

INTELLECTUAL PROPERTY AND 'TERMS OF TRADE'

THE CHALLENGES FOR
ENTERTAINMENT BUSINESS IN
THE EMERGING PLATFORM
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Intellectual Property and 'Terms of Trade': The Challenges for Entertainment Businesses in the Emerging Platform Economy

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This working paper is a lightly edited transcript of a CREATE public lecture delivered at the University of Glasgow on 13 November 2019.²

Abstract

For the last two decades, the industrial organization of the UK screen sector has been shaped by the so-called 'Terms of Trade'. 'Terms of Trade' are codes of practice adopted by public service broadcasters, regulated by Ofcom under the 2003 Communications Act. Under these terms, independent producers retain ownership of the intellectual property rights in their programmes. Commissioners typically receive a licence for a package of primary rights in their home market for a specific period. Revenues from international sales are split. The paper explores investment decisions and business models that evolved in response to this intervention, and how they are changing with the entry of Video on Demand (VoD) platforms (such as Netflix) into the commissioning market. VoD services are outside the current scope of Ofcom's supervision, and therefore free to pursue exploitation models outside the 'Terms of Trade'. Drawing on Blazing Griffin's experience as an innovative digital entertainment company, the paper explains difficult trade-offs between retaining rights and up-front payments, as well as the effects of information asymmetries in three industries: video games, TV, and film. Television

¹ Blazing Griffin is a BAFTA-winning independent digital entertainment company based in Scotland. With a team of over 40 people, it specialises in storytelling across a wide range of platforms, with special focus on the development and production of film and TV, post production services and video game development. Naysun Alae-Carew oversees business development, operations and strategy as well as heading up the company's film and TV division.

Naysun is a graduate of the University of St Andrews with a first-class MA(Hons) in Economics and International Relations. He produced the feature film *Anna and The Apocalypse* (Orion/MGM), which won the Best Midnight X-treme film in 2017 and was nominated for a 2019 Saturn Award. Naysun was previously a junior producer with Black Camel Pictures, where he developed and helped deliver *Outpost 2* and *3* and *Sunshine on Leith*. In 2011 he won a New Talent BAFTA for Best Producer for the short *Zombie Musical*, which was also nominated for Best Director and Best Original Music.

² Editorial note: The transcript was edited by Kenny Barr who also wrote an earlier report from the Public Lecture (available [here](#)). The Lecture is part of CREATE's workstream on Intellectual Property, Business Models, Access to Finance, and Content Regulation within the AHRC [Creative Industries Policy & Evidence Centre](#) (grant: AH/S001298/1).

is characterized as a highly regulated oligopoly, and subject to considerable consolidation within the independent production sector (now often foreign owned). Film, while less regulated, is described as a 'bisected market' dominated by a handful of large studios and many smaller producers. By comparison, business model innovation in the online games market continues to rapidly and fundamentally alter relationships between producers, publishers and platforms. Finally, the paper reflects on the changing role of digital users, and a new understanding of copyright under which unauthorised 'mash-ups' may be seen as an opportunity.

Introduction

I'm here tonight to talk about intellectual property. My experience of IP is not as an academic, I operate inside the video games industry, inside the TV industry, and film industry – both the independent side, and the studio side.

Blazing Griffin is a small company based in Glasgow. I have anecdotal knowledge of copyright and intellectual property from my experiences and I try to boil-up a lot of our knowledge into a sort of systems analysis if you like. How do our activities and the deals that we do, fit into a broader global framework? My knowledge is anecdotal, rather than the product of years of research, or specialist knowledge.

One thing I want to try to think about is to identify if there is a thread through all of this? The three different industries, films, games and TV, all make creative products but they all have different norms and behaviours. They've got different routes to market, different value chains and different ways of making things. Is there a common thread that I'm drawing through this as I write up my thoughts?

Maybe no, is the answer? There are *some* common elements, but the biggest thing that you may pick up on as we go through, is that there are contradictions in the way I'll be talking about things. Because I'm looking at things from what I see as a healthy market, and I ultimately want to operate inside a healthy market. I want to see my TV shows, video games, and films, develop in a way that is sustainable and beneficial to the system as a whole. But ultimately, or maybe not ultimately, in the short term I also want my company to make money. I want to return value to my shareholders. I want to employ people. And sometimes those two things are in conflict. My short-term interests which I often would have the tendency to follow are in conflict with the larger idea of what a healthy approach to intellectual property is, both on the individual and on the global scale.

Some of what I talk about is going to be that kind of contradiction, that tension between what I want right now, and what I want ultimately for the system as a whole, because in 20-years' time that is going to be to my long-term benefit, and to the system's long-term benefit. That's my caveats out of the way.

Pragmatism and Principle: Visualising a Healthy Market

As Martin Kretschmer said in his introduction, Blazing Griffin is a company that wants to create worlds. We're a small company of about 45 people. We're a young company operating and growing since 2015. We've been going for longer in different guises, but really our start as a multi-sector creative company was in 2015, so we're coming up to the five year mark. There's been a lot of learning. We've been essentially three different start-ups: we work as a video games developer, we work in independent film and have expanded now into television production, where we create our own productions.

We're also a service provider which involves working on other people's shows, and we have a post-production facility in the Southside of Glasgow where people bring their TV shows to us, like *Shetland*. We did quite a lot of the post-production on the new BBC/HBO production *His Dark Materials* and post-production for the Starz/Sony show, *Outlander*. We also do a lot of factual shows like *Murder Case* which won many Scottish BAFTAs. These are examples of us providing a service to other people who make and own that content, and we just get paid for doing that. So, we come at things from quite a few different perspectives, and we are subject to quite a few different external forces shall we say. A film that we released last year was *Anna & The Apocalypse*, a zombie Christmas musical, and the relevance of this will become apparent as it's quite a fascinating case-study for intellectual property and what you can do with it.³

A useful thought-experiment as we get started with the practical complications of intellectual property, and the creative industries, and particularly in our experiences, is to ask 'what is the dream?' As I get into 'Terms of Trade', copyright protection, the rule of policy, and just what we're thinking about when we're negotiating individual deals, what is it that we're actually aiming to do?

