



Expert insight for the content industry

WIGGIN



Contents

3	Introduction
5	Regulatory
7	Distribution
8	Music
11	Ad blocking
13	Social media
14	Delivery
16	Compliance
17	Data
18	Brands
20	Rights protection
21	Incopro
22	Key contacts

Wiggin's media distribution expertise

Wiggin's market leading position in the UK content distribution sector is confirmed by a number of firsts. Since the early 1990s, we have been involved in some of the biggest deals and most significant landmarks in one of the most sophisticated content markets in the world.

- ▶ We assisted on the funding and applications for the first UK cable franchises in the UK.
- ▶ During the advent of digital television, we advised on the first digital satellite carriage agreements and DTT capacity arrangements (both SD and then HD).
- ▶ Following the introduction of return path functionality, we worked on the first "red button" television application integrations.
- ▶ We executed the first ever pay-per-view internet-only international football match.

Content distribution

Wiggin now represents many of the most high profile commercial broadcasters and content providers. We also act for successful distribution platforms and OTT service providers.

We support our clients on all commercial, regulatory and corporate matters – dealing with high value carriage and distribution agreements, regulatory, e-commerce, music and data protection issues, advertising and sponsorship representation and sales, brand expansion and protection and corporate structuring and joint-venture arrangements.

Content acquisition

High value content acquisition often resides in multi-year output deals and agreements for the licensing of live sports rights. Content owners and their customers instruct Wiggin on their most important contracts because

of our understanding of the downstream pay distribution market and our unique exposure to a broad range of complex deals.

Transmission and technical services

The compilation and delivery of content to the consumer is as important as the commercial negotiations relating to its exploitation.

From scheduling and playout to fibre, uplink and transponder capacity deals, Wiggin's media technology function has advised broadcasters, multiplex operators and technical service providers on the traditional means of transmitting content to the home.

More recently, high speed internet has also paved the way for novel IP-based solutions which we have been perfectly placed to advise on – supporting our clients through the next generation of content and advertising delivery.

We hope that the pages that follow are thought provoking and provide further useful background on the broad range of expertise Wiggin offers to the content industry.



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The future of Ofcom's licensing regime

All broadcasters that fall under Ofcom's jurisdiction require a licence for each linear television licensable content service (TLCS) they wish to distribute to the public, whether by satellite or any electronic communications network, such as cable or the Internet. Ofcom licenses each TLCS, as opposed to each licensee, which means a broadcaster offering three separate services, for example, will need three separate licences.

Licensing multiple feeds

It is the responsibility of the service provider to determine how many TLCSs it provides. Ofcom's guidance states that multiple feeds of a TLCS will require multiple licences if they contain different "programmes". The statutory definition is important in this context: section 405(1) of the Communications Act 2003 says: "'programme' includes an advertisement and, in relation to a service, anything included in that service." Ofcom's view is that separate licences will be required for each feed or version of a TLCS where the service contains:

- ▶ different television programmes; or
- ▶ the same television programmes shown at different times; or
- ▶ the same television programmes, shown at the same time, for only part of a day.

So where programming content stays the same, but the advertising changes (e.g. where advertising is localised for different markets), a strict reading of the legislation means that this will count as a different television "programme" and therefore require a separate licence. Whilst this may make some sense in respect of separately licensing a TLCS for distribution in multiple territories, applying the same theory to a change of advertising as a result of dynamic insertion technology (where

adverts are selected and displayed based on user data), would have absurd consequences. In August 2015, after we pursued this with Ofcom, Ofcom acknowledged that where technologies enable insertion of advertising by, or with the agreement of, the broadcaster, this should not normally be interpreted as requiring a separate licence for each feed, the number of which could be infinite.

What next for variations originating from the "same service"?

