edinburgh soundbites', in *The Guardian*, (August 2003)

⁶⁸ *All Grown Up*

⁶⁹ 'BBC questions 25% indie quota' in *Broadcast* (9th March, 2015) – this represents the most recent example of an oft-made comment

⁷⁰ 'BBC response to ITC Programme Supply Report', bbc.co.uk/pressoffice (November 2002)

⁷¹ *The Tipping Point*

In *The Tipping Point*, it was suggested that “the loss in foregone revenue from rights sales (because they are now owned by independents), while having no compensating cost advantage in production, has not so far been an issue that appears to have been scrutinised in terms of its impact on the BBC’s ability to deliver the best possible value for money.”⁷²

In 2005 it was also calculated that 3.2 per cent of the total spend by the BBC on independent productions went towards writing the legal agreements and monitoring the contracts financially and editorially. However, as the now financially robust Indie sector expanded and kept the best creative talent, the BBC embraced it. In 2006/7 it opened up another quarter of all its commissioning to direct competition through the WOCC (the Window of Creative Competition).

This was adopted by the BBC in 2006 alongside its Ofcom review, as part of its renewed Charter. Brought into force in 2007, the WOCC allows an additional 25 per cent of qualifying network television commissioning to be contestable between in-house production units and the independent production sector. The contestable 25 per cent is in addition to the 25 per cent mandatory independent production quota, which remains in force.

9.3. Pact’s assessment of the impact of Terms of Trade on PSBs

Pact argues that the introduction of Terms of Trade has been a major benefit to the PSBs in two distinct areas – new business, and keeping prices down.⁷³

9.3.1. New Business

With regard to the emerging market opportunities from new platforms and programme funders, Pact argues that:

“The indie sector has effectively built a new business which previously did not exist based on a combination of exploiting rights to existing programmes, international expansion in production driven by owned formats, and more recently expansion into the international co-production and global commissioning market with global channels such as Discovery and MTV, and subscription video on demand (SVoD) platforms such Netflix and Amazon Prime.

“This has created a win:win for the UK creative community and broadcasters with (1) the Indies creating a £3 billion business from £1.5 billion of UK commission spend (the creative IP multiplier) and (2) the broadcasters able to refocus more of their efforts on international channel and B2C service expansion, buying the rights from the independents where needed.”⁷⁴

This is of particular relevance when we consider the fact that without the initial boost to capitalisation and professionalism which the 2004 Terms of Trade created, Indies would not have been in position to exploit the opportunities created by these new platforms. Without doubt, such platforms would have required content from somewhere, and since it is apparent that the PSBs could not fulfil this demand, it is likely that such production would have emerged from outside the UK entirely, representing a loss to the UK’s economy and production sector.

⁷² *ibid*

⁷³ *A New Age Of UK TV Content Creation*

⁷⁴ *ibid*, pp. 10-11

9.3.2. Keeping Prices Down

Pact also highlights the value to both the PSBs and the broader public that the post-Terms of Trade Indies have created as a result of their more economical production model. Compared to production within the PSBs, the Indies have more nimble operations, doing more with production funding in an environment where commissioning prices haven't risen for several years. Given the increased creative quality of British production in the last few years – mirroring the increased quality of television production in other major markets – this is, in many ways, quite a remarkable outcome. The report states:

*"The attraction of risk capital into the indie sector and their success in exploiting UK IP globally directly, has helped keep programme commission prices down – evidence suggests that on a like for like basis commission prices have been largely flat in nominal terms since 2006 – in real terms they have, therefore, fallen by about 10 to 15 per cent over the period – this has been to the benefit of the BBC and their licence payers as well as other broadcasters (the period has seen no lessening of BBC commissioned programming's ability to win prizes at home and overseas, and most surveys suggest that the perceived quality of the BBC's output is as high as ever)."*⁷⁵

A strong indie market is also said to have helped broadcasters by contributing approximately £200m in gap financing.⁷⁶ Furthermore, PSBs also get to share in producer success (profits) as follows:⁷⁷