This comes right back to what Martin was saying about Blazing Griffin. Ultimately, we want to create story worlds. For us, we want to create something that, ultimately, people will want to pay for. And they'll want to pay for it because they want to be in that world, they want to engage with it. We want to spark a creativity in *them*. We want to develop a community around it. Whether it's

³ <https://www.blazinggriffin.com/movie/anna-the-apocalypse/>

a game, a TV show, a film, I want to have the impact that I had when I read books that made me want to read the next book, that inspired me to make art, or to go and study. I almost went and studied physics, and that's pretty much because of Star Wars, and there were plenty of people who were inspired to study physics because of Star Wars. Ultimately when we make these things we're trying to have meaningful impact on the lives of our consumers.

I think for Blazing Griffin particularly, we very much like the idea that stories are something that can connect people. We're in an age where a lot of the time the stories we tell, whether we think they're real or not, are designed to divide us, or appeal to specialist interests, and remind us how different we are. I think there's a role in the arts in particular to tell stories that remind us we are very similar, and what we all want are usually the same things. And when we remind ourselves how similar we are, then things suddenly become a little bit easier.

I've got that goal, which is a woolly ephemeral sort of thing that I want to do with the art, that hopefully someone will value enough that they'll want to pay for. And I have to fit that inside something which is practical, which is a contract. In fact, it's a series of contracts, and it's got to go through such a series of agreements to ensure that it ultimately gets on screen, whether it's a feature film in the cinema, or it's a video game on your phone, or on your computer.

I've spent a lot of time thinking: what is a healthy system? That idea that I want to do something that's going to connect, that people are going to respond to emotionally, that are going to get something rewarding, is going to give them some meaning to their lives: how do I make that into something that is very practical? This made me think about systems, my undergrad was economics, so I often look at things in frameworks of what a healthy economy looks like. I think there's a lot of interesting ideas that come from asking: what does a healthy market look like?

For me in the creative industries, it's a few things. It's new-entrants entering the market. The market becomes very stagnant, very unhealthy if it's dominated by few major players, and the barriers to entry are really high. Ultimately, we're talking about property, we're talking about assets. It's got to be a framework that allows people to develop or acquire new assets, in this case intellectual property, without having significant barriers to entry. Ultimately in this, I want a framework where profits from those assets come back to the company that has created it and invested in it, so we're getting a return on our investment. I want to be able to provide that to my shareholders, and I want to be able to reinvest that. Ultimately, I want to be able to use that to keep on going, because I'm doing this because I love it.

I want the system to reward risk taking, but I want it to do so in a balanced way. Risk taking is a cultural phenomenon, it is something that the system can impact, but you can see how cultures

of investment are completely different across the globe. The UK is particularly risk-averse and most of the time private investors will invest in bio-medical sciences, real estate, and not much else. So, how do we foster something where investing in intellectual property is encouraged and we can show there is a path to market, a route to market which doesn't have significant barriers?

I also want a system that isn't dominated by a few gatekeepers. This is very, very *specific*, especially if its product making, in the creative industries in particular. I have made something and I want to be able to get the fastest and lowest cost route to getting to the consumer. But a lot of time I have to ask permission to make that film in the creative industry. It's not enough just for me to write a few lines on a page, I've also got to convince people to put money into it because it's obviously a very expensive risky thing to make great products. It's ultimately down to creativity, and we have not figured out how to measure that: the greatest directors can make horrible films. We know that it's always risky.

Ultimately, the manufacturing process of creative products, requires many gatekeepers, I acknowledge that. But in my system, my ideal system, I want the gatekeepers to be market-led, not personality-led. I want them to be doing it on the basis of fact and data, not on the basis of who they went and had a drink with last night, or who they made their last video game or TV show with. You might be able to tell, by the way that I'm talking about it, that our current system is personality-led, it's relationship-led, and is dominated by a few gatekeepers that sometimes have some perverse incentives for what projects they commission.

For me, this healthy system is something that promotes proliferation of product-makers, producers, manufacturers, which is what we are in the creative industries. I want it to encourage that. I want it to encourage sustainability. I want it to encourage reinvestment. I want our barriers to entry and our routes to market to be as slick as possible; low cost, easy to understand, and easy to navigate.

I also want information, which is really key when it comes to intellectual property. We don't share information very freely in the creative industries. There is not one model, if I've done a deal with Apple, I have no idea what someone else's deal was. That's understandable, we understand the selfish reasons for wanting to keep that information to ourselves. But at the same time when you are a new-entrant, as I consider us to be, not knowing how far you can push the BBC only benefits the BBC. There are unions and trade bodies like PACT, in the film and TV industry that have agreements with the broadcasters that I'll talk about later, which regulates some of this, but you still have to be part of the in-group to access that kind of information, and you still have to pay for it.

TV and film are the best regulated out of all of them, but when it comes to international deals, and video games, there is no standard, so you're often all-at-sea as a new-entrant into the market. The reason why I'm talking about this is because again, from an economic standpoint, it's quite useful to look at what an unhealthy market looks like, and to me, an unhealthy market is a market of extremes. For us as consumers and just as citizens of the country, a healthy economy for me at least, and this is ideological as much as it is based in fact and research, is one where there are no extremes of wealth and poverty; where you have a large middle-class, where you have a large consumer base, you don't have incredibly rich people, and you don't have incredibly poor people.

Now, there are very strong rational reasons why that's the case. If anyone is interested in reading *The Spirit Level* (Wilkinson and Pickett 2009) it pulls together a whole load of studies on the social indicators affected by income and equality. It's not quite a meta-study but it's a narrative - drawing a narrative through an incredible amount of research into income and equality. It shows how at *every* level of a society that has extremes of wealth and poverty, everyone whether they're rich or poor has lower life expectancy; is more likely to experience mental illness; is more likely to go to jail; is more likely to have families break apart. That applies to rich people as much as it applies to poor people.

There are strong parallels with a healthy market on the production side. What we want is to have a very large, medium and small size industry where there are lots of actors who generate a sustainable amount of income. Where behaviour is such that they tend to reinvest their profits, rather than give them to shareholders. At the same time, if we have extremes of very small lifestyle businesses and very large conglomerates, then what we get is consolidation and a tendency towards oligopoly and monopoly which is also unhealthy.