Whilst Ofcom stresses that such guidance is strictly limited to circumstances in which broadcasters are using targeted advertising replacement, and this is subject to change by Ofcom from time to time, does provoke some thought regarding the other ways in which the current licensing regime might need to change as technology and/or practices develop. For example, it will be interesting to see how the Commission's update to the Audio-Visual Media Services Directive, targeting online platforms, will move the online content world in line with the rules that apply to traditional broadcasters. Video-sharing platforms which organise and tag a large quantity of videos will have to protect minors from harmful content (such as pornography and violence) and protect all citizens from incitement to hatred. Whilst initially intended to be managed through self-regulation, Ofcom will have the power to enforce the rules, which depending on national legislation, could also lead to fines. Will this code of conduct for video-sharing platforms be a further step towards stricter online content regulation?



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Latest OTT market trends

A mere six years after Blockbuster filed for bankruptcy, the concept of heading to the high street to hire a film feels somewhat antiquated. Whilst the decline of DVD was bittersweet (Christmas shopping has become a lot harder) it was not surprising. As with the victory of MP3 over mini-disc, the emergence of internet-delivered video on-demand services felt like an inevitable evolution – the DVD library of the digital age. However, the rise of OTT services is not confined to physical media, with distributors such as Netflix and Amazon continuing to pose a disruptive threat to established business models.

Event TV

In its recent Ofcom report, Kantar Media observed the increasing significance of non-linear viewing but found that the majority of participants favoured linear viewing of “event TV” content “to avoid spoilers and be part of the conversation”. Kantar Media recognised, in particular, a strong preference for “linear viewing of live sports events and, to a lesser extent, drama series and soaps”.

These preferences have not gone unnoticed by the OTT community. The emergence of services such as Coliseum in New Zealand and DAZN in Germany and Japan, demonstrate that live sports broadcasting need not be limited to linear channels and recent speculation would indicate that Amazon is keen to get in on the action.

As with Amazon’s “Preacher”, OTT providers can also be seen to embrace staggered episodic release of premium television content, enabling the audience to enjoy the suspense of linear broadcasting with all the convenience of VOD.

“Cord-cutting”

This approach is not limited to OTT providers – Juniper Research identifies “cord-cutting” as one of the key trends in the digital TV market, with broadcasters offering their own OTT services to match standalone providers. Concurrent on-demand and linear release is also becoming increasingly prevalent, although traditional broadcasters have the added consideration of cannibalising their other offerings.

The growing landscape of content offerings arguably gives pay-TV bundles an added edge, aggregating third party services and providing the convenience of a one-stop shop. This too does not appear to have gone unnoticed, with Amazon opening up its platform to other third party services and YouTube and Hulu looking to provide broadcast channels.

Continued evolution

The latest research from Juniper Media predicts that SVOD revenues from services such as Netflix and Amazon will grow from US\$14.6 billion to US\$34.6 billion by 2021. However, with recent reports indicating a slow down in Netflix subscriber numbers and a reduction in content, the OTT market’s continued desire to adapt and innovate to address consumer demands will likely remain central to its success.



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Synchronisation licensing

In the last five years the synchronisation business (licensing music into film, TV and computer games) has grown significantly, and the licensing and the terms and conditions in licences have become more complex.

Licences no longer include the full set of rights historically enjoyed by producers, since pressure is being put on music rights owners to keep licensing costs down, and the digital world has opened up new forms of secondary exploitation, which the rights owners prefer to exclude from the initial synch licence. Labels and music publishers are therefore withholding certain online rights with a view to licensing them further down the line.

This approach shifts the centre of gravity in terms of licence fee burden from production to distribution. It also fragments the traditional

lump sum licence fee to some extent, spreading it across the chain of distribution. But the process of synch licensing is still often slow and painful, even after the need to seek artist consent is taken into account. Speed and efficiency in licensing is essential if this market is to develop further – that must be the focus of all involved.



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Ad tech and the ad blocking arms-race

In the last full financial year, global digital advertising spend was approximately \$60 billion, and industry analysts continue to predict rapid growth in the sector. The value of the market has fuelled rapid innovation and diversification in the ad tech space, with Gartner reportedly tracking over 2000 ad tech companies. The volume and complexity of the data that is exchanged to enable ads to be served to users across multiple channels is phenomenal – according to the CEO of one leading advertising analytics business, the ad tech world processes about 400 billion transactions every day, compared to the 6 billion trades per day going through the New York stock exchange. And with the rise of programmatic advertising technologies, that complexity keeps growing, with each ad trade involving up to 100 different data fields, compared to a mere ten on a stock trade.

