

## **BPI response to the Draft Ofcom Annual Plan 2013-14**

### **Introduction**

1. BPI welcomes the opportunity to comment on the planned work of Ofcom in the year 2013-14. BPI will contain its comments to those aspects of the plan that relate to regulation of content online and Ofcom's role in ensuring that consumer and citizens can experience a safe, legal online environment.
2. Ofcom should have a wider part to play in ensuring that the UK economy captures the benefit of online consumption of content through dynamic and competitive content and technology markets. The work Ofcom has outlined in its plan reflects a time of greater convergence between online and offline consumption of content services.
3. The UK is a digitally advanced nation – with much greater use of online commerce than European competitors. It is certainly digitally advanced in music, with over 70 legal music services – more than any other country in the world.
4. However Internet piracy remains a huge problem for the future development of the UK digital content market. This also represents a significant loss to the exchequer from tax revenue foregone and to the economy in jobs and output. BPI believes that there is a need for greater co-ordination from Government, regulator, rights holders and legitimate businesses to tackle the problem of illegal online distribution of content. Ofcom's role in network and content regulation should be fit for a modern, digital world where it could help ensure ongoing investment in content and services is protected against activity that competes unfairly and illegally.
5. Ofcom's role in the regulation and implementation of the Digital Economy Act is crucial, and BPI welcomes Ofcom's prioritisation of its work on the Act. Whilst there is a delay, rights holders rely on Ofcom to ensure that all of the aspects of the timetable remain on track, and would urge Ofcom to continue to apply sufficient resource to ensure the essential elements of the implementation are completed in a timely fashion.
6. Currently, the only enforcement mechanism open to rights holders to block websites that illegally infringe copyright on a mass scale, the powers under section 97A of the Copyright, Designs and Patents Act, are expensive and cumbersome. BPI took a successful action in the High Court against one of the most obviously infringing sites, The Pirate Bay, but this was undertaken with a great time and cost commitment.
7. The powers in the 2003 Act were designed for a still mostly analogue world – where consumption of TV content was sufficiently different to online content for there to be an inconsistency in regulation. This inconsistency looks increasingly difficult to justify, with services from the BBC iPlayer to the use of internet streaming for pay per view movies, to the rapid increase of tablet use for watching content on the move substituting for traditional streamed broadcasting content.
8. One example of this problem is that Ofcom's powers to regulate online TV services that are acting legitimately contrasts with its complete lack of power to intervene where similar services are acting illegally. Ofcom can fine legitimate companies that do not, for instance, have adequate age verification, but can take no action over illegal sites that supply hardcore pornography for free alongside vast amounts of our members' content.

9. Given the current considerations within Government of a Communications Bill, greater consideration should be given to Ofcom's enforcement powers against illegal content. At the moment those businesses wishing to trade legally face regulatory compliance - those deciding to operate illegally do so without fear of repercussions from the regulator.
10. BPI would welcome Ofcom consideration of whether its current duties are sufficient to deal with the issues outlined above. There are two main aspects BPI believes Ofcom may wish to consider:
  - I. **BPI has called for an expedited site blocking process**, so that actions against illegal foreign websites can be low cost, swift and effective in defending the rights of UK creators and businesses. BPI would welcome Ofcom consideration of options to improve the site blocking process to ensure that action against sites is speedy enough to minimise damage and disrupt those websites and website owners that are undertaking illegal activity. This could be the basis of measures in the Communications Bill.
  - II. BPI has called for the Communications Bill to include proposals for **Ofcom to have a duty to reduce online and mobile copyright infringement in the UK**. This general duty could be accompanied by specific powers to require entities to take reasonable measures specified by Ofcom to achieve this objective.
11. A General Duty would complement Ofcom's Duties to further the interests of citizens and consumers, by ensuring that there are dynamic legal content markets and consumers are protected from unlawful services and being guided to them. It would also complement Ofcom's duty to further investment in infrastructure – as money from increased demand for innovative new legal services could support infrastructure investment and content and technology investment.
12. There are three major aspects where BPI believes Government should be able to take action where providers of digital services have actual knowledge of infringement of copyright: advertising, payment and search. BPI is involved in productive discussions with companies engaged in these three aspects, but would like to ensure that there are backstop powers in statute to guard against voluntary agreements failing.
13. BPI is working to ensure that digital advertisers do not serve adverts to websites whose purpose is wholly or mainly to supplying material that infringes copyright and the rights of our members. Such adverts legitimise the sites, as well as monetising those sites and making commercial profits from illegal activity. Not a penny goes back to UK creators and the adverts create an incentive to drive traffic by providing valuable content.
14. On payment, BPI has worked with the major providers of payments to try and reduce the opportunity for consumers to be duped into giving their details to illegal sites that take payments but do not pay for the content they are selling. It is important that there are measures that can be taken to ensure that payment providers that are willing to allow payments to illegal sites are regulated. Ofcom should consider how it may take a greater role in the regulation of online payments. On this note BPI welcomes the recognition that micropayments will begin to be an important aspect of the online consumption of content and asks that Ofcom considers potential of harm to rights holders from micropayment systems alongside harm for consumers.