Ownership of IP Assets

I'm sure some people here will have read Thomas Piketty's (2014) book, *Capital in the 21st Century*. His central thesis is the idea that as long as returns from the stock market outstrip GDP growth, that is a proxy for income growth in this case, then you will always have a tendency towards inequality. You will always have the rich getting richer, and the poor getting relatively poorer, which leads to the things we're talking about.

Looking at that, it tells me that money flows to wealth, it doesn't flow to work. So, if I own an asset, an intellectual asset in this case; then money flows to me. But if I work for hire, if I make a TV show on behalf of the BBC, then I will get money but I will always be outcompeted and I will never have the resources of a company that has historical assets. The big examples, the likes of

Disney, create value, and own something that wealth will keep on coming back to. They need to keep investing, but the marginal investment required to be able to keep that income flowing to those assets, to that intellectual property, is much less than the wages that I earn as I work hourly. At Blazing Griffin, we charge by the hour for some of our services, and we have to keep on doing that. As soon as we stop working then we stop generating income. If Disney shut down today they would still make a *huge* amount of money because of the assets they own.

The Disney example tells me what I'm aiming for, it tells me I'm aiming to own assets, I'm aiming to retain as much property as I can in my portfolio of video games, TV shows, films, and I want to keep it to myself. And so this is what I was saying at the start, that's the selfish part of me that's saying, 'I need to accumulate this, because I don't want to be subject to other people's whims about whether they say, "Yeah we want you to edit that on our behalf", I don't want to be subject to that. I want to have control over my own property, and I want to generate or seek rents from that property.

Television Production and 'Terms of Trade'

The first thing I'm going to talk about specifically is TV, where the importance of ownership of IP was recognised in the television industry. Prior to 2003, we had a nation of 'work-for-hire' TV companies in the UK that would create ideas and sell them for specific tariffs to Channel 4, BBC, ITV, public service broadcasters (PSBs). Those PSBs would own 100 percent of the copyright in those shows. In that market, companies that would start, make a few shows, but not make enough of a margin on the shows they were making. Because they didn't own any assets they would shut down. Then those people would go to other companies and would start again, or start their own companies again. They would just keep on doing this.

Pre-2003 which is when the government brought in the 'Terms of Trade' for PSBs, the overall turnover for the industry was about £700 million.⁴ When the 'Terms of Trade' came into force, it was a watershed moment. The 'Terms of Trade' ensure PSBs cannot own the indie's copyright.

⁴ Editorial note: The so-called 'Terms of Trade' that followed the Communications Act 2003 were designed to, partially at least, correct the imbalances of bargaining power between commissioning broadcasters and independent production companies. The transformative effects of this intervention have received considerable scholarly and trade-press attention. The 'Terms of Trade' is at once heralded as the catalyst for a period of unprecedented growth in the UK TV production sector while also being cited as a conduit for a prolonged period of merger and acquisition activity that saw ownership in the sector become increasingly consolidated. Cf. "Public service broadcasting, streaming services and the future for 'Terms of Trade'", Response by the CREATE Centre to the Parliamentary Inquiry by the Digital, Culture, Media and Sport Committee into 'The future of public service broadcasting' (19 June 2020).

Instead, Indie producers retain the intellectual property in productions they create. It completely transformed the industry.

The UK TV production industry has grown from £700m pre-2003, to somewhere between £3bn and £4bn now, and that is absolutely massive. During that time there also has been a complete change in the way that we consume TV. There's been huge influx of high-end dramas in the UK as a result of the tax credit that was brought in.⁵ This is an incentive for coming to shoot in the UK, where you essentially get 20% off what you make here. There are also other factors which have influenced this, but the introduction of the 'Terms of Trade' has had a huge effect on the TV industry as a whole.

Specifically, what it has done is this: it says for secondary TV sales you have to split it 50/50. Broadcasters could keep 50%, and the producers keep 50%, although the BBC gets to keep 75%. International programmes and formats, which is the *really* big one, Indies get to keep 85% of the income on sales of TV shows abroad. Before, what we had was an industry that when the PSBs bought and wholly owned these formats, a quiz show format, or a great drama, whatever, they wouldn't do anything with it. They would show it to the public, they had budgets, they weren't commercially incentivised to do anything with them, so these things did not get sold abroad. Whether just directly being sold for people to watch them, or for change format rights, which is when you get the American remake, or the Spanish remake for example.

In effect, these property rights just weren't being exploited. All of these assets were sitting there doing absolutely nothing, or very rarely doing anything, apart from maybe sometimes with kid's TV shows. The facility to keep 85% of the revenue from international provides a huge incentive as an Indie, to go out there and say, 'right, sell. I'm gonna sell this!' And what it created was what they call distributors in TV, and what we'd call sales agents in film. There are these companies and some of them are commercial arms of PSBs (public service broadcasters), like BBC Worldwide, and ITV Global, and they go, 'we'll sell these rights for you, and for that we'll pay you some money'. So, this was entirely new revenue, obviously bigger than the revenue we could get from the UK alone, because the world opened up to us. The 'Terms of Trade' also allocated producers 85% of VOD (Video on Demand) and DVD, and 50% of transactional VOD, which is where you're on iTunes and you buy an episode of something.

The idea behind this, absolutely incredible. People wanted to come to the UK; they realised, 'well we're going to set up in the UK. We don't want to have to sell all our rights to Sony, MGM, or any of

⁵ Editorial note: Tax Relief for High-End Television, Animation and Children's Television was introduced in 2013: <https://www.bfi.org.uk/film-industry/british-certification-tax-relief/about-tax-relief#television-animation>

these studios in the US, we're protected in the UK, we're going to come and setup here and produce our stuff out of here'. This opened up huge revenue streams for the Indies, who got to keep their IP assets, got to earn from the assets that they created, and that is - fundamentally brilliant.

There was also the idea that this was going to deepen and shorten what PSBs would do with the assets that they had, because they were then limited under the 'Terms of Trade', and needed to make the most use of the asset whilst they had it. So, the iPlayer and NowTV, often they're only on for 30 days of when you've shown it on TV, and I've got the ability as the Indie to go and sell the rest of the year to someone else as a digital product.

