



## Directors UK's response to Ofcom's first consultation on proposed changes to BBC iPlayer

1. Directors UK is the professional association of UK screen directors. It is a membership organisation representing the creative, economic and contractual interests of over 7,000 members — the majority of working TV and film directors in the UK.
2. Directors UK collects and distributes royalty payments and provides a range of services to members including campaigning, commercial negotiations, legal advice, events, training and career development. Last year we distributed over £17million to our members in UK and Foreign payments for the secondary use of their works.
3. Our members are the TV and film directors who make the programmes which fill the BBC schedules. Directors UK welcomes the opportunity to respond to Ofcom's consultation on the proposed changes to BBC iPlayer.

**Question 2.1: What do you think of the BBC's proposals and the procedures it has followed in carrying out its PIT?**

**Question 2.2: What are your views on the BBC's assessment as set out in its PIT? Do you agree with its conclusions?**

4. We recognise the need for the BBC to innovate and modernise its services in order to remain competitive and relevant in the changing digital market.
5. However, Directors UK is concerned that there has been a lack of proper consideration of the concerns expressed by a wide range of stakeholders about the potential impacts on secondary rights markets, coupled with a lack of available market data available for respondents to assess it. For these reasons we do not believe Ofcom should simply accept the BBC's assertion that these changes will have minimal impact on secondary rights and should explore this further.
6. Directors UK is particularly concerned that the BBC's proposals to extend the iPlayer viewing window to a minimum of 12 months and to increase the availability of box sets, selected single programmes and archive programmes will have an impact on the secondary rights market, which will in turn have an impact on rights and royalty income for underlying rightsholders, such as writers, directors and performers. These potential impacts on underlying rightsholders have not been explored in the PIT assessment.
7. In terms of process, the BBC should have provided the details of their proposal and the supporting analysis and market assessment information at the time of the original PIT consultation in February in order to allow respondents ample opportunity to respond to the details of their proposals. There was minimal information provided at the time of the original PIT consultation making any meaningful assessment and comments by stakeholders very difficult. The density of the research information now provided in support of the proposal and the short window to respond to Ofcom on our views on the proposals puts respondents at a disadvantage. Given this, the preliminary decision by Ofcom that it will not be looking into 'the

reduced value of secondary rights' is of real concern to us and our members as we do not feel this has been thoroughly explored and do not agree with this conclusion.

8. The BBC's assessment of secondary rights impacts, based on research presented by Frontier Economics, explores the vertical market impacts but only down to production company/producer level. We do not believe this has gone into enough depth as it does not explore the additional impact on underlying rightsholders (writers, directors, performers) who receive payments for the onward use or sale of their work, and how this contributes to their employment environment and affordability to work. We therefore consider this an incomplete analysis.
9. The BBC is seeking to make these changes to the iPlayer because their PSB role and value is being impacted as a result of the changing market and audience behaviours. They are seeking to move the boundary on the window of availability in order to restore value and to meet audience expectations and the competition's offering. But there is a complex interaction of commissioning and production processes, relationships and distribution models that shape the industry and there are very real and tangible onward impacts if you change the infrastructure for content production and distribution in one area, such as extending the iPlayer window from 30 days to 12 months or longer, as it fundamentally changes the model of secondary sales and distribution and has a knock on effect all the way down the chain to the creative authors. Ofcom must properly interrogate the impact of this change all the way down the line.
10. We do not believe there has been enough evidence to truly quantify any impacts or potential decreases in value in secondary sales after an extended holdback window. Currently programmes are not available to view after the initial 30 days so that audience interest is not saturated, and they still have value for the producers to exploit when they become available again after the holdback window. Under the new proposals the lengthened availability on iPlayer during holdback does risk saturating the audience and we believe this is likely to impact on secondary exploitation. In its BCA Ofcom should give stakeholders an opportunity to present evidence to challenge or support this assertion. In addition, the analysis provided does not adequately address the additional impact of BritBox.
11. The BBC's conclusion (para 221) that *"even if increasing the availability of programmes on BBC iPlayer were to lead to a reduction in future commercial revenues, in a competitive market, a reduction in value of the secondary window could, all things being equal, lead to an increase in price in primary commissions."* must be examined. Ofcom should ask the BBC if it expects to pay more for the extended window in order to compensate for the value of the loss of secondary revenues and if it has made budget provision to do this. Ofcom should explore where the additional revenue is coming from in order for the BBC to be able to increase payments for primary use. Simply extending the iPlayer window will not generate income for the BBC as it is not gaining additional revenue or subscribers for this extended use and potentially may itself be losing income from any reduction in onward sales.
12. Based on the BBC's proposals Directors UK would consider the proposed additional use of returning titles, non-returning titles and archive titles as new forms of secondary use and would expect secondary-use payments for our members whose works are used in this way on the iPlayer.

