



Directors UK's response to Ofcom's BBC iPlayer Competition Assessment

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 BBC iPlayer Competition Assessment.

Question 3.1: Do you have any comments or other views on the sector developments and likely future developments we describe in Section 3?

4. We generally agree with the views presented of developments in the sector and likely future developments. Content ownership and exclusivity is becoming increasingly important and likely to become more so as new SVOD platforms, such as Disney and Apple, enter the market. As the Ampere Analysis report predicts "*Content exclusivity will increase over time making VOD services more distinct from one another in terms of the titles they offer*"¹. This raises the question of how many VOD services audiences will use or subscribe to; 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 in the future.
5. We believe that the changes in the market and the proposal for the iPlayer extended window of availability will fundamentally change industry business models for production, the secondary use market and remuneration. As each platform or channel seeks to hold onto its content exclusively it may result in there being no secondary market at all in the UK. This has an impact on how programmes are funded and how creators are remunerated for their work. To not acknowledge these when considering sector developments is an oversight.

Question 4.1: Do you agree with our estimate of the likely increase in BBC iPlayer viewing as a result of the Proposals? Please provide evidence to support your views.

6. We are not qualified to comment on the analysis of the increase in BBC iPlayer viewing other than to note that, in the absence of hard data, much of the research and analysis 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*

¹ Ampere Analysis 2019 https://www.ofcom.org.uk/data/assets/pdf_file/0026/149075/ampere-analysis-current-status-future-development.pdf p23-24

with caution.”² The evidence presented on current iPlayer usage is based on a very small sample size of 108 titles over 10 years. In addition, responses of competitors to changes in the behaviour of the BBC are unpredictable but will affect the outcome. Ofcom’s own analysis concluded “We recognise that there is uncertainty about the actual impacts of the proposals”³; “for example, [if] the BBC is unable to secure the content required, then the impact will permanently be lower than we have estimated.”

7. Given this uncertainty and the lack of reliability in the data, if the proposals do go ahead, we believe Ofcom must commit to a full review, e.g. after 2 years, of the impacts including whether it has increased viewing of the iPlayer and audience appreciation, and the impacts on the market.

Question 4.2: Do you agree with our estimate of how the viewing of other services is likely to be affected by the Proposals? Please provide evidence to support your views.

8. We are not qualified to comment on the analysis of the impact on the viewing figures, subscriptions, advertising and revenues of other service providers, other than to note that this is also based on assumptions of market and audience behaviours which are rapidly changing and as such must be treated with caution. As the Ofcom report highlighted “*a degree of caution is necessary. Responses to hypothetical questions, some of which ask respondents to provide their reactions to service features that do not yet exist, will necessarily be speculative and may not reflect their actual behaviour*”⁴
9. Given this uncertainty and the lack of reliability in the data, if the proposals do go ahead we believe Ofcom must commit to a full review e.g. after 2 years, of the impacts on other BVOD and SVOD services and audiences viewing habits. Ofcom must also have a role to play in developing a universally acceptable metric for assessing BVOD and SVOD viewing as part of their reporting requirements. Key to this is addressing the issue of use vs consumption.
10. We would expect that the other BVOD services would be more likely to lose viewers to the increased iPlayer window as they are the most similar services to the BBC iPlayer offering UK content for UK audiences. This was evidenced in the research by both BBC and Ofcom.

Question 5.1: Do you agree with the findings from our review of the BBC’s assessment of the public value of the Proposals? Please provide evidence to support your views.

11. Directors UK expressed concern in our response to the BBC’s PIT and to Ofcom’s first consultation, that the BBC did not provide any estimate for the potential cost of additionally compensating for any content rights for the additional use on the iPlayer. It is therefore impossible to make an assessment of the impact this may have on public value. This is despite the

² <http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/iplayerpit/frontier-competition.pdf> P42, ref 55

³ https://www.ofcom.org.uk/__data/assets/pdf_file/0020/152327/consultation-bbc-iplayer-provisional-determination.pdf p61, A2.34

https://www.ofcom.org.uk/__data/assets/pdf_file/0020/152327/consultation-bbc-iplayer-provisional-determination.pdf p61, A2.35

