Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Content management on the HD Freeview platform

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Representing (self or organisation/s):   Self and 49 Other Open University Academics

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CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	**X**	Name/contact details/job title	☐
Whole response	☐	Organisation	☐
Part of the response	☐	If there is no separate annex, which parts?	

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Name   Blaine A. Price   Signed (if hard copy)

An Open Letter to Ofcom on the BBC HD DRM proposal
(also available at http://cloudworks.ac.uk/cloud/view/3199)

As a group of academics who teach and conduct research at the Open University, which since its inception has used broadcast and multimedia technologies in education, we are writing to express our objections to the proposal to allow the BBC to add a Digital Rights Management (DRM) flag to its high definition (HD) output.

We believe that the proposal is misleading in claiming that it will not involve signal encryption. We further believe that the proposal has significant disadvantages for

- licence payers
- the disabled
- UK industry
- innovation
- education

BBC Charter Obligations

Licensing and regulation of the radio frequency spectrum exists to ensure that a monopoly on a certain part of the spectrum serves the public good. Article 3 of the BBC Charter states that the "BBC exists to serve the public interest." Article 4 further explains

The Public Purposes of the BBC are as follows—

(a) sustaining citizenship and civil society;

(b) promoting education and learning;

(c) stimulating creativity and cultural excellence;

(d) representing the UK, its nations, regions and communities;

(e) bringing the UK to the world and the world to the UK;

(f) in promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television.

No part of that public purpose encompasses enabling the BBC to encrypt free to air audio and video broadcast signals and no matter what terminology is used to make it appear that the DRM flag is not encryption, the plain technical truth is that it is.

The BBC scheme involves not the scrambling of the audio and video signals themselves but of the accompanying digital instructions for decoding these signals. The 'free' broadcast signal will now merely come locked behind a DRM shield that people will need specially licensed equipment to view. The BBC proposal would undermine its public service obligations under the Charter, and we find it difficult to reconcile Ofcom's repeated declarations that a broadcast flag DRM regime would be inappropriate for the BBC with the

current consultation shaped around the notion that the proposed DRM technology is a good idea.

Disadvantages for Disabled
To make matters worse, that specific data the BBC proposes to scramble includes subtitles and data used in specialist TV equipment which is needed by those who are visually- and hearing-impaired to enjoy broadcasts. So an audience that is already disadvantaged in terms of access to 'free to air' broadcasting would become further disadvantaged, as the barriers to the market supplying specially adapted devices with assistive features become ever higher.

Does Not Work Anyway and Undermines Backwards Compatibility
More than a decade's worth of painful experience for industry and the consumer has demonstrated that DRM digital locks do not actually prevent copying and come with significant costs. After creating ranges of incompatible devices that consumers could not use interchangeably, most of the major online music suppliers have removed DRM from their stores. Every DRM regime thus far invented has been broken within days and the details placed in the public domain. The people inconvenienced by DRM are frequently those who legitimately purchase the product and find, due to software updates or online music retailers ceasing to trade, that they can no longer access their legitimately-purchased electronic music and video collections, or that they are difficult or awkward to use.

The Communications Act 2003, Part 1, section 3, outlines the General duties of OFCOM:

> (1) It shall be the principal duty of OFCOM, in carrying out their functions—
>> (a) to further the interests of citizens in relation to communications matters; and
>> (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

The backward compatibility problems created by DRM, e.g. where older equipment will no longer work or communicate with new devices, can form no part of Ofcom's remit to further the interests of citizens in relation to communications matters or to facilitate a consumer friendly evolution of the consumer electronics market. The DRM proposed could result in those who have already invested in a modern HD TV and PVR being required to purchase a new approved decoder to view programmes and a new approved PVR in order to record programmes. Even then it seems that the new PVR will only be permitted to record programmes received through its own "integrated" receiver, not from the signal receiver in the TV.

In the case of the BBC DRM proposal, ordinary TV license fee payers will be prevented from accessing BBC HD broadcasts unless they use equipment approved by an offshore licensing consortium and agree to a draconian set of restrictions on their use of that equipment. This includes a ban on adjusting it in such a way as to improve its operation, even to facilitate backward compatibility with older equipment.

An Empty Threat
The BBC implies that without some form of DRM scheme (which the BBC itself admits are not difficult to break), HD producers will refuse to use the BBC as an outlet for their offerings. This is a demonstrably empty threat for at least two reasons:

1. The BBC is too big a player in too important a market for independent commercial producers to refuse to do business with it.
2. The identical threat was made in the US in 2003 by TV and movie studios through the Federal Communications Commission (US equivalent to Ofcom). The proposal was thrown out by the D.C. Circuit Court of Appeals in 2005. Five years on, despite similar threats to migrate high definition programmes away from TV if they did not get their broadcast flag, the entertainment companies and sports franchises in the US continue to broadcast their productions DRM-free. A rather compelling fiduciary obligation to maximize return to shareholders meant they had to continue production and broadcasting even without DRM.

The BBC management in its recent "BBC Strategy Review" document, under the heading "Setting New Boundaries" on page 5 proposes:

"Reducing spending on imported programmes and films by 20%, capping it thereafter at no more than 2.5p in every licence fee pound"

Even if we accepted that DRM prevented copying - which we categorically do not - acceding to the demands of the BBC's commercial partners to encrypt the HD digital signal in order to "protect" their productions, when purchases from the third party rights holders in question will not amount to more than 2.5% of BBC non-commercial revenues. Accordingly we regard the measures under consideration to be seriously disproportionate.

Barriers to Education
As educators at an institution committed to open access to and widening participation in higher education, we are particularly disappointed. The Open University has spent 40 years breaking down barriers to university study in partnership with the BBC. We now see a respected national institution proposing a restrictive scheme, which will only make it more difficult for us to engage the wider public in high quality supported open learning.

Anti-Competitive/Conflict of Interest
Finally, we fail to see how the notion of the BBC and its commercial production partners, through an offshore corporate consortium, the Digital Transmission Licensing Agreement (DTLA), dictating, restricting and controlling the design, development and operation of broadcast signal receiving equipment, can be reconciled with the public service remit of the BBC. Restricting who can manufacture the equipment required to decode a public broadcast TV signal is anti-competitive (and therefore probably contrary to European law) and can only serve to push up the cost to the consumer and stifle creativity and innovation.

In summary, the BBC HD DRM proposal is contrary to the public interest, will not prevent copyright infringement, will incur significant costs for consumers and industry, lacks proportionality and will not provide any noticeable additional incentive for the production of HD materials. We therefore believe it is Ofcom's duty to categorically reject this proposal and we wish, in addition, to fully endorse the Open Rights Group's detailed position on the matter available at: http://www.openrightsgroup.org/ourwork/reports/bbc-drm-sub

Disclaimer: The views expressed are those of the undersigned and do not necessarily reflect those of the Open University.

Signed [50 Open University Academics]

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