Ad blockers and blocking the ad blockers

Despite the rapid pace of progress in precision marketing technologies, consumer demand for friction-free access to internet content has resulted in many installing ad blocking technology – estimates suggest that already over 200 million people worldwide have installed an ad blocker of one kind or another. In turn, major publishers have developed technology to block the ad blockers, creating a spiralling arms race between the two sides.

The amounts at stake are significant, driving further innovation and incursions into each other's traditional territory.

Recently, for example, the leading ad blocking technology company, Eyeo, announced that it would allow advertisers to pay to have their ads whitelisted on the company's self-serve platform, enabling their advertisements to reach the parts that other advertisers' products cannot reach. While all may be fair in love and war, even the most hardened industry veterans might not have predicted that a leading ad blocking company's end-game would be to build an ad-delivery business.

Legal issues

In the meantime, ISPs and mobile companies are joining the fray, promising to offer their subscribers ad blocking technology, only for regulators and governments to join the battle, too, arguing in the EU at least that such steps are prohibited by the new net neutrality rules.

Certainly, no one can say that all's quiet on the ad tech front.



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Complementing linear broadcasting or threatening revenues?

There is no dispute that social media has had an astonishing impact over the last ten years. Users have an exposure to a range of content which was never possible before the era of high speed broadband and the growth of these sharing platforms. Brands and rights holders have embraced social media to increase their reach, popularity and marketing potential.

For example, the testimonial match to celebrate the career of England captain Wayne Rooney was made available on Facebook via Rooney's and Manchester United's official page, to a potential audience of 1.7 billion users.

Live rights

US sports rights holders now frequently reserve some limited live rights for exploitation via social media – this started in 2015 when the NFL made a game available globally live on Yahoo! and followed this up very recently with matches available via Twitter.

This approach requires a careful balance as broadcasters pay princely sums for these exclusive rights and, whilst the reported \$10 million for ten Thursday night games should not be sniffed at, it does pale into insignificance compared to the \$45 million a game for five Thursday night contests which CBS Corporation and NBC each paid during the 2016 and 2017 seasons. Aggrieved broadcasters may well see this free-to-air creep as undermining the most valuable of rights reserved for the big screen.

Meeting the big screen

Twitter's connected-TV app and its announcement that it intends to launch apps on Apple TV, Amazon Fire and Xbox One, has taken this tension a step further. The sports rights industry was previously concerned with the emergence of Twitter Videos, Vines and

Periscope streams but has seemingly sought to embrace the power of social media in a move which arguably increases the appeal (and therefore value) of its coverage whilst also marginalising and devaluing unofficial recordings or copyright infringement.

Broadcasting the conversation

The BBC now frequently conducts exclusive interviews via Facebook Live, and other news and business outlets such as CNBC and Bloomberg have a perhaps surprising presence on social media channels that are typically associated with Generation Y. All manner of content providers are now using social media to complement and expand their linear businesses and online offerings.

Publishers are also getting in on the act – Snapchat recently eclipsed Twitter in terms of daily usage and its “Discover” channel, which has been running for almost two years, allows users to access selected stories and articles from 19 publishers in the UK. This makes commercial sense – if a Snapchat user enjoys the teaser content available to him or her they may well then subscribe to the publisher's own online portal or website – not only does this increase subscription and advertising revenue but also serves as a rich source of customer data from a key demographic.



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Transmission services: technical efficiencies lead to contractual complexities

Channel delivery used to be a straightforward process. Following playout and the insertion of advertising, a linear television signal would be delivered for uplink to satellite capacity, to a head-end for retransmission via a cable network or to a multiplex for distribution via land-based transmitters. The broadcaster's agreements for the lease of fibre lines, the provision of backhaul and uplink services or the reservation of space segment capacity on a transponder would ensure the delivery of the channel to viewers of the relevant platform.