13. A wider impact, as identified in the BBC PIT (para 217), is that the area of content production that would be most impacted by any losses in secondary revenue from the iPlayer changes are mid-budget level programmes. These often rely on advance UK secondary sales in order to help raise the upfront investment in the programme, and so any impact on the value of the secondary rights after the iPlayer extended window may affect these upfront investments. These are exactly the programmes that global platforms aren't investing in or buying that are aimed at UK audiences telling UK-focused stories. These are of enormous PSB value to UK audiences. Ofcom, as the independent regulator for PSB, should have a duty to explore this as a potential impact of any secondary use losses.

**Question 3.1: Do you have any comments or other views on how the sector has evolved or is likely to evolve in the future that we should consider?**

**Question 3.2: Do you have any views or evidence on how viewing of individual programmes changes over time on VOD services?**

**Question 3.3: Do you have any views on how UK VOD viewing might evolve in the future?**

14. The rise of on-demand providers has created a renewed competition in the market and a boom in content production. This is good for the creative economy and employment opportunities in the UK creative sector and is creating more choice for audiences. One consequence of this is that it is changing how and where people view content and is unsettling the traditional models of production, financing, distribution and remuneration.

15. There are many reasons why it is difficult to speculate on how the sector and VOD might evolve in the future:

- a) It is still too new and there is a huge amount of disruption taking place making it difficult to make useful predictions.
- b) The industry is exploring ways of mitigating the impacts of these changes which will in turn affect viewing habits and behaviour, for example the imminent launch of BritBox will change how BBC and ITV shares its content with audiences longer-term. The question of how this will sit with and impact on the iPlayer, itv Hub and other BVODs and SVODs is as yet unclear. Whether it will positively or negatively encourage international sales and viewers to UK content, and how this will be measured and reported are all yet to be determined.
- c) The lack of transparent data on VOD/SVOD use makes it hard to model or speculate on the impacts of the iPlayer and VOD/SVOD changes in the market and is something that Ofcom needs to work with the industry to address as a matter of importance.
- d) As the SVOD and VOD markets change - through both consolidation (BritBox) and fragmentation through the entrance of new players (e.g. Disney, Apple) - the question of how many subscription services viewers will pay for; whether the licence fee model continues to be an effective/viable funding mechanism for the BBC; and how all of this will affect content production investment models, audiences and advertising will all need to be examined and addressed.

- e) The way content is being commissioned in the SVOD market is also changing. As Frontier Economics highlighted in their report <sup>1</sup>*“It is notable that there is an increasing trend for commercial sVoD providers (for example Netflix and Amazon) to commission content and acquire rights in the primary and secondary window in totality. The commissioning broadcaster therefore would retain the rights to exploit the content in some or all secondary markets. Where this is the case, the commissioning broadcaster pays the production company more at the point of commission to reflect the fact that the production company will not retain and exploit the secondary rights.”* This is fundamentally changing the secondary use market and, significantly for our members, is having an impact on traditional rights and remuneration models for rightsholders. This business model means there may be no secondary market at all and therefore no further revenue stream for rightsholders and content producers. Instead, rightsholders have to accept a buyout of all their rights up front, before there is any way of assessing how well a programme would perform. Buyout models remove any incentive to make a success of a work and risk undervaluing the rights. Ofcom may want to refer in this context to the provisions in the new European Directive on Copyright in a Digital Single Market<sup>2</sup>, regarding appropriate remuneration for authors and performers, and the problems associated with buyouts.
- f) This impact on business models is aggravated by the lack of transparency, as SVODs and VODs do not make their consumption information available to rightsholders. This means any remuneration model, such as royalties, calculated on consumption or use of content cannot be applied. This absence of data reporting is causing a great deal of disruption in the industry as we work to establish new models for how royalties can be paid for by VOD and SVOD platforms based on little or no information. Bargaining is currently taking place between global super-power organisations such as Netflix and individual freelance agents or their CMOs, but there is a serious imbalance of power making negotiations difficult. Without royalties many freelance creatives struggle to survive in the industry.
16. In terms of our members, issues that are of concern in this changing marketplace are:
- a) How the changes in the sector affects their employment opportunities and remuneration.
  - b) How the changes in the marketplace impact on the secondary rights market and the blurring of lines between primary and secondary uses.
  - c) How we can ensure fair remuneration for creative rightsholders for the use of their works on all platforms and how this is quantified and valued.
  - d) BritBox and how this will impact on the onward use and sales of PSB content. It is still unclear how it will work with the proposed iPlayer 12month window and how it will impact on the onward sales to the secondary use market.
  - e) Protection of distinctive UK originated content for UK audiences.
  - f) Protection of copyright in the digital age.