⁴ https://www.ofcom.org.uk/__data/assets/pdf_file/0020/152327/consultation-bbc-iplayer-provisional-determination.pdf p75, A2.72

assertions in the BBC PIT that, “a reduction in value of the secondary window could, all things being equal, lead to an increase in price in primary commissions.”⁵

12. We therefore agree with Ofcom’s finding (p30, para 5.46) that: *“The BBC has not set out the expected costs of the Proposals or the possible implications to its overall service if it has to pay more for rights associated with an extended window on BBC iPlayer and we note that it says the costs of the Proposals are still uncertain. We recognise the difficulty in providing full costings, though we would have expected more detail on the approach to funding than has been provided. If the BBC is not able to realise its Proposals fully due to higher costs, we would expect both the impacts of the Proposals and the associated public value to be less. This introduces some doubt around the amount of public value generated by the proposals”*
13. We note that Ofcom has stated that if increased costs leads to a reduction of performance due to the withdrawal of funding from other services or investment in content production that this could be examined through the Operating Licence Regulation and their Annual Reports on the BBC (P30, 5.48). We believe that this assessment must be an essential requirement if the proposal is approved and remedial measures taken if required.
14. In terms of whether the proposal delivers personal value (individual) and social value (society more widely) we agree with the Ofcom statements that *“The Proposals would increase the range of UK content available on BBC iPlayer and may expose content made for niche audiences to a wider audience. However, the social value generated here is dependent on the BBC commissioning such content and audiences discovering it”* (p27, 5.27) and *“whether the BBC is able to deliver this social value would be dependent on how the BBC implements its plans”* (P25, 5.25). As Pact has argued in its response⁶, the BBC should be focusing more on using its content to reach audiences not just the means of distribution. To fully assess whether the BBC is achieving Public Value Ofcom should be examining not just the volume of content but also the audiences engagement with the content - Is anyone watching it and engaging in it? How discoverable is the content? What is being watched and where? Is BBC content reaching audiences via other means/platforms?
15. We also agree with Ofcom’s concerns that the BBC’s focus must be on delivering public value in the widest sense, not simply on selecting the most popular titles. The BBC has not been transparent about the types of titles from each genre that would be included after the initial 12 month window, or as archive, and as such we agree with Ofcom’s view: (p25, 5.26) *“We might also be concerned if the BBC selected titles simply to drive viewing to BBC iPlayer, rather than to deliver public value. We would expect the BBC to consider how this content supports the delivery of the mission and public purposes when exercising its editorial judgment in selecting those titles it makes available for longer than 12 months.”* Therefore, we think it is essential that this is reviewed after 1-2 years to assess the range of programmes available and how much these are viewed in order to ensure the public value is being met and that this is delivering the public purpose and mission.
16. We agree with Ofcom’s wider concerns over the accessibility of news, and the audiences’ ability to be exposed to a wide range of content, *“it is not clear how the proposed changes to BBC iPlayer would impact viewing of news. On BBC TV, news is provided at regular and widely*

⁵ <http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/iplayerpit/pit-submission.pdf>, (p63, para 221)

⁶ https://www.ofcom.org.uk/__data/assets/pdf_file/0024/149280/pact-bbc-iplayer-changes-response.pdf

recognised times, often adjacent to popular programming where audiences can passively come across it as part of their TV viewing experience. The BBC must consider the risk of audiences being less exposed to news content if they increasingly use iPlayer as a viewing destination and view less live BBC TV, and ensure that it is able to continue meeting the first public purpose through its range of news provision". (P27, 5.30) and "As audiences are able to actively choose what content they want to watch on BBC iPlayer, there is a risk that the range of content individuals view is reduced. The BBC has not addressed this potential risk in its PIT. We would expect the BBC to consider how it can ensure audiences are exposed to a range of content through BBC iPlayer." (p29, 5.42). It is disappointing that the BBC has not considered this to be a critical factor in their iPlayer proposal and must be reviewed after 1-2 years if the proposals are to be approved.