IP delivery and asset delivery

Some would argue that the use of IP delivery techniques, content delivery networks and "cloud services" have streamlined the process (or at least made it more economical). This may be the case for some linear services but the rise of non-linear services and the delivery of targeted dynamic advertising functionality have, from a contractual or integration perspective, muddied the waters somewhat.

Content providers must now agree with delivery platforms how non-linear content assets are delivered (and, potentially, how they then reach the viewer) or, indeed, whether the platform may make and store off-air recordings of the linear channel to minimise delivery costs. Allied to this are the discussions around the sale and serving of advertising – often integration arrangements need to be completed to ensure that ad servers are integrated with ad-decisioning platforms – the days of stitched

advertising delivered with the content asset are disappearing fast as targeted advertisements based on viewer or household profiles are now inserted at given marker points. This also gives rise to a debate around protection, control and ownership of the valuable viewer data.

Impact on content licensing

Efficiencies and modernisation of the technical delivery of content have multiplied the number of variables in play in any licensing negotiation. Agreements, which were previously standard form or based on the terms of the underlying fibre or satellite owner, are now often drafted from scratch to cover technical and commercial models which were previously not considered (or, indeed, were not possible).



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Turning the airwaves blue

Broadcasters are more likely to run into trouble with Ofcom over the use of offensive language in content than for any other reason. This is not a case of Ofcom being prudish: its September 2016 survey found that viewers continue to find bad language objectionable, especially if children might hear it, supporting the 9pm watershed.

Ofcom investigation

Since 2010 there have been more than 100 investigations concerning possible breaches of rule 1.14, which states that the most offensive language must not be broadcast before the watershed or when children are particularly likely to be listening. 2016 has been a bumper year, with 12 such investigations already. Most investigations of a potential 1.14 breach also consider whether there has been a breach of rule 1.3 (children must be protected by appropriate scheduling from unsuitable material) and/or rule 2.3 (any material which may cause offence must be justified by the context).

What is clear is that technical mistakes, such as a post-watershed edit being shown in daytime, are almost always going to result in a finding that there has been a code breach – whether they are the result of human error or system bugs. Arguing that the event was a one-off or that better processes are now in place seldom has an effect on the decision.

Resolution

Where offensive language has been used in live broadcasts in 2016, Ofcom has given credit where immediate remedial action was taken. Complaints have been resolved where:

- ▶ immediate action was taken to prevent the re-broadcast of material on catch-up;
- ▶ an immediate apology was made (with the correct degree of gravity) and the apology was repeated; and
- ▶ it was evident that efforts had been made to limit the chance of the language being used, such as clear warnings in advance, or rehearsals having taken place without incident.



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Making the most of your customer database

One of the key assets for many content distribution businesses will be its customer database. This data will form the keystone in any marketing campaigns for new products, services and special offers. In addition, a business may decide that it wants to derive further data from the system – such as aggregated and demographic information – or perhaps even to sell or licence the database to a third party. These activities are not necessarily prohibited under law, however there are numerous regulations around marketing, electronic marketing and data protection which organisations will need to comply with in order to ensure use of their customer databases is lawful.

The best and simplest way to make the most of your customer database is to identify from the outset what activities your business is likely to undertake. The next step is to obtain any necessary consents (whether opt-in, opt-out or “soft opt-in”) when a customer first comes into contact with the business. In addition to these consents, a clear privacy policy will assist companies in making the most of its database.

Of course, as a business evolves it may wish to use its database in ways that it had not originally anticipated.

This will pose difficulties where consents were not obtained or privacy policies do not adequately cover the new scope.

Initially, steps should be taken to understand whether the new activity is even captured by the regulations. Where challenges are identified, businesses can seek to overcome them in a number of ways – ranging from contacting customers to obtain consent, to updating your privacy policies and terms and conditions.



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Opportunities for TV brands in an international context

Selling format rights is one way of extending the value life-cycle. Direct exploitation of TV brands in overseas markets is also increasingly prevalent. In each case, trade mark licensing and protection is a central consideration.