15. The announcement by Google in August 2012 that it will take into account the number of notices it has received under the DMCA in its search algorithm is a major step towards a consensus that search engines have a role to play in reducing traffic to sites that are acting illegally. However, there is no evidence yet that, in the case of the most egregious offenders, the high number of notifications has led to a proportionate impact on the search rankings for content on those sites. BPI believes that Ofcom does not have adequate powers to deal with the impact of search on signposting illegal sites to protect consumers from unwittingly accessing those sites.
16. This contrasts greatly with, for instance, Ofcom's oversight of Electronic Programme Guides, where Ofcom has legitimately been given a role to ensure that access to television content is fair, reasonable and with due discrimination. The role of search will be increasingly important in a world where consumers may switch their content viewing seamlessly from online devices to the traditional television set. Ofcom may consider what powers the Government could give it to deal with this problem.

## **Comments on the Plan**

### **Priorities for 2013/14 (p4/5)**

17. BPI welcomes the priority that Ofcom has set to "Implement the Digital Economy Act 2010 provisions on online copyright infringement" in its 'Priorities for 2013/14' (p4/5). BPI and other rights holders rely on Ofcom to bring forward a cost efficient, effective means of communicating with subscribers whose accounts have been used to illegally upload music. The Digital Economy Act is crucial to ensure the ongoing investment in new content in the UK.
18. BPI is frustrated by the lack of progress on the Act's implementation, firstly through legal delays but now through intervention by the Government. The delays to the Digital Economy Act are a significant blow to our members' businesses, and the costs of the Act, including Ofcom's costs, continue to rise. As such, content owners bear both the costs of implementation and of delay. Timely, efficient implementation of the Act is essential for UK businesses and BPI would urge Ofcom to continue to do all within its power to speed up the timetable and ensure that rights holders can begin to use the Act.
19. In particular, rights holders welcome Ofcom's engagement with the industry through the implementation working group set up to deal with the technical aspects of implementation. BPI also values the communication with Ofcom about the implementation, and recognises that Ofcom has at times had to supply capacity to work on implementation where central Government has found itself light on resource.
20. Ofcom is aware that rights holders remain concerned about the absolute levels of cost which will act as a serious barrier to use of the process, particularly by small rights holders. BPI would urge Ofcom to ensure it is controlling its costs, particularly given the lack of transparency for rights holders over the basis for the charges.

### **2.19 Investment in Superfast Broadband**

21. Ofcom outlines the public policy objective of ensuring that, by 2015, 90% of premises in the UK will be able to access superfast broadband services. BPI welcomes the opportunities that this holds to provide content to consumers through compelling digital music services. The driver for superfast broadband is demand for faster access to content, and the UK is strongly placed to benefit from a digitally connected economy as the home of world class innovation in film, music, TV and books.
22. Investment in legal digital services requires a return. Ofcom needs to ensure that the rise of superfast broadband facilitates a rise in consumption of legal content via digital means. Countries that have great content, backed by a copyright regime that incentivises innovation and protects that investment will gain an advantage in attracting this investment.

23. However, legal services are currently competing with websites and online sharing software that allows unlimited download, of all the content that the UK produces without payment or license. Investment in superfast broadband is important for the development of future content services but it is important to ensure that there are adequate systems in place to control access to illegal content.

### **2.27 – Deployment of IPv6**

24. BPI understands that the problem Ofcom highlights on the lack of supply of unallocated IPv4 addresses may cause issues with the provision of services on the networks, particularly streaming services. It may also create challenges for the implementation of the Digital Economy Act. BPI would urge Ofcom to ensure that ISPs are in a position to comply with the Act with efficient, cost effective systems for the identification of subscribers.
25. BPI is also concerned to ensure that ISPs network technology does not hamper the consumption of digital services. Consumers expect to be able to get the legal content they want from services they use through any devices seamlessly, for instance using their smartphone or tablet on 3G, 4G, wi-fi or through a home network. If one of those links – the home network – causes problems of connectivity on those services this will be extremely disruptive. This issue is central to Ofcom’s principle duty to “further the interests of consumers in relevant markets, where appropriate by promoting competition.”

### **3.65 International Engagement**

26. BPI welcomes Ofcom’s desire to focus on international engagement to achieve good outcomes for UK consumers and citizens. As outlined above, BPI and other rights holders have significant burdens placed upon them to litigate against foreign based websites that act illegally distributing our members’ copyrighted works. These sites act outside the law and outside of any regulatory control, providing a wide range of content. Ofcom lacks sufficient regulatory tools to bring enforcement measures against these sites for their lack of content ratings and parental controls. This is in contrast to the enforcement measures Ofcom can bring against companies operating entirely legitimately.
27. BPI would like to see a greater, European wide, enforcement regime that protects legitimate business and consumers from the activities of illegal websites supplying content to UK consumers. The line between offline and online content and legal and illegal sites is becoming increasingly blurred and without adequate regulatory powers, Ofcom will find itself unable to supply consumers with the confidence and protection required. Some of those powers will require changes at European level and it is important that Ofcom is part of those discussions.