That was the intention and it did some absolutely wonderful things for the industry. Of course, there were also unintended consequences following this intervention. David Abraham, who is the ex-CEO of Channel 4, was really down on the 'Terms of Trade' and wanted to renegotiate them. As a broadcaster he's got a desire to keep some of this revenue. Suddenly the broadcasters said, 'wait, we can make money from this, and we aren't doing that, maybe we should have some of that?' Abraham said, 'bring the American movie and drama productions here. That's great for jobs, but IP and profits are on the first boat out of here'. That seems like a contradiction, all the IP is owned by British companies now, so what's he talking about? Why is it on the boat out of the UK?

The reason is this: when all these British companies suddenly own all of these assets, they become a target for acquisitions. From around 2008 onwards, there was a series of acquisitions and increased consolidation in the British market, mostly to US companies, to studios, but also companies from other territories. There are really big examples, the likes of Endemol Shine group, which is the result a series of mergers and acquisitions. And of course, Shed Media, which was a series of acquisitions, and then a purchase by Warner Brothers.

That is not to say this is necessarily bad, in fact, in a lot of cases it's really good, because as someone who has to be constantly looking at what comes next, and how we're going to pay our employees' wages for the next month, or the next year, having a parent company say, 'don't worry about it. You do what you need to do, we'll take care of HR, we'll take care of all of the other stuff while you go and make stuff'. It's not always that simple, but the idea of having a parent company that gives you some security is wonderful. The idea that someone is going to come and pay you for your shares that you've worked so hard to increase the value of, people are not going to say no to that.

So, on an individual micro-behaviour level, there is nothing wrong with being taken over. And depending on where you sit on the ideological spectrum, there's nothing wrong with it at all. The problem comes back to, what does a healthy economy look like, and where are profits being reinvested, also, what are you as a producer subject to?

Another thing that happened around 2007-2008 was the writers' strike in Hollywood. A lot of argument in this case, was over DVDs, and what writers who write screenplays should receive from ancillary sales. They were very angry because basically they didn't get anything. So, the writers went on strike. You may have noticed if you were watching TV at that point, that suddenly all your favourite shows were cut short, and they only had 8 episodes instead of the usual 24. That was an American problem, mostly the things were made in America, but they were also, at that point, made in Canada, because they had very significant tax credits, and they still do. Over the years Canada became service orientated, mostly owned by American companies. TV shows go and film there, or they'll pay a Canadian production company to make a TV show on their behalf, or they'll coproduce with them to access incentives.

When the writers' strike happened the Canadian film industry and TV industry almost died. There was no money, completely out of their control. They were so reliant on foreign investment to feed that service industry. They almost ceased to exist for a few years. A lot of companies went under but a lot of new ones started a few years later, and at that point Telefilm Canada and the Canadian Government tried to rework the way that they invest in Canadian films to keep some element of the profits of a film in Canada. This has not really had much effect because after the strike the tap got turned back on, and everyone started making American TV shows again.

In May, there may be another writers' strike, this time about SVOD (subscription video on demand), and the whole thing is probably going to happen again. This is great for UK writers. But, the dangers of a system which is over-reliant on external sources of finance are apparent. Getting taken over and not having control over where its profits go, on an individual company basis, no big deal, it's got some great benefits. But added up, the UK system becomes subject to external forces, and becomes very vulnerable as an industry. And this comes round to what Blazing Griffin do as a company. We've had to make some calls where there's a trade-off between short-term vs long-term benefit. Where we sacrifice our intellectual property rights for our overall benefit within the system.

At present we've got the development of SVOD, and at the same time the growth of 'cheap TV'. And this is really new, because 'cheap TV' is very new, the last couple of years, and in Scotland, the last year. As I was saying earlier, the sign of an unhealthy market is when you essentially

create two markets within one. When we bisect to the point that the high end of the industry is unrecognisable from the lower end of the industry. When you've got one which is consolidated multinational companies, and on the other you have lifestyle businesses, and they're expected to compete in the same market. That tends not to last very long, just because of the way markets operate.

So, what we have now is SVODs moving into the UK market, not subject to 'Terms of Trade'. Where I was once protected in the way that I could create an idea for a TV show, sell to a PSB, keep the rights, sell it internationally, now an SVOD comes along and says, 'I'm going to pay you way more money for that, but I'm going to take *all* of your rights'. This is specific mostly to Netflix. Amazon has a different model and Apple has a different model again. Here we come to the problem of not having the information because even when you've done a deal with Netflix, how do you do a deal with Amazon?

At the same time as that, where I'm incentivised to give up my IP, or at least give up control of my IP, and therefore my assets, which looks great right now because frankly I need the margin, I need this year to go back to my shareholders and say, 'we made X percent on the dollar or the pound', and Netflix just won't let me do it. But I did sell that asset off, and we're never going to make any more money from it, we're just going to make it this one time. So, we're going to keep on doing that really fast, and if we stop doing that, or we get one year where no-one buys it from us, then we've got no assets to continue to generate passive income from.

On the flip-side we have BBC Scotland, the Scottish channel which has got some of the lowest tariffs I've ever heard of. Our company, and some of my friends' companies have had to subsidise the tariffs that we receive from BBC Scotland because we're like, 'we can't make it for this money, but you know what? Let's do this one, and hopefully the next one is going to be worth more'. That's a really challenging conversation to have with yourself, because you've got no idea if it's going to be worth more. And yeah, it's protected by 'Terms of Trade', but if in the meantime we go bust because we've made no margin on it, then what are we going to do?

I own an asset, it's worth nothing, because we've gone bust, or have had to sell it to someone when we've gone into liquidation. So, you have this splitting and divergence within the market, into these quite separate parts. A lot of the actors in this end of the market will never have access to that side, and vice-versa. There are obviously companies that straddle both, and that is very healthy if it's possible. The 'but' in this is that I'm having to choose between an asset which is going to be paid for, it's nothing, but I get to own, or I sell my asset and make a lot of money right now. For us, when I'm making a commercial decision, it doesn't come down to that at all. It comes

down to: do I trust the person whom I'm interacting with across the table to do this deal in a timely manner? All theoretical thoughts about my approach to intellectual property go out of the window, because I say, 'if I do a development deal with the BBC, when can I expect to get that made?'