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<sup>1</sup> <http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/iplayerpit/frontier-competition.pdf> 6.2.4 p84

<sup>2</sup> <http://www.europarl.europa.eu/news/en/headlines/priorities/copyright>

**Question 4.1: What are your views on the methodology and conclusions of the BBC’s assessment of public value generated by the proposals? Are there any impacts on public value that have not been identified by the BBC? Please provide evidence to support your views.**

**Question 4.2: Do you agree with our approach to reviewing the BBC’s assessment of public value generated by the proposals? Please provide evidence to support your views.**

17. We are not qualified to comment on methodology other than to note that, in the absence of hard data, much of the research and analysis presented by the BBC is based on assumptions and hypothetical behaviours, which is likely to impact on the reliability of the predicted outcomes. As Frontier Economics themselves state *“Results of surveys which elicit respondents’ hypothetical response to a described hypothetical future change should be treated with caution.”*<sup>3</sup>
18. Similarly, the impact on markets in terms of how the iPlayer change will affect viewing figures, subscriptions, advertising and revenues of other service providers, is also based on assumptions of market and audience behaviours which are rapidly changing. It is important that Ofcom is mindful of this and conduct its own independent assessment so that the market impacts of the proposals are examined accordingly.
19. More generally:
- We agree that Ofcom should conduct a full BCA.
  - We agree that Ofcom should commission its own independent research into consumer behaviour and analysis of the VOD markets.
  - We agree that Ofcom needs to do its own independent modelling and research into audience viewing of iPlayer.
  - We do not think that Ofcom has allowed enough time for respondents to review the latest BBC proposal and supporting materials.
  - We do not agree that Ofcom does not need to explore the impact on the value of secondary rights.

**Question 5.1: Do you agree with the concerns that we have set out in Section 5, or are there any others that we should consider? Please provide relevant evidence to support your views.**

**Question 5.2: Please provide evidence on whether and how the BBC’s proposals could directly impact on rivals’ viewing, revenues and investment.**

**Question 5.3: Please provide any evidence on whether there might be reduced access to content rights, and whether this might reduce the ability of rivals to compete and why. We also welcome evidence on the alternative sources of content rivals would consider.**

20. We agree with the concerns that Ofcom has identified in Section 5 (p16) of its consultation document on market impacts.
21. We do not agree with Ofcom’s decision to focus only on the first two of these *‘as the more plausible and significant risks’* and to not independently address the other risks such as the potential impact of the *“Reduced value of secondary rights”*. Ofcom itself in its consultation document acknowledges the value of secondary rights (3.21.1) p11 *“These rights are important*

<sup>3</sup> <http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/iplayerpit/frontier-competition.pdf> P42, ref 55

*sources of revenue to external producers – secondary rights were worth a total of £480m in 2017*”. We are particularly concerned about the onward impacts on payments for secondary rights to underlying rightsholders such as writers, directors, performers which has not been properly explored.

22. Further assessment is needed as to what extent does this proposed change alter the current separation between primary and secondary uses? Does it do so in a way that threatens the structure of further payments of royalties to underlying rightsholders under long-standing collective agreements, and if so, has the BBC put in place arrangements to review and restructure those agreements with the rightsholders? Only through a comprehensive, independent assessment will it be possible to determine the scale of the impact that the changes to the iPlayer service will have and how to mitigate any potential risks.
23. Ofcom’s explanation for its decision (p17) that *“producers would need to agree to provide the BBC with the rights to put content on BBC iPlayer for longer, including through the Terms of Trade negotiated with PACT. Potentially producers could receive higher primary rights payments or other terms from the BBC to compensate for the extended availability on BBC iPlayer and any reduction in the value of secondary rights.”* is not a sufficiently thorough assessment of the issue.
24. We think it is a risky assumption for Ofcom to make that the BBC will automatically pay more for the rights, as the Terms of Trade between production companies and broadcasters are subject to negotiation, highly regulated under the Communications Act and Ofcom has a role in reviewing and enforcing these. Some of the rightsholders involved in these rights negotiations will argue that there is an imbalance of market power as the BBC is one of the largest content commissioners in the UK. There has already been widespread discussion in the trade press<sup>4</sup> over the importance of rights highlighting just what a controversial issue this is. It is therefore entirely appropriate that Ofcom should investigate these impacts further.
25. This conclusion also assumes that the BBC has available additional money to spend on primary rights to compensate for any loss in value from secondary use. It is not clear in the BBC’s proposal or Ofcom’s assessment where the additional money for any increased payment for primary use would come from if it is not generated through secondary sales. Increasing the number of people watching on the iPlayer will not generate additional license fee revenue nor is the BBC gaining revenues from increases in subscriptions, and there is a risk that they may even have a reduction in income from the loss in value from any secondary use sales. Therefore, we do not feel there is sufficient evidence to dismiss this as a ‘not-significant risk’. Ofcom should explore the question of whether the BBC has the means or has allocated money to be able to increase payments for primary use.
26. The research by Oliver & Ohlbaum Associates cited in Pact’s response<sup>5</sup> found that the extended iPlayer window will have the impact of reducing the money available for future investment if investors get less benefit from secondary sales, coupled with the dilution of value of secondary rights by the extended use on iPlayer. They also found that there will be a potential impact on production budgets for mid-range programmes that rely on approximately 20% of the production finance up-front from advance secondary use sales which could have a detrimental impact on the