17. We also agree with the view that *"The BBC did not consider impacts on the public value generated by other broadcasters in its PIT. We consider that the PIT is therefore deficient in this respect, We consider that other PSBs in particular provide social value, given the PSB purposes and characteristics they are required to deliver, and that the fall in viewing to non-BBC PSB live TV and BVOD services would offset some of the gains to public value identified by the BBC"*. It is disappointing that the BBC has not considered this to be a critical factor in their iPlayer proposal and must be reviewed after 1-2 years if the proposals are to be approved.
18. Directors UK is concerned by Ofcom's findings that the BBC has been lacking in its assessment or acknowledgement of some key areas of impact in their proposal and in their PIT assessment. We agree with Ofcom's concerns and, if the proposals are to be approved, support the introduction of conditions provided that they are meaningful and that there is a means of correcting if the BBC is found to be failing on these: (p31, 5.50) *"we have concerns about the extent to which this [public] value would be realised, as the BBC has provided limited explanation as to how it would ensure that this public value would be delivered. In particular, the BBC would need to consider the shift of viewing from live TV channels to BBC iPlayer, and the implications of this for the range of content that viewers watch and the delivery of the mission and public purposes. We therefore propose to put in place conditions to address these issues, as in the absence of further assurance on delivery of public value and its contribution to the mission and public purposes, it would be difficult to reach a conclusion on whether the public value of the Proposals justifies the adverse impact on competition we identify"*

Question 6.1: Do you agree with our assessment of the likely impact of the Proposals on fair and effective competition? Please provide evidence to support your views.

19. Directors UK is concerned by Ofcom's overall finding that there will be *"an adverse impact on fair and effective competition...spread across a number of different offerings"* (p44, 7.5). This is largely in relation to a reduction in revenue and viewing of rival services, and the impact on BVOD services and their incentive to invest. If the proposals go ahead these recognised competition impacts must be reviewed and assessed after implementation and remedial action taken if these are found to be significant.
20. Directors UK does not agree with the provisional conclusion regarding the impact on the value of secondary rights *"that the Proposals would be unlikely to significantly harm competition in the production sector."* (P39, 6.35). The Pact response to Ofcom's first consultation clearly sets out the evidence produced by Oliver & Ohlbaum regarding the potential impact on the

secondary rights market for producers and the disruption of production investment models⁷. We share their concerns.

21. Pact's response⁸ sets out how distributors' investment decisions are based on a number of complex factors, including the extent of the time delay between the PSBs use of the content and international/secondary market use.
22. The research also identifies 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.
23. Ofcom's own analysis found that *"extending the BBC iPlayer window may reduce the attractiveness of some content for secondary exploitation if more viewers watching the programme in the primary window results in fewer potential viewers in the secondary window. We recognise the risk that the extended availability of content in the BBC iPlayer window may erode some of that content's potential future usage as more viewers see the content."* (P50, A3.121). Ofcom goes on to suggest however that this could be offset in theory as producers could choose whether to sell archive content or previous series to the BBC iPlayer instead of, or as well as, other outlets (such as Netflix) which may push up the price of secondary rights. In reality it is not yet known how the change of use will affect the secondary use market as Ofcom noted *"there are conflicting influences on the price of secondary rights and it is not clear which effect would dominate in practice"* (P50, A3.123). For this reason, we believe there is a risk to the secondary rights market. If the proposals are approved this must be monitored and reviewed to determine whether there has been a detrimental impact.
24. We also do not agree with Ofcom's view of the impact on underlying rightsholders; *"we do not consider that the Proposals would have an effect on the owners of underlying rights (e.g. directors, actors and owners of music copyright) such that there would be an adverse impact on fair and effective competition that could ultimately affect audiences. Some rightsholders implied that creators of content could leave their profession due to the overall reduction in income (thereby presumably affecting the nature of the content produced). However, we have not yet seen any evidence to suggest that the likely reduction in revenue from BBC content would be sufficient for this to occur and why revenue from alternative sources would be unable to prevent this."*
25. Directors UK believes that the impact on Secondary rights market is being under-estimated. The extension of the BBC iPlayer use from 30-days to a 12month window creates a significant change to the infrastructure of how the secondary rights market works, and fundamentally changes how rights are traded.
26. In order to fully understand the potential impacts in relation to underlying rights holders it is important to understand how the current secondary rights system works. For each underlying

⁷ https://www.ofcom.org.uk/__data/assets/pdf_file/0024/149280/pact-bbc-iplayer-changes-response.pdf

⁸ https://www.ofcom.org.uk/__data/assets/pdf_file/0024/149280/pact-bbc-iplayer-changes-response.pdf

rightsholder (writer, director, actor, musician) the arrangements are different. Below is an overview of how the rights system works for television directors and the significance of these arrangements.

