

Consultation response form

Question	Your response
<p>Question 2.1: What do you think of the BBC's proposals and the procedures it has followed in carrying out its PIT?</p>	<p>The full response is below as a number of questions have been merged together</p>
<p>Question 2.2: What are your views on the BBC's assessment as set out in its PIT? Do you agree with its conclusions?</p>	<p>Confidential? – Y / N</p>
<p>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?</p>	<p>Confidential? – Y / N</p>
<p>Question 3.2: Do you have any views or evidence on how viewing of individual programmes changes over time on VOD services?</p>	<p>Confidential? – Y / N</p>
<p>Question 3.3: Do you have any views or evidence on how UK VOD viewing might evolve in the future, including viewing to individual services or total levels of viewing?</p>	<p>Confidential? – Y / N</p>
<p>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.</p>	<p>Confidential? – Y / N</p>
<p>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.</p>	<p>Confidential? – Y / N</p>
<p>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.</p>	<p>Confidential? – Y / N</p>
<p>Question 5.2: Please provide evidence on whether and how the BBC's proposals could directly impact on rivals' viewing, revenues and investment.</p>	<p>Confidential? – Y / N</p>
<p>Question 5.3: Please provide any evidence on whether there might be reduced access to content rights, and whether this might reduce</p>	<p>Confidential? – Y / N</p>

the ability of rivals to compete and why. We also welcome evidence on the alternative sources of content rivals would consider.	
Question 5.4: How do you think any potential for adverse market impact of the proposals could be reduced?	Confidential? – Y / N

Equity welcomes the opportunity to contribute to this consultation by Ofcom on proposed changes to BBC iPlayer.

Equity is the trade union representing over 45,000 people working in the UK’s film, television, theatre, dance, variety and music industries. Our membership includes actors, singers, dancers, stage managers, stunt performers, theatre directors and many other performers and creative workers. The BBC is one of the most important engagers of Equity members because of the investments it makes in talent and commissioning content and the public provision of services.

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?

- Equity is concerned about the process by which stakeholders are being consulted on the BBC’s proposals for iPlayer. Stakeholders were given almost six weeks to respond to the first Public Interest Test consultation, but on the basis of very limited information provided by the BBC. This consultation has given stakeholders a two-week window to respond to Ofcom and the BBC’s separate documents, which includes a further three external reports covering audience research and economic analysis. However, despite the length of documentation, the BBC’s assessment in its iPlayer Public Interest Test does not adequately address the considerable concerns expressed by a wide range of industry stakeholders (from competitors such as Virgin Media, to producers, performers, directors and other rightsholders) about the detrimental effect of these proposals on the secondary rights market.
- Firstly, its analysis failed to include its proposals for Britbox, the proposed joint streaming service with ITV. It is currently unclear how the two proposals relate to one another, i.e. if content would go to Britbox after 12months on iPlayer, and for how long it might be held on Britbox. The combined potential effect of these proposals could be very considerable on the secondary rights market, and yet Britbox has been excluded from the analysis. In addition, the assessment it makes of the effect of iPlayer provides contradictory evidence as to the effect on secondary rights and commercial revenues in the secondary market. Firstly, the analysis provided by Frontier Economics did not provide evidence, as suggested, that keeping content for longer on the iPlayer would not erode potential commercial revenues. The report said that the relationship between the exposure of content on BBC and

the value of the secondary window is “complex” and found cases in which “increased exposure of content on the BBC can increase value in the secondary UK windows”. However, while this could be the case if a very popular show is held back (or not available for commercial exploitation) for longer, it is a very different scenario if all or most content is held on iPlayer during the holdback period. Equity and many other stakeholders who submitted evidence contend that extending exclusive VOD on iPlayer will prevent it from being sold to other content providers until a point its value has significantly declined. Secondly, this analysis did also acknowledge that the BBC had “somewhat mixed commercial incentives” to both restrict access to BBC-controlled IP on other VOD services on the one hand, and for BBC Studios to commercially exploit BBC programmes around the world. Thirdly, its analysis on this issue was mostly focussed on the evidence put forward by PACT that lengthening the availability of programmes on BBC iPlayer reduces producers’ ability to generate commercial revenues in the UK. It did not address issues raised by Equity, Directors UK and others about the importance of royalties and secondary payments to the ability of performers, directors and other rightsholders to earn a living and sustain careers in the sector (detailed below), which is vital to the quality and future of the content the VOD platforms hold.