Being who we are as a relatively new entrant, we're not trusted. We've had coffees with the commissioners, we have a development deal with the BBC, we have a development deal with SKY. That's great, but how much time and effort does it cost me to get a show with them, in the market that we have right now? Probably about three years. So, I'm saying, 'okay, as a new entrant to the market, I've got to factor in everyone's wages for the next three years, whether I own this asset or not, and the time and effort. Actually, it might go nowhere, and it's subject to these gatekeepers who are not always rational actors, or at least they do act rationally within their own self-interest, which usually means protecting their job. It does not necessarily mean doing their job well, but doing it to the lowest risk. So, I'm subject to that market, when there's a much larger market outside of the UK that I did a deal for a TV show with a studio which took me three months, and we got some of the biggest show-runners in the world on that, three months after that. And it will be a pilot in about six months.

I gave up a lot more intellectual property for that deal, but from a risk point of view I get something made. The reason I bring it up is because this is the commercial reality. I can talk about all this theoretical stuff but when it comes down to it, the micro-behaviours and the incentives for individual actors within an industry have far more impact than the theoretical considerations I have discussed, but there is interplay between both. How we act as individuals in this market is affected by the types of deals. It's affected by 'Terms of Trade', and as an individual I want to sell my company to Sony who've just come along and said, 'Hey, we want to make *Outlander* in the UK. Can we buy your company please, and then we'll make it and we'll get access to the UK tax credit, high-end TV tax credit', great, cool I'll sell my company!

Then, do you know what? They went and made *The Crown*. They're one of the best performing UK production companies since then, so that worked incredibly well for them. It's individual behaviours, it's not the framework. In the UK because there are so few actors. We're still essentially an oligopolistic market. We are subject to a handful of people's desires, and that's what it comes down to. Channel 4 has been through many commissioners over the last few years, particularly in drama, and so have never settled on a strategy. That impacts anyone who's a new entrant into that market who wants to sell to Channel 4. Because whilst they're going through a process of change which lasts about four years, of course they (the commissioner) go to trusted people, who've made something before. So they order something from them again,

because they don't have time or energy to think about how they develop new relationships, because they're also going to be out of a job in a year. Which is essentially what's been happening. Channel 4 are one of three major buyers in the UK along with BBC and ITV, not even a market, it's barely an oligopoly, it's almost a monopoly.

As I said at the start, it's hard to draw a consistent thread for TV. I'm going to be quicker when it comes to film and games, it's simpler because there's no rules. As a commercial actor within the UK what I just have to ask is: what's the perfect form of what I'm going for? Plato's ideal form of what my IP ownership looks like. I'm going to aim for that, but if I get 50% of the way there in this field then great. If I get 25% of the way there in this field then not so great, but I'll do it. If I get 100% of the way there, which is always what I'm working for, I'm going to go for that. Ultimately what that means is, I'm trying to own as much as I can, but if I can't, I'm going to do a deal with someone like Sony that allows me to keep some of it. It allows me to go, 'OK, we have frozen the video game rights'. Now, we couldn't come to an agreement on exploiting them, but at the very least they've got to come to me and ask to do a video game, and I have to come to them and ask to do a video game. No-one is very happy with that; it sucks, but at least it's better than them getting the IP and not doing anything with it.

That takes a huge amount of time, a huge amount of resource and expertise, and literally we've argued over the retention of stage show ancillaries. So, we've retained the stage show rights, but what does that actually mean? It means retaining the live broadcast rights for stage, it means retaining the merchandise rights for stage, for a TV show that's based on a film. It's based on a short film, so I'm not sure how many levels that is; short film, film, TV show, stage show, and ancillaries of the stage show. Five levels of IP that I have to negotiate in that one deal in order to retain as much as I possibly can. And that's *fine* for us, that's kind of fun for us, because we want to make story worlds, we're like, 'We're making a stage show'. Blazing Griffin are hopefully making a stage show with a well-known West End theatre company, and that's a whole other thing which I could talk about. Rights are a lot easier there, apart from music. We've now done a couple of music deals, and I'm not touching that because I don't understand it at all! Not even a little bit.

We want to make use of our IP rights, because that's part of our business model, inherent to us. We've got 45 people, and we can have a business affairs person who when she doesn't know something, she can call up and say, 'What the hell do I do here?' And we can afford to pay for specialist lawyers in Broadway, or in American TV, to come in and advise us. But that's not a healthy market, because the barriers to entry is so high that new entrants are discouraged. They literally can't afford to figure out how to make best use of their assets, even under the 'Terms of Trade', because they simply don't regulate that kind of thing. And because it's too

hard sometimes to work with the British broadcasters then you look abroad, and then it's a no man's land. The theory is lovely, the practicalities are fun but tough, and you need resources, and that creates a market which, in my view, is not very healthy.

The Film Industry: Anna and the Apocalypse

Film is similar to what I was talking about with the bisected market, you have independent film, and you have studio films. And while you're making the same product, they operate with completely different business models, different funding models, and different ownership models. Indie film, I get to retain the rights, so for *Anna and the Apocalypse* I get to retain the rights. I've sold it to MGM as we did in the States. It did very well in the States but it did terribly here in the UK and there are interesting reasons for that, which might be to do with the film. But it did really well in Japan, Germany, and the US, so there's a reason why it didn't do well here other than the film itself. We did a book with Macmillan. We sold the soundtrack to Universal, we actually still retain those rights, but we licensed it to them. So, it goes on.

We can do that because we own the rights, we control it. We had the bandwidth and the time, as part of our business model, to do that. The film did fine, made its money, but as we talked about the upside is in owning that asset, and it's making use of it. Creatively, it's being able to make a story world so that we hope people will want to come. Even though that film was released last year, its useful life as a creative product is probably going to peak in two or three years.