### **3.69 – 3.71 The Role of Internet and IP-based Services**

28. BPI agrees that the role of the internet is increasingly important to communications services, both for consumers and suppliers of these services. BPI welcomes Ofcom’s recognition that consumer and citizen’s interests in a super-fast broadband world will be served by better control of the illegal world. This is also important to the goal of widening the take up of online services.
29. The control of illegal services is also important for competition, innovation, trust and investment as Ofcom outlines. BPI has worked hard to get intermediaries to take their responsibilities seriously. The Digital Economy Act implementation is part of that, but there is a bigger part for Ofcom, and the Government to play in ensuring businesses can compete in an online market that supports business models for investing in content. This is not just a creative industries issue – technology companies that rely on selling content for their revenues cannot compete with free, illegal content distributed online.

30. BPI would welcome Ofcom's support in ensuring that the UK Government develops a strategy that ensures that: legitimate businesses are united in acting against piracy; there is adequate education of the impact of piracy on jobs and growth; and legal enforcement is proportionate, cost-effective, and flexible enough to deal with technological change and swift enough to be useable by rights owners.

#### **5.59 UK Council for Child Internet Safety (UKCCIS)**

31. BPI welcomes Ofcom's positive role in UKCCIS and the use of research and awareness into online media. BPI is a member of UKCCIS and runs the Parental Advisory scheme on behalf of its members. Following a review in late 2010, BPI decided that in addition to the long-established practice of labelling physical products with the logo, online retailers of physical music products and DSPs should also be encouraged to adopt the Scheme.
32. BPI has issued Scheme Guidelines to record labels, retailers and digital service providers, advising them of content criteria which BPI recommended would attract the use of the Parental Advisory logo, and how best to display the logo against appropriate content. A significant number of major online retailers and digital service providers are now compliant with the Scheme, or are in the process of implementing it to their online services. BPI would put forward Parental Advisory as a model of a voluntary approach to ensuring that content is rated and parents have adequate information.
33. One of the major problems that parents have is from sites and services that do not act responsibly, in particular by not supplying means for parents to filter out inappropriate content. The Parental Advisory and other ratings schemes rely on the digital service providers to also willingly support ratings, content filters and age verification.
34. Undoubtedly the biggest gap in the provision of controls against inappropriate content is found through open access to illegal sites that are clearly signposted by major search engines on the front pages of results.
35. BPI believes that Ofcom should specifically look at the role of sites that facilitate online file sharing in access to harmful material in line with Ofcom's statutory duty to apply adequate protection for audiences against offensive or harmful material. Illegal file sharing sites create a serious problem for parents wanting to control access to harmful material. More music is downloaded from illegal websites and online sharing services than is downloaded legally. These sites and services allow uncontrolled access to hardcore pornography alongside music and there is no effective regulation and legal action against these sites and services. The only regulation applied to these sites at the moment is through copyright holder actions for infringement of material.
36. BPI would also urge Ofcom to consider the role of search engines in pointing children to sites that contain inappropriate content, through listing such sites in their search rankings.

#### **7.14 Role of Internet Intermediaries in Delivering Policy Goals**

37. BPI welcomes Ofcom's recognition that ISPs may have a greater role to play in policy goals such as copyright protection and the protection of minors and that this may require European co-ordination of rules and enforcement. The current European framework gives too much flexibility to ISPs and digital service providers to not take action. BPI of course understands it should not be the role of ISPs or digital service providers to have wide sweeping requirements to manage content on their networks and services.

38. However, BPI believes there should be greater responsibilities to take action where the service providers have actual knowledge of infringement on their networks and services. A process that is more collaborative in stamping out inappropriate and illegal content would be welcome, recognising that legitimate economic entities should have a responsibility to act against illegal activity that they have been made aware of.

### **7.16 Use of Micropayments**

39. BPI welcomes Ofcom's anticipation of the greater use of micropayments to buy services online – particularly content services. The regulation of such payments is important both to ensure that the consumer is protected and that rights holders, creating content, are protected against illegal sale of copyrighted material.

40. Ofcom might consider whether its power to intervene in online markets where payments are made are sufficient to ensure that rights holders, as well as consumers, are protected from harm. It is also a crucial part of ensuring an online economy that reflects the offline economy – with payments made for valuable content to encourage investment and production of content. Micropayments allow legitimate companies that pay for their inputs to invest in online content services. Without enforcement action against those receiving payments for unlawful material there is a potential to distort competition.