- Fourthly, the assessment did finally note 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 the value of the secondary window could, all other things being equal, lead to an increase the price of primary commissions”. It did also highlight that “we expect to negotiate fairly with rights holders around any additional rights we need to secure for BBC iPlayer”. However, Equity has widely shared concerns about where the BBC will find the funds to pay increased primary commissions that could adequately offset the loss of secondary payments. There is no proposal for consumers to pay for an extended use iPlayer and the BBC itself could lose revenue from the loss of secondary rights sales, with less to spend on increased primary payments, as well as new content, that will undermine its ability to meet its public service broadcasting remit to serve the nations and regions of the UK and the wider diversity of the UK. Ofcom should ask the BBC if it expects to pay more for the extended window to compensate for the loss of secondary revenues and to scrutinise if a budget to pay has been allocated for this purpose and where the funds are coming from.
- Equity strongly urges Ofcom to include the far-reaching effects of these proposals on the secondary rights market in its assessment and to particularly consider the loss of secondary rights income to performers and creative practitioners, producers and to the BBC, as part of a comprehensive BBC Competition Assessment which is promised in this consultation. An assessment will therefore need to be made about how extended use on iPlayer will impact on revenues from other uses or onwards sales of programmes – i.e. to other channels or platforms or on DVD or Blue Ray – that will affect the remuneration that rightholders would have otherwise received. There is a lack of clarity currently on this on this and on whether the BBC intends to hold back titles to reuse as a boxset when another series is showing, rather than pursuing

sales, and on how it will affect the ability of BBC Worldwide to sell titles to other channels and territories.

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?

- Section 3 of the consultation document outlines many of the key developments in how the sector is evolving. The overall effect of many of these changes in the market on the UK television production sector has been positive for Equity members in expanding the amount of content and associated job opportunities; with competition among broadcasters for quality programmes and drama resulting in increased revenues for the UK production sector. Equity supports such a competitive market which recognises the financial worth and market value of the creativity of its members. In contrast, moving to a model where the buyer and seller are the same and where content is exclusive to the platforms that hold them could have a detrimental impact on competition, on onwards sales and secondary use markets, and on remuneration of performers, especially royalties from future sales and uses. If the BBC's proposals are approved, it is also likely that other PSBs will seek exclusive windows for their online players, diminishing the secondary rights market further.
- One example of a new development in recent years, which is covered in 3.18, but could be adversely affected by the development by the BBC and other PSBs of VOD platforms holding exclusive content is on co-productions. The substantial programme budgets of big global online players such as Netflix and Amazon is raising the bar - and cost - of what audiences expect from quality programmes, especially premium drama, and increasingly co-productions (with finance from US co-producers) are necessary for raising enough finance for higher budget dramas to make them viable. The BBC is the main beneficiary of coproduction deals, that allows it and other PSBs to commission more original content without the expense and risk of funding all of it, as well as a much wider range and quality of content at less of the cost. A good example is the *Bodyguard* that was made by World Productions (part of ITV studio) and co-financed by Netflix; its first window was on BBC and iPlayer 'in season stack', its second window was on Netflix 3 months later. If the BBC wants to commission content exclusive to iPlayer, it's likely that players such as Netflix will be less likely to partner with the BBC without this second window. In its submission, PACT sets out how this will result in the BBC either reducing the number of its commissions or reducing the budgets for the programmes it makes, that will have a knock on effect on the quality of the programmes it makes and ultimately exports and their value in the international distribution market.

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?

- It is not possible for Equity to make an assessment about how UK VOD viewing changes over time or might evolve in the future. There is a proliferation of new players about to join the SVOD market, but there will be a limit on how many of

these platforms to which each household can afford to subscribe. A recent survey in Advanced Television ([here](#)) has found nearly half of consumers (47 per cent) are frustrated by the growing number of subscriptions and services required to watch what they want and they also expressed frustrations with content discovery across platforms. It's not possible for Equity to make an assessment of what this market will look like when it settles down, or whether an extended iPlayer or Britbox will find its place in it. There are also concerns consumers may question why they have to pay for Britbox, when they pay the licence fee, potentially undermining public support for the licence fee, (certainly in the absence of a campaign to highlight how the licence fee only pays a fraction of the services the BBC provides). Equity is also concerned about the diversion of funding from content production to establish these new platforms, when some analysts are predicting these initiatives will have serious difficulties succeeding, unable to compete against the big platforms with a relatively small initial investment. Equity supports measures to improve the visibility of PSBs' content and services on online platforms, as well as measures to encourage online services to produce more content in the UK.