On the other hand, that took years to put together. Funding pulled from all sorts of different places, it's risk-averse, same as TV, you're creating a product, how can I trust that you can make something? You have to have made it with me before. This applies across the board in creative industries. You have to come up with interesting ways to sell everything, and a lot of that time that means licensing, selling rights before you've even made it, which we didn't have to do for *Anna and the Apocalypse*. But it's very common in indie films, where you've pre-sold this; instead of MGM coming in acquiring the film after we've made it, we could have tried to sell the rights to MGM beforehand and used the money to make the film instead. That wouldn't have been very much money, but as long as the film is any good a pick-up is better than a negative pick-up.

So, it's got a significant downside which makes it incredibly hard to even call the indie film industry, an industry. It doesn't really have the features you'd normally expect of a market where you can have consistent revenues, where you've got a business model which is repeatable, which is projectable. I know how many times I've tried to project what revenues we're going to get from independent film; there's nothing regular about it. You get people who will have great success once or twice, and never again. You get people who have success regularly, and you of course

get people who have never had success in the film industry. It is also one of those industries where you can make a product that makes everyone lots of money, but the producer who made it gets zilch. That is very common. It's not protected under any regulations, you can have retained your intellectual property all you like, I ultimately own *Anna and the Apocalypse* the film, but will I see any profits from it as the producer and owner of that intellectual property? Who knows?

Actually, *Anna's* not a good example, that's fine, we're all good with that. But if it was any other film, could we guarantee that? What if MGM has made \$10 million off it but I haven't seen any of it? So, it is an inherently problematic industry, and it is also subject to changes in the way that we consume, just as TV is, but even more strongly than TV. We pay money to go to the cinema, and cinema revenues are pretty healthy, but they're for a certain type of film which mostly involves superheroes, that personally I love. But I also want to go and watch other kinds of films, and would ideally like other people to go and watch those kind of films, because that is still worth more than any secondary market for film, whether that's physical or digital sales.

So, without cinema backing us up as the route to market, independent film is even less sustainable than once was, that does not mean you can't have success, it just means it's not predictable, it's not a business, it's fun. On the other hand, there's the studio model. My friends in the US who are backed by studios. The studio comes to them and says, 'I'm going to do a deal with you: I'm going to pay you money right now and everything that you develop in the next five years (usually a bit less than that) is mine. So, I'm going to pay your wages, and you're going to get a slice of it, it's fine, you're going to make money, and you're probably going to make a few million, but it's mine'. My friends are not complaining!

Or someone from Disney might come along and say, 'I'm going to pay you a million dollars, then I'm going to fund films that I agree to. So we have to agree which films they are going to be, but when I agree I'm going to then pay *a//*the money for it, I'm going to pay you \$50 million budget to make a film, you're going to get to keep 10-15% of that, and then it's mine'. Doesn't seem like such a bad deal. Three years are up, you might have made a film, you might not have. You made a million dollars, two million dollars, and then you don't own anything at the end of it, but then you go and do another deal with Universal. Or, you might just stop working and retire.

So, what does it matter if I own intellectual property in the UK? Great. I own *Anna and the Apocalypse* outright? No-one's gone to see it in the cinema. I've sold the rights to all the various ancillaries that I could: got a bit of money. I have an asset: it's really well-protected. I've managed to do five levels of ancillary negotiations: from the short film, all the way to a stage show, and music rights for the stage show, so that's six levels. I could have been in the States and made

a million dollars, and actually not made a single film. But if I had, someone else would have paid for it. I would have been able to focus on developing scripts, hiring the director, the crew, not have to think about budget. But on the other hand, if I've just made *Toy Story*, for example, for Pixar (and Pixar was independent once) and I just sold it, where I could have made \$1bn, instead I made \$2m. That franchise is worth somewhere over \$3bn dollars now, including all of its ancillaries.

So, if I had stuck to my guns, this could be a brand new independent studio that could fund new shows, that could break up the big five, sometimes six, studio system, an oligopolistic market. If I just retained my IP at that point and stuck to my guns, I'd literally have three billion dollars of revenue, not profit to be fair, big difference! That might have been the start of something new, but I can't get to that point because in order to even know if it will be a success, I have to have sold all my rights.

Now I come back to that first part, which part of my brain am I listening to? Am I listening to the part that's saying, 'I really want to be part of a healthy system that's going to distribute income, that's going to reinvest in risk taking products that innovate. That means I get to watch movies that I've never conceived off before, that aren't just repeating the same movie over and over again. Do I want to be part of that healthy system, and therefore take a hit and turn down your deal and I'm going to try to self-release this? Maybe I'll make a billion dollars, but probably not. Or am I going to take the money, sell the intellectual property, and go 'great, you make all the money you want off it, but I'm going to go to Barbados and sit in the sun'.

Of course, 99% of the time you're going to sell and maybe you'll make a few percent off it, but probably not. They tried in America. They tried with their system of unions, which are much stronger than here, to have something called 'modified adjusted gross receipts', which is a wonderful euphemism for net profits. They basically said, 'this is what we allow you to deduct from revenues, and then we'll pay you a percentage of that'. And because everyone had agreed to take net profits, but no-one could agree what net profits were, they never got paid, so they tried to regulate it. And yes, sometimes people do get paid royalties from modified adjusted gross receipts, which do have allowable deductions. That is still not enough of a royalty basis, because ultimately the healthy industry comes from receiving profits, not fees, because I then have an asset that I don't have to work to generate income off, I have passive income. But it's not a model: it's luck, it's hope, it's trust. 'I trust you to have defined modified adjusted gross receipts in an effective way', and 'I trust you to have accounted for it effectively', and 'I trust you to then pay me the amount that I'm due'. It's not a market, it's just a network of relationships, which maybe is what markets are I guess.

Video Games and Evolving Business Models

Blazing Griffin is also a games developer, which means we are programmers, artists, designers, and we create that thing. In the way that with film and TV we'll sit with the writer that we pay to make a script, for games we sit and we make it. We employ a reasonable sized team of people, every single month, every single year to make our games.

Games is an interesting one because it changes much quicker than film and TV, it goes in cycles. It's very young, so this might be why it's self-correcting constantly as we go. It's also much more responsive to technology, whereas obviously TV and film take a long time to respond to new technologies. In 2005-06 there was a big shock to the video game industry when the Steam platform became a thing. This was the first time a consumer could digitally open up their computer, buy a game, and go, 'it's mine'. It was a curated platform, so owned by a company called Valve which made the game *Half Life*, a huge game. Funnily enough they used the profits of their game *Half Life* to then develop a platform that they could sell their games on, and then open up to other people. That's how useful ownership is.