- UK Secondary TV sales – broadcaster 50:50 producer (BBC 75:25)
- International programmes and formats – broadcaster 15:85 producer
- VOD/DVD – broadcaster 15:85 producer
- T/VOD in territory – 50:50⁷⁸

Pact suggests that the international growth of the UK independent sector has brought further benefits that helped to sustain the UK PSBs through the recent economic downturn. It stated in 2013:

*"Amongst these has been a greater capacity to directly contribute to programme commissioning costs, whether through producer deficit finance or by arranging co-production partnerships or pre-sales agreements from relationships across their global networks. This has helped UK commissioning broadcasters to hold down the cost of commissioning in a market where inflation would otherwise have had a stronger effect. Again, the ownership of rights under UK Terms of Trade has been a key factor in this as international rights trading has been a source of high margin income for UK Indies and thereby provides a high proportion of the funds for re-investment."*⁷⁹

While there are anecdotal arguments against the Terms of Trade, it is difficult to prove that they have caused any harm to the broadcasters since their introduction in 2003/4.

As recently as 2011 Pact stated that "there is no evidence that the Terms of Trade have had any negative impact on PSB's businesses",⁸⁰ citing as an example Channel 4 where pre 2003

⁷⁵ *ibid*

⁷⁶ *ibid*

⁷⁷ *A Decade of Success*

⁷⁸ TVOD represents VOD provided through television platforms, such as Sky's satellite TV service

⁷⁹ *A Decade of Success*

⁸⁰ *Response to Communications Review, Open Letter from Pact (June 2011)*

annual profit from IP exploitation was £10.9m, representing just 1.4 per cent of total 2002 revenues. This is taken to exemplify that the PSBs were not – prior to the 2003 Act – undertaking an effective exploitation of the rights they held onto given the significant growth in this value which has been seen since. The data also underlines that, prior to the introduction of the Terms of Trade, these rights contributed little to the overall revenues of the PSBs.

Ofcom agrees that the impacts for the PSBs from Terms of Trade have been positive, stating in its 2015 PSB review that:

"A thriving independent sector has been credited with helping to bring new creative ideas to broadcasters and helping to stimulate creativity and quality, through increased levels of competition in the market for programme production (with external producers both in competition with each other and with in-house production departments at the BBC and ITV). Analysis of output shows that the independent sector is delivering across a range of key PSB genres."⁸¹

There is still debate about whether the Terms of Trade should be the same for both small Indies and global studios, however. In his recent MacTaggart Lecture, Channel 4 chief executive, David Abraham, said that "smaller companies need a special level of support and protection when participating in a market characterised by big players."⁸² This reflects the UK broadcasters' perspective that the consolidation in the Super Indie segment of the market has led to another bifurcation of the production sector, given the larger companies' increased scale and access to finance, but while enjoying identical protections to smaller companies under the Terms of Trade and quota systems.

⁸¹ *Public Service Content in a Connected Society, Ofcom's third review of public service broadcasting* (December 2014)

⁸² "Who should take a bigger slice of the IP pie?", in *RTS Magazine* (2004)

10. IMPACT FOR AUDIENCES

Whether the Terms of Trade have had a positive or negative impact on the viewing audience is hard to ascertain.

Pact's main argument is that the plurality of suppliers leads to greater plurality of voices on screen, and that the Terms of Trade ensure that Indies can invest in great original content. Therefore, the more Indies can invest, the broader the range of ideas that can be pitched and the higher the chance that viewers get to see the best ideas possible.

This position is underlined in Pact's response to the 2015 Ofcom PSB review: "the Terms of Trade enable independent producers to exploit their rights in secondary markets – as they have successfully done in consecutive years since this legislation was introduced in 2003 – thereby enabling the independent sector to help PSBs to provide a wide range of high-quality output."⁸³

From a systemic perspective, Ofcom is also highly supportive of the role that independent production plays in the UK. It highlights the following benefits of a strong UK indie sector:

"Underpinning the PSB system: strengthening the independent sector benefits the system as a whole by helping PSBs provide a wide range of high quality output, as well as by helping Channel 4 and Channel 5, the PSBs which commission the majority of their programming externally, to benefit from a wider range of competing suppliers in all genres.