Directors and Copyright

27. Copyright is a legal right given to authors of original creative works. It is a form of Intellectual Property that protects creative work and stops others from using it without permission.
28. Under UK law (Copyright, Designs and Patents Act, 1988) the principal director of every television film or programme is a joint author and copyright holder of the work with the production company or broadcaster. This means that every finished audiovisual work has two joint authors who each own copyright when the work is created. Copyright can be transferred, assigned or sold to another individual or organisation.
29. Usually when a director takes a job, they are required to sign an employment contract that contains a clause in which all of their rights are assigned to the production company or broadcaster. The production company or broadcaster then owns all the copyright in the work which means that they can then exploit the film or TV programme. In exchange the director should receive a fair reward from the production company or broadcaster from the sales or repeat use to compensate the director for the assignment of their copyright.
30. The income generated from copyright, in the form of a royalty or residual payment for the ongoing use of a work, is a vital source of income for freelance directors, who often experience gaps in employment between projects. Royalty payments help provide many directors with the means to continue investing their time and energy in developing new creative ideas and creating the next project for the public to enjoy.
31. However, Copyright law itself does not automatically guarantee royalties for TV directors. Sometimes a producer will “buy out” this compensation upfront in a one-off payment or fee, before it is known how well the programme will do. The result is that a TV or film director doesn’t share in the revenues from uses of their work; even when it’s a huge success.

Directors UK’s role

32. Directors UK is the Collective Management Organisation (CMO) for film and TV directors in the UK. We negotiate, collect and distribute royalty and residual payments for uses of the works directors make. Our aim is to protect directors and their copyright, ensuring they do receive a fair reward for the use of their creations. Without a Collective Management Organisation (CMO) negotiating and collecting exclusively on behalf of directors, many would not receive any royalty payments for their work and miss out on these vital earnings. Directors UK collects and distributes tens of millions of pounds on behalf of film and television directors every year. In 2018/19 alone we distributed £11.2 million in UK royalties to 3,476 directors.
33. Directors UK negotiates an agreement with the major UK TV production companies and broadcasters (our UK agreement currently includes BBC, ITV, Channel 4, Channel 5, Sky, S4C and Pact) covering all secondary uses, such as UK transmissions, DVD and international sales for works made since 1 July 2001 under a freelance contract. The broadcasters pay a lump sum to Directors UK, which is then shared between the individual directors of the TV programmes

used. This agreement is renegotiated on a regular basis to ensure the value of the rights is regularly reviewed (Usually every 3 years, and renegotiating these deals can typically take 12months or more).

34. Directors UK is charged with the responsibility of devising, implementing and administering a scheme for the distribution of these payments to individual directors. Payments are allocated under the terms of our UK Distribution Scheme. This takes account of the type of work, transmission length and form of secondary exploitation (e.g. repeat transmissions, sales, DVD releases etc.) for programmes which the director was engaged on under a freelance contract. The scheme is based on information supplied by broadcasters and production companies. Producers are contractually required to supply Directors UK with information on which to base distributions of payments under the Distribution Scheme. This includes details of all secondary exploitation of qualifying works.

Directors Remuneration - primary and secondary uses

35. “**Primary use**” used to mean the first exhibition to an audience, but this concept has been expanded over time to mean more than just the first transmission on a TV channel. Primary now encompasses other forms of exhibition where the audience is given additional opportunities to view something for the first time. Directors UK currently does not allocate payments for primary uses as directors are paid an agreed salary for their work on a production and this has traditionally remunerated them for the “primary use” of the work.