Now, they had a really good idea where they were like, 'Well we don't need to own everyone's IP, but we could get a percentage of it. So, if we can corner the market on PC, we will get 30 percent of everyone's revenue, revenue, not profits, and we'll get to keep it'. Now this is normal. This is what Apple does with the App Store, what Google does with the Play Store, at the time this was revolutionary. They had a closed system that a few developers were able to put content on. They wanted to have it curated and they wanted it to be high-quality games. Suddenly we didn't need what we call publishers. Publishers are the intermediary. In film the equivalent is your distributor, the person who puts it on in the cinema. I could go straight to the cinema, sell my asset right there, I could literally stand in the cinema and say, 'Watch my film! Pay me money for it', and I'd get money, that kind of thing. So, I could do that, I could do it at zero cost, put my game up if Steam agreed, and I would have access to several million people who were demanding content, and didn't have enough content.

There was an explosion of independent developers, and we were one of them in our previous pre-merger life in Blazing Griffin, really benefitted from this. We all got to retain our IP, we didn't do much with it, because that's not what we did, that was not what we were specialised in, we just wanted to sit and make stuff. We could say no to publishers because we were all independently-minded geeks who did not want to sell. Culturally we did not want to sell what we did to publishers, were very suspicious of them. We made a lot of money, and it was great, and then more games came on the Steam platform. More games came on, and actually any games that

were developed using the technology that Valve had developed, called the Source Engine, which is a 3D graphics engine that *Half Life* used – you had to pay them 50% of your revenue, not 30%.

Suddenly we were inundated, we weren't used to spending money on marketing, we put our games up and we're like, 'Well, you just put a game up and then people buy it, it's got to be kind of good, but apart from that, that's literally your only barrier, it's got to be creatively interesting'. This is something we can do, we trust ourselves creatively. That suddenly was not enough, suddenly there's 20 new games a month on Steam, then 50 new games a month, then 100 new games a month, and there are *thousands* of games on Steam, and how does anyone know what to play next? I'll tell you how they know what to play next. They know by adverts, by marketing, they know by publishers buying your game first, sometimes not paying for it at all, and then them putting it on Steam.

So, the cycle came back and publishers are really important again, and now I have to possibly sell my copyright. I have to give it to them and it becomes a work for hire deal. Or, if not that, then I get to retain copyright but for 15 years I have to give a publisher the right to take 85% of my revenue. If I'm not lucky it might be 85% of their profit that they get to keep, and I get to keep 15% of their net profits. I got to make my game, but I don't have any assets. So, we had this explosion, which was great for skills and development, no complaints, then suddenly publishers are really relevant. And to be fair, there's now no normal in publishing. You can get a completely different deal with one publisher from another one. So I can retain my copyright in some cases, I might get an advance, I might get a fee, I might sell my copyright, I might not. There's a million different ways it can be done.

What we have now, and this is very new, in the last year we had the cycle coming back again because Steam had a monopoly on PC games. PlayStation and Xbox were closed console markets, where they controlled their market environments. And you talked about mobile but that also contributed to the explosion of independents, and then the problem of discoverability. Then free-to-play which requires you to have money to buy users, to get noticed, which means again same trend as always. Only the people with money can afford to make money.

Now, there's a moment of opportunity inside the video games industry, because of the multiplication of avenues of distribution. You have Apple. We were a launch party title for Apple, *Murder Mystery Machine*. I can't tell you for contractual reasons what the terms of that agreement were, but I can tell you that we own our copyright, it's our game. We sold the distribution rights for Apple products only and we have some limitations of what we can do

with that game now. But broadly I can now go and sell the different rights, just as I did with *Anna and the Apocalypse*.

In this case I can sell a game, maybe *Murder Mystery Machine 1.5* to a PC console publisher, or in fact self-publish it if I want to, and I've got that asset. I can self-publish and keep 100% of that revenue. Or I can sell it to a publisher and keep whatever, somewhere between 5% and 30% depending on the type of deal that I do. But it's open, and Steam would never do that in a million years because they're earning passive income, they're making 30% of your revenue for every game that's in existence on PC.

But there's the example of Epic, a video games developer who self-publish, own their own IP, which is key here, and then have reinvested that in making their own store. They also own their own underlying tech called Unreal, a similar way to Valve. They've made a store, they've made a competitive platform fee. It is 12% if you use their technology, or 18% if you don't, or something like that, which is meaningful in terms of where I want to sell it. They are paying for exclusives because they need to get content, in the same way that Apple is paying for exclusives.

You also then have Stadia by Google, a brand new cloud based console which has a ludicrous business model, which is not going to work. But you never know, maybe it will? You have to both pay to subscribe to their tech, but also still pay full price for your games. So, I think it will be fairly limited, but right now they're still paying for exclusives, they're still paying for content, and they're not necessarily owning IP. Again, it's about distribution rights. So for a short period of time I can competitively take one of our games. That's what we're doing right now, a game that is a sequel to a game that we own, that we're shopping around to Apple, to Epic, to Google. We ignore publishers for the moment because I get to own my IP, I get to have control over it.

For a while that's going to be great, and then the distribution avenues are going to realise, 'Oh, we have overpaid, a lot! We've got some users, but now we can't afford to continue to acquire users, we're going to have to go through traditional models, traditional avenues, to keep user retention up. We're going to have to pay for normal advertising, and we're not going to have anywhere near as many exclusives. Or, it's going to go to the bigger guys, the tentpole films equivalent. They'll go to the Marvels, not to us Indies. But right now, it's brilliant, it's a really good time to be in video games if you have access, and you're a trusted developer.

One final point on video games that's worth mentioning is China. It had once been traditionally quite difficult to do business with China when it comes to intellectual property. But that has changed a lot recently, and it's been really interesting because we have talked with quite a few big Chinese companies over the years, we've just never got to the point where we were able to

do a deal, until last year. What has happened recently is that some of these Chinese companies that we've known for a long time come to us and say, 'We know what our reputation is, so therefore we're going to act better. We're going to give you better terms than any other company in the world would give you, because we need to prove to you, and prove to the world, that we're trusted parties. Prove that we can do this and that your products are worth something in China, and we'll actually pay you money'.