"Ensuring plurality of ideas and cultural diversity: the best programme ideas originate from across the whole market and external producers often cater for a wider mix of genres, therefore the regime helps to ensure that a range of creative voices is delivered on screen to the viewer.

"Widening production's geographic footprint: recognising that smaller producers are more likely to be based outside London in the nations and regions, the regime also helps deliver different voices to the screen."⁸⁴

The international demand for UK finished programming has grown substantially since 2003 and it is said that trade in this part of the market tends to be "reinforcing" – i.e. "viewers" appreciation of one UK show makes them more likely to accept another and, in turn, broadcasters are more likely to take the risk on a UK acquisition. The strength of UK IP and this virtuous circle effect partly explains the rapid growth that producers experienced in TV exports from 2004 onwards."⁸⁵

In its 2006 review of the production sector, Ofcom asked whether intervention was justified with recourse to the perceived benefits that the independent production sector delivers to both end consumers of television and UK citizens more generally.⁸⁶

These perceived benefits include:

⁸³ Pact submission to Ofcom's third review of public service broadcasting

⁸⁴ *ibid*

⁸⁵ *A Decade of Success*

⁸⁶ *Review of the television production sector*, Ofcom Statement (25th October, 2006)

- Promoting innovation, creativity and risk taking;
- Increasing competition, raising quality and reducing costs;
- Increasing range and diversity, in terms of programme genres and geography;
- Providing an alternative source of new on- and off-screen talent as well as helping to develop a skilled workforce;
- Making it easier for new channels to enter the market, thereby contributing to viewer choice;
- Increasing employment in different parts of the UK, and in places which lack a major in-house production presence, thereby contributing to dispersal of production around the UK; and,
- Creating a base for international success.

The report summarised: "it is an open question how many of the above characteristics are intrinsic to the independent sector. While some have argued that in-house producers are unlikely to generate all these benefits for consumers, others have been robust in questioning whether the independent sector is any better placed than in-house producers to deliver these outcomes."⁸⁷

Perhaps most importantly, given its importance to the UK and its initial reluctance to embrace the Terms of Trade, "the fact that the BBC recognizes the importance of the Indie sector in ensuring that [the] licence fee is invested in the best ideas and the best talent is paramount."⁸⁸

The 2006 review concluded by stating that the need for intervention continued to be justified, with particular reference to:

- The disparity in negotiating strength between the broadcasters and the independent producers;
- Vertical integration between the broadcasters and much of the production sector; and,
- The current concentration of production power and funding in the Greater London area.

It was stated that the continuing existence of these conditions – deemed negative for the Public Service aims of the PSB – meant that "the prospects for the withdrawal for intervention are limited in the near term."⁸⁹

⁸⁷ *ibid*

⁸⁸ *ibid*

⁸⁹ *ibid*, p. 79

11. CONCLUSION

Over the last 30 years the independent television production sector has benefitted from a unique legislative and regulatory framework that continues to underpin its very existence.

From the introduction of the independent production quota to the opening up of the BBC's programming via the WOCC, it has benefitted from a number of regulatory market interventions. But none have had a more significant impact than the Codes of Practice, and the agreed Terms of Trade, that feature in the 2003 Act.

With the Producer now having the right to exploit the inherent value of the IP, continued access to PSB commissioning and the ability to take formats to the broader global marketplace, Indies are now a highly valuable and productive part of the UK's creative economy.

But while intervention has been crucial, its impact has been to bolster and enhance the creativity that was inherent within the sector in the first place rather than artificially simulate it. Without great ideas and great talent to bring those ideas to the screen, intervention would have been futile.

As John McVay of Pact said in 2013: "the acceleration of growth since 2004 is attributable to the Terms of Trade. Without this, there would have been no consolidation nor internationalisation among UK Indies. But you still have to be a really good producer with really good shows."⁹⁰

⁹⁰ *Pact hails new era for indies*, in *Broadcast* (October 2013)

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13. ANNEX – EXAMPLE TERMS OF TRADE

Attached below are the current Terms of Trade for the BBC, as updated in July 2010 following agreement with Pact; these are provided as an example of the outcome for this process, and are attached without comment.