36. “**Secondary use**” includes all “non-transactional” uses (i.e. repeats or other uses where no transaction has taken place) and “transactional” uses (sales). Non-transactional includes repeated use of a work on a “main” channel or showings on other channels within the same group, from the day after the primary use, this also includes viewing on a VOD “catch-up” platform for 30 days. The director is usually remunerated for this in the form of a **residual** (based on a percentage of salary). Transactional uses (i.e. sales to another channel, DVD sales etc) is remunerated via a **royalty**-based valuation.

37. The table below summarises what currently constitutes each type of use.

Primary uses	Secondary uses
First TV transmission on any channel or VOD platform (whichever is first)	Repeats on a “main” channel.
Transmission on a +1 or other time-shifted service	
Showings on other channels within the same group within one day of 1 st transmission	Showings on other channels within the same group anytime from the day after 1 st transmission.
VOD availability on a channel’s own platform for a short “catch-up” window – 30 days after transmission	VOD availability on a channel’s own platform after 30 days (we currently get no data or payment for this use)
	Sales to other 3 rd party channels in the UK. DVD/Blu-ray sales etc

BBC Residuals

38. In 2006, Directors UK also signed an agreement with the BBC to take over the administration of BBC residuals due to freelance directors and producers of BBC programmes made under their 1976 and 1984 union agreements. Directors UK administers payments for programme sales. These agreements also gave an entitlement to payment for repeat transmissions and VHS/DVD and these payments are administered by the BBC and Steria. In 2018 we distributed £102,000 in BBC residuals to directors.

Issues affecting the secondary rights market

39. Directors UK is concerned that the change to the BBC's proposed use on the iPlayer to a minimum of 12 months fundamentally impacts this model in two ways:

- i. **Non-transactional** - It is likely to have a significant impact on residuals currently earned through non-transactional use i.e. if the programme is available on the iPlayer, and this is intended to become the viewing destination, this is likely to impact its repeated use on the main BBC channels. According to our distribution reports there were over 6,000 hours of repeats on the BBC's main channels and over 5,000 hours of repeats on CBBC and CBeebies in 2017-8. The BBC's repeat use of content on its main channels equates to 30% of directors' payments for non-transactional use. We simply do not know what the impact of extending the iPlayer window will be on this type of use, but anticipate it will impact on repeats on its main channels.
- ii. **Transactional** - it is also likely to impact on royalties earned through transactional use as the extended iPlayer window from 30-days to minimum 12 months will reduce its value in the external market-place as it is likely to be perceived to have already saturated the market. Currently programmes are not available to view after the initial 30-days and they still have value when they become available again after the holdback window. In addition, due to the absence of data on viewing of online platforms, it is very difficult to distinguish between "catch-up" VOD (30days) – which would be regarded as a primary use – and non-catch-up VOD which we would regard as secondary use and eligible for allocation of royalties. This distinction between catch-up and non-catch-up is becoming increasingly blurred.

40. Based on the BBC's proposals Directors UK would consider the proposed additional use of returning titles, non-returning titles and archive titles on the iPlayer 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.

41. Whilst we recognise the potential benefits to the BBC in expanding the iPlayer window and acknowledge their assumption, reiterated by Ofcom, that any impact from this increase in primary use should be offset by an increase in payments for that extended use, the reality is, in negotiating rights deals it is almost impossible to attribute any value for extended online use because:

- i. There is a lack of data that would help parties arrive at a deal – no figures are published by VOD or SVOD operators for consumption/use or revenues. The BBC currently has not supplied us with a metric on which we can measure iPlayer use which will assist us to compensate directors for genuine secondary VOD use. (We note that the BBC has provided Ofcom with viewing figures privately as part of their modelling evidence).

- ii. The deals we do are long term (for the next 3 years) and the on demand market is growing very rapidly making it hard to predict and therefore value online uses.
42. It is therefore very difficult for rightsholder organisations to be able to quantify for Ofcom the impact financially, as there is very little data available to make predictions about future impacts. Our concern is that this lack of data reporting and sharing means that underlying rights holders will not be fairly compensated for any loss in earnings as a result of this change in use.
43. This concern is exacerbated by the fact that the BBC has not made it clear in its PIT proposals how it is budgeting for any increase in payments to producers or to underlying rightsholders for extended primary use. In negotiations rightsholders representatives are being told there is no additional money available. We therefore are concerned that the BBC will seek to introduce the minimum 12 months iPlayer window with no additional compensation.