It's been really interesting, and there's been a huge number of acquisitions recently in video games with China. Tencent is incredibly active in the UK and has snapped up a lot of video game companies. In fact, the model is really similar to what was happening in TV, and I've only just made this connection. A lot of the time, with Chinese companies specifically, they are no longer buying games, they're buying companies. So, if they like your game, they'll buy you, and then they'll keep you making stuff. Then when you don't have anything to make they'll shut you down again, which is exactly what Microsoft and Sony once did. They would just buy the studio and then shut it down after five years.

We've been able to do licensing deals. We licensed one of our games *Murderous Pursuits* to Netease, and what we've done is, because we retained the IP for *Murderous Pursuits*, we self-published, we owned that, we could license them the mobile rights. In return we get a percentage from gross, minus platform fees. It's very similar to Steam and we'll earn from the first dollar that comes back. That is not common in video games or film to start receiving revenue before costs are taken off. That's when royalties are *incredibly* valuable, so it might be our first *truly* royalty-generating game in a significant way. This is a result of something that we made, licensed the mobile rights for a Chinese company but did a deal. So we still retain the IP and we get royalties at the top of the income waterfall, which is unexpected frankly. You wouldn't have expected it to be that way, but it is this change in behaviour that we've seen.

Conclusions

As I said at the start, I don't know if there's a thread through all of this, other than nothing is normal. It is not obvious in the moment whether when you're in a deal whether you're choosing to work in a system where you get to retain your IP is actually beneficial, especially, definitely in the short-term. We're continually getting buffeted for reason to sell either our companies, or our products and the IP elsewhere, whether inside the UK or outside the UK, and become subject to making our markets more vulnerable.

I can see that in our company and I can see it in my friends' companies. For me, it comes back to what does the perfect market look like, and how do we encourage this through policy and through

sharing of information, which is a big one. Through trying to encourage long-term thinking, even if you're just retaining a small amount of your intellectual property. Just a small change in behaviour to be able to get to the point where like Epic, you make a game that you happen to own, and suddenly you have enough money to reinvest and make a *brand new* platform that disrupts an entire market. Or, not do a Pixar and sell everything, and be subject to now making average films when once they were brilliant. To be honest, Disney now manages to make better films than Pixar does, which is really interesting given that they're both controlled by the same company, but you see they're now controlled by outside forces.

So, we have to be nimble. It's not a friendly environment for new entrants, especially ones that want to grow. It's complex, it takes money and it takes time, but opportunity is there. This is the thing with the market that is incredibly different, when there are no rules. 'Terms of Trade' maybe need to be extended to SVoDs in the UK, but then that would create a non-competitive environment. Regulations would be better if they were implemented on a global scale, but they never will be. So, we've got to understand how our little slice of regulation is going to impact the behaviour of a global system, not just the local system. But within that there is a huge amount of opportunity, because as we found, we can create custom agreements that mean you can make indie franchises that might one day do something, or at least have the spark, the hope that there will be something. You can do deals with China that mean it might be worth something, a lot of the time it might be worth something, you never know!

I believe that copyright should be short, and I believe creative products should be open. I think that benefits a market overall. If I make something, and then someone makes something based on the thing that I have made, that is of benefit to the whole. I've made something, I've invested in it, I've made my money back, and then someone else has a go and makes something. There's no better example of this that I can think of than the modern community in video games.

I made a video game, I've created the sandbox world, and then someone has taken the technology that I have made, then they've made their own version of it. They've made a fantasy world inside the tech that I have made, they're not making *anything, any* money off it, this is for love and not for anything else. They're spending hours of their day, sometimes in teams of 100-people, making incredibly complex product based on the products that I have made. To me that is creatively wonderful, and there's a very good example of why this is important, so this proliferation of ideas based on someone else's idea creates something called *Dota 2*. This was a mod based on a Blizzard video game, and someone said, 'I can use their tech, I can make a thing. A completely other kind of game that no-one has ever seen before, but I can make it because you made it'.

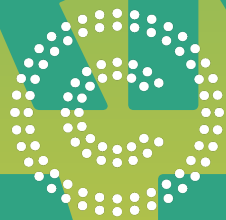
It is now the biggest sport in the world that most of you have never heard of. Literally the biggest sport in the world. It's a competitive video game that people play professionally, make money from. That started from the idea that you could take what someone else has made, and made money from, and put your own spin on it. Then that company went, 'Ooh, we'll commercialise it'. So, to me, encouraging that kind of behaviour, user-behaviour is really important and leads to a creatively, and potentially commercially vibrant market. At the moment we don't exploit that. We're very protective over our IP, where we want to control it, we negotiate with licensing and brands all the time to be able to make use of the IP on our products. That is one of the most exhausting negotiations you'll ever have, because rightly so they're protective over their brands, and over their property.

The flip-side of that is, when you're not, when you put it out to the market you create things that are worth billions of dollars by accident, that no-one trying to approach that strategically would ever do. So, innovation from being generous with your intellectual property can be the engine of growth for an industry, it can completely transform an industry.

So, personally I love it when people take our stuff and mash it up, and if they pirate it - they pirate it, but the getting out there is more important to me than if I've made an extra 2 cents on the dollar, because of the multiplying effect of what that can have in industry. Again, that is subject to our selfish individual short-termism's behaviours. Whilst video games is a good example of it we're not very good at approaching it in a structured way. We're not good at commercialising it. So, we could create a system where if you made a mod for our video game, you're allowed to exploit that for commercial gain, but you just have to pay us 10 percent. That could be a very simple way of doing it.

But then you get into who's responsible for it, how do you regulate it, the content that goes onto it. There are a whole load of very complicated questions, that as an Indie company you don't have the time or the resources to answer properly. So you just say, we'll just do the normal thing. And as a big company you're already making enough money so it doesn't really matter, you're not thinking about innovation. So, you have a gap in innovation there, but I do think it's ripe for exploitation. It is and I think it will change.

INTELLECTUAL
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