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<sup>4</sup> <https://www.broadcastnow.co.uk/bbc/rights-revolution-needs-new-rules/5138903.article>

<sup>5</sup> <http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/iplayerpit/pact.pdf>, p11

volume or quality of programmes produced, or cause production companies to seek less-UK focused productions that will attract more international investment up front and will sell to a global market.

27. In its paper, Frontier Economics acknowledges that the relationship between the exposure of content on BBC iPlayer and the value of the secondary window is “complex”. We feel it did not provide sufficient evidence that extended viewing on the iPlayer would not damage potential commercial revenues across the range of programmes being proposed for extended use. The report makes the assertion that “*Even if the value of the secondary window did decline (which is not certain), there would not be an impact on the production market since theoretically the value of the primary window should increase to offset any potential reduction in the secondary window*”<sup>6</sup>. We don’t find this assertion to be adequate evidence to not explore this potential impact further.
28. Producers, directors, performers, writers and composers have all expressed their concerns in their response to the BBC’s PIT. Given this is an issue of such contention to key groups in the industry we believe it would be a failure of Ofcom to not examine it more thoroughly.
29. The BBC states in the PIT (p84) that it is committed to “*negotiating fairly with rights holders around any additional rights we need to secure for BBC iPlayer*”. Given the sheer size and scale of the BBC in the UK market it is inevitable that rightsholders will be under pressure to do a deal. But one of the biggest challenges facing rightsholders and CMOs in managing these negotiations over the changes in use to on-demand services is the absence of any accurate reporting metrics, which are fundamental to how value is determined and remuneration is calculated. There is a lack of data and no consistent measure of how to assess content use on VOD platforms. It is a matter of urgency that the industry identifies a viewing metric that enables assessment of VOD uses. We believe Ofcom, as the independent regulator, has a duty to examine this as it is fundamental to the assessment of the function and perceived value of the secondary use market.
30. We believe that there is sufficient concern in the industry over secondary rights impacts which Ofcom must take seriously. We urge Ofcom to conduct a full assessment as to how the extended use on iPlayer will impact on revenues from other uses or onwards sales of programmes that will affect the remuneration that rightsholders would otherwise have received. We, and other rightsholder groups, would be happy to meet with Ofcom to discuss what information we can provide on the potential impact of the BBC’s proposed changes and how best to mitigate these.

**Question 5.4: How do you think any potential for adverse market impact of the proposals could be reduced?**

31. **Full Competition Assessment** - In undertaking a competition assessment Ofcom must include an exploration into the impact on the whole secondary rights markets value chain, as this is the only way to fully understand the potential negative effects and how to mitigate them or to identify and promote positive impacts. Currently the BBC has provided no assessment on the impact on underlying rightsholders.

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<sup>6</sup> <http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/iplayerpit/frontier-competition.pdf><http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/iplayerpit/frontier-competition.pdf>, p52, section 4.4

32. **Transparency in data reporting** – There must be sufficient transparency of data reporting of the viewing or use of content on VOD and SVOD platforms to allow for a full assessment of the value. This is essential in order to enable CMO's and unions to calculate the residual payments owed to artists, authors and performers. There is currently no transparency or consistency in VOD data. If the BBC's intention is to make the iPlayer their main destination place then the industry and Ofcom should require better auditing, monitoring and reporting of audiences and viewing on online platforms.
33. **Fair compensation to rightsholders** – If the BBC wants the iPlayer to use rightsholders work for longer and different uses then there must be adequate and fair compensation for all uses, taking into account the length of window of use, box sets and archive and is dependent on transparency in reporting.