Potential impact on audiences/public value

44. What significance does this have on public value and audiences? The services are only as good as the content available on them and that requires a creative workforce who can afford to sustain a living creating new works. The UK, and the BBC in particular, is world renowned for the high quality of the programmes which are created by a talented, largely freelance workforce. A reduction in quality due to talent leaving the industry because of affordability would negatively impact on audiences.
45. On the surface it is easy to dismiss the issue of secondary rights uses as a purely commercial transaction that takes place between a broadcaster and its suppliers (producers, directors, actors etc) which will be resolved by market forces and is therefore not relevant to the BAC, which looks at public value and the impacts on fair and effective competition.
46. In reality, underlying rights holders are not on a level-footing in negotiations with broadcasters and producers. Working in the creative industry is a precarious profession. It is made up of a largely freelance workforce who aren't afforded the same workplace protections as staff workers. As freelancers they face income instability, weak bargaining power and carry high-risk during the unpaid development stage. Approximately 10% of a directors' income comes from secondary use payments⁹.
47. There is a serious imbalance of power between the freelance creative and a broadcaster and it is very difficult to secure fair value in this increasingly fragmented market-place. Therefore, we are not confident that Ofcom's assertion regarding the BBC's buying power is correct, "*we do not believe that the Proposals would increase whatever buying power the BBC may enjoy when dealing with content producers or other underlying rightsholders*" (p112, A3.116). 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. Whilst we support the need for the BBC to be able to respond to the new viewing dynamics in this rapidly changing market, it is more important than ever that creators are fairly remunerated for all uses of their work - whether it's on traditional linear TV or on-demand digital use.

⁹ http://www.filmdirectors.eu/wp-content/uploads/2018/05/FERA-FSE-Audiovisual-Authors-Remuneration-study_First-results-March-2018.pdf

48. Our concern is that no real analysis has been undertaken for deciding on a 12 month window or to determine the tipping point of value for content to be available on the iPlayer – i.e. the point at which the public value of content being freely available is no longer substantial and selling it in the market place increases the public value through revenues back to the BBC and the rightsholders, leading to more investment in new content. The BBC and Ofcom’s own modelling of BBC iPlayer viewing shows that most VOD viewing takes place soon after the first broadcast (in the first month after transmission) and after 3 months the viewing is limited (P103, A3.81). The ‘decay curve’ charts presented (p57)¹⁰ shows the viewing drop off for new, returning and archive series on the BBC iPlayer which all plateau after 6 months. For this reason the 12 month window seems excessive given the potential loss in secondary rights revenue it may cause.
49. Ofcom has also noted that “*the BBC has not been specific about what kinds of titles would be made available past the standard 12 month period or bought back from its archive*” (p26, 5.25) It is therefore difficult to analyse the potential impacts. The BBC has also not provided a clear explanation of what is archive and at what point a programme becomes archive.
50. Directors UK also shares the concerns of Pact and other stakeholders about the relationship between the BBC as a broadcaster, BBC Studios as a commercial producer, the recent acquisition by the BBC of UKTV as an advertising-led distribution channel, and the proposed BBC-ITV led subscription based BritBox. There is not enough clarity as to how the relationships for the BBC, as a creator, seller and buyer of content, will operate in practice. We acknowledge Ofcom’s assertion that current regulation will allow them to address any issues should they arise, but this must be carefully monitored, and action taken to ensure there is transparency.
51. In terms of how relationships with the newer SVOD channels compares with the BBC. The increasing trend with SVODs is that they use a ‘buyout model’ to commission content and acquire rights for all uses in some or all secondary markets. As outlined in our previous response, this is also fundamentally impacting the secondary use market and, 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. We are concerned this will ultimately impact on audiences as there is less incentive to reinvest in new content if there is less to be gained from successes. Ofcom may want to refer to the provisions in the new European Directive on Copyright in a Digital Single Market¹¹, regarding appropriate remuneration for authors and performers, and the problems associated with buyouts.
52. 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.