- Equity has also been calling for greater transparency and consistency across the industry in how it reports VOD data, that would make it easier to make an assessment about how UK VOD viewing changes over time or might evolve in the future. This would enable a reliable assessment about viewing or use of content on these platforms, that would be used by unions and CMOs to ensure rightholders are receiving fair remuneration and to calculate the residual payments owed to them. Indeed, s.16 of the Collective Management of Copyright (EU Directive) Regulations (2016) obliges users to make this data available for this purpose to an agreed format. This data must be easily available as it is presumably used for selling programmes on.

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.

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.

- Equity very strongly disagrees with Ofcom's proposal not to include an assessment about the reduced value of secondary rights in its assessment of how competition may be adversely affected by the BBC's iPlayer proposals, as it represents a fundamental change to the rights and royalty model that Equity members are reliant on to sustain their careers.
- Equity questions why producers are the only group identified as reliant on secondary rights. Ofcom asks a number of questions only PACT and other producer organisations can answer, to establish whether competition in the production sector is harmed; although it must be noted a very high hurdle has been established for

them in having to prove that the loss of such a significant income stream that will affect their profitability, will cause companies to reduce investment or exit the market.

- In addition to producers, we would expect the BBC to enter into a fair market negotiation with the relevant rightholders' representatives to ensure that performers, directors and writers continue to be fairly compensated for the change in use which the BBC has confirmed (detailed below). Equity negotiates extended collective licencing of contractual rights based on collective agreements negotiated with industry bodies and engagers on which the vast majority of audiovisual productions are made; it represents in the region of 98% of performers engaged in UK television productions. Over 95% of programmes made by independent producers in the UK, for example, engage performers on the terms of the PACT/Equity agreement. Through the collective agreements and contracts, performers mandate Equity to negotiate their exclusive rights for 'mandated uses' which are set out in those contracts and include secondary uses of their performances. Equity enters into agreements to enable the licensing of exclusive rights, for example, for VOD services. These agreements secure significant secondary use payments for performers; the amounts have been negotiated by Equity and arise from Equity collective agreements and contracts. The union takes responsibility for distributing micro-payments for most uses of a performer's work and arising from licensing agreements negotiated by Equity for artists who worked on Equity collective contracts.
- The potential public value of these proposals is dependent on the ability of the BBC and others to continue to have talent to draw on for producing content – on and off screen – which is reliant on the ability of performers to be able to make a living from their creativity. These proposals could fundamentally change the rights and royalties model for rightholders for the repeat use of their work. As the majority of performers are freelance, royalty payments are a crucial part of their incomes and livelihoods. Extending the use of content on the iPlayer would inevitably affect this, as would any recalibration of the balance between payments which gives more weighting to the engagement fee. An assessment would also need to be made of whether this proposal would change the structure of further payments of royalties to underlying rightholders under collective agreements.
- It is vital to ensure that performers are adequately and fairly compensated for their work, to ensure they can make a living from it; so that producers continue to have that talent to exploit, which is critical to the quality and diversity of the BBC's output. Indeed, if only those who are able to draw on independent wealth can work in the sector – and this is particularly true in the early stages of their careers – this will harm its ability to reach new audiences and grow commercially. There is also an issue in how these payments are made which assists performers in making a living from their creativity, in providing future payments which help them to pay the bills etc and is more akin to salary payments received by employees.

- If the BBC wants the IPlayer to be able to use rightholders work for longer and different uses, then there must be adequate and fair compensation for all uses. In its 'iPlayer Public Interest Test' document, the BBC does confirm: "As set out in Section 4, we expect to negotiate fairly with rights holders around any additional rights we need to secure for BBC iPlayer". And it is also welcome that Ofcom also confirms that "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". Nonetheless, this change represents such a fundamental shift to the market it needs full consideration by Ofcom alongside those other areas it has identified (p.16).

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

Equity urges Ofcom to conduct a full Competition Impact Assessment of the proposed changes that must include an exploration into the impact on the whole secondary rights markets value chain, as this is necessary for identifying positive and negative effects of the proposal and therefore steps needed to mitigate any negative impacts.

Equity urges Ofcom to fully consider the market impact of these proposals, by making an assessment about the following impacts of them on:

- 1. Rightholders and ensuring fair compensation for the use of their work.**
- 2. The onward sales of works.**

Please complete this form in full and return to BBCiplayerbca@ofcom.org.uk or:

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