The budgets for high-end drama have increased significantly as a result and in such an environment, secondary exploitation must be at the centre of an effective commercial strategy. TV titles like Downton Abbey, Sherlock and Game of Thrones have gained traction in overseas markets. The viewing figures have been impressive for imported shows in emerging markets such as China, which has led to demand for branded consumer products and an increase in brand licensing activity. There are challenges - but there are also opportunities. Local streaming sites can attract millions of viewers.

The more reputable licensors with access to major retailers only license brands with local trade mark protection. Obtaining protection in emerging markets is not always straightforward but with careful management - and real-time awareness of the landscape - it is possible to launch successful licensing programmes and capture additional revenue.



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Tackling illegal OTT content services

Digital piracy is a well recognised and documented issue. As new online technologies develop, so too do the means by which infringers provide unauthorised access to digital content. Addressing the diversification of infringing operations presents an on-going challenge to content owners.

Growth in illegal access

The growth of OTT services is no exception. Investigations conducted by the Federation Against Copyright Theft have found that illegal access to subscription TV services increased from 6% to over 18% in 2014/15. This problem has not gone unrecognised by Government. The UK Government strategy paper "Protecting creativity, supporting innovation: IP enforcement 2020" identifies a need to understand the challenges posed by set-top boxes and to work with partners "to tackle this emerging and fast growing method of infringement."

Access methods

Infringing OTT services may offer live linear streaming of unauthorised broadcast feeds and/or catch-up TV, cloud recording or video-on-demand services. These types of services may be accessed through various means. For example, access may be dependent on the user purchasing a pre-configured set-top box or USB, or loading add-ons/apps to their smart TV or mobile devices which run on a media player installed on the device.

Enforcement considerations

The best means of enforcing against these services will depend on the situation: How does the specific service in question work? How does the service obtain the broadcast feed? Are descrambling circumvention technologies used? How is the infringing operation structured? Who are the key players in the operation and what's their relationship? Jurisdictional issues must also be considered when identifying the infringing acts that are occurring and the best forum in which to bring enforcement proceedings.

Civil enforcement changes afoot?

In the UK, both civil and criminal enforcement routes should be considered. The civil option will be further informed by the FilmSpeler case, which at the time of writing is pending before the Court of Justice of the European Union. The case concerns the sale of set-top boxes which connect users' television sets to the internet and which are equipped with an easy-to-use user interface and links to various websites. The reference raises questions as to whether the seller of the set-top boxes is communicating to the public, as well as questions relating to the application of the temporary copying exception.



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Incopro

Incopro's Talisman technology tracks, ranks and prioritises online IP infringements (copyright, design rights and trade marks) in real time, enabling content industry operators to achieve the scale of enforcement coverage that they need, providing a targeted and intelligent approach, which reduces the seeming complexity of enforcement.

Talisman is supported by Incopro's multilingual team of analysts who speak an array of languages including Mandarin, Cantonese, Arabic and Russian. The analysts are overseen by leading experts in IP law and law enforcement intelligence. This approach ensures total effective online protection for rights holders.

Incopro's Talisman technology tracks, prioritises and solves the following threats:

- ▶ Hacked code
- ▶ Abuse of paid search to mislead customers by piggybacking on your brand
- ▶ Using a domain name with your trade mark or setting up rogue look-a-like websites
- ▶ Fake apps using your trade marks
- ▶ Fake merchandise

Incopro works with clients to implement strategies that actively manage the issues associated with online IP infringement – brand damage, loss of revenue, the targeting of potentially vulnerable customers and the contravention of industry safety standards.

Incopro can enable organisations in the content industry to:

- ▶ Protect brand equity and reputation globally
- ▶ Demonstrate CSR and improve consumer trust
- ▶ Increase efficiency and efficacy of enforcement – an end-to-end solution
- ▶ Reduce costly out-of-system legal action
- ▶ Target resources where needed
- ▶ Optimise revenue and marketing investment

INCOPRO

Incopro Limited was founded by Wiggin to build on our market leading position in online IP protection. The company was created by Simon Baggs (Head of IP at Wiggin) and Bret Boivin (formerly of Warner Bros.) and now operates in the UK and US.



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