¹⁰ https://www.ofcom.org.uk/__data/assets/pdf_file/0020/152327/consultation-bbc-iplayer-provisional-determination.pdf

¹¹ <http://www.europarl.europa.eu/news/en/headlines/priorities/copyright>

53. 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.

Question 7.1: Do you agree with our provisional conclusion that the public value associated with the BBC's iPlayer proposals justifies the adverse impact on fair and effective competition we have identified? Please provide evidence to support your views.

54. Directors UK is concerned that many of the arguments for an increase in public value are based on data derived from hypothetical situations and may therefore be unreliable. In addition, like Ofcom, we are concerned about how this delivery of public value will be ensured given so many unknowns at this time.
55. In terms of the adverse impacts, we note that Ofcom has rightly identified that there will be an impact on fair and effective competition on other BVOD services and other services such as BritBox, and *“does not rule out an impact on the price of secondary rights”*. Our concern is that the lack of data regarding on demand use means it is difficult to predict the real impact and therefore whether the perceived public value is justified.
56. Directors UK is concerned about the length of the extended window as the evidence from the *“decay curve”* shows that viewing drops off significantly after 3-6 months, and therefore question the public value that is being added after that time given the potential loss in secondary market value from having it available for a minimum of 12 months.
57. We therefore believe that, if Ofcom has concluded that the proposals can be approved, they must make a commitment to review the public value assessment and actual impacts on fair and effective competition and secondary rights market post-implementation in order to address any market and audience impact issues that arise.

Children's Content

58. Directors UK is concerned by the BBC's plans to make all BBC commissioned children's programmes available on BBC iPlayer for a standard period of five years. We commend the BBC for its excellent provision of children's programmes and can see the public value in making this content available for longer. However, the extension of the catch-up window to 5-years will, as Pact states in its response, effectively end the secondary rights market in children's TV¹². The BBC did not make this extended use clear in its PIT consultation proposal, as highlighted by Ofcom. And we are concerned that this impact has not been adequately explored given the length of time of the proposed extended window. We note that Ofcom itself says in its report that *“we have not analysed the impact from increased viewing of children's content in the same way...due to lack of available data.”* (P45)
59. Due to lack of available reporting Directors UK is not able to provide any additional evidence. In 2018 there were 5,000 hours of repeats on CBBC and CBeebies. Our concerns are that

¹² https://www.ofcom.org.uk/__data/assets/pdf_file/0024/149280/pact-bbc-iplayer-changes-response.pdf

extending the window to 5 years would effectively, as Pact puts it, “foreclose any rights recoupment” which would remove any scope for directors to receive royalty or residual payments and therefore reduce their income and incentive to create future children’s works. We would encourage Ofcom to reconsider the length of the window for children’s content given the lack of information about potential benefits and market impacts.

60. Pact has suggested in its response¹³ that the proposal to extend children’s television use on the iPlayer to 5 years is indicative of the BBC’s intention to eventually make all content available for 5 years. The BBC’s request in its PIT for no further limits to be placed on the BBC iPlayer adds to this concern. Therefore, we are supportive of Ofcom’s intention to make the current proposals for extended use (if approved) to be the new baseline for BBC iPlayer and for these to be clearly set out. “If the BBC wants to further evolve BBC iPlayer, the BBC Board will need to consider whether any changes it wishes to make are material compared to this baseline position.” We would expect Ofcom to hold the BBC to account on this condition.
61. Ofcom also sets out its understanding that the vast majority of returning series, non-returning series and archive series would not be made available on an exclusive basis after the initial 12-month period and that this also forms part of the baseline: “we do not expect the BBC to increase the number of exclusive titles it makes available on BBC iPlayer without carefully considering the potential impact on competition.” (p45, 7.16). We would expect Ofcom to hold the BBC to account on this condition. We also would not expect repeats of a programme on their traditional channels to automatically reset the clock for 12 months without negotiation with rightsholders

Question 7.2: Do you agree with our provisional conclusions on the conditions and guidance that should apply to the BBC? Please provide evidence to support your views.

62. Directors UK agrees that if the BBC extends the iPlayer it should not be free from regulatory controls and that there will need to be conditions and guidance to mitigate risk. We agree (if the proposals are approved) that Ofcom set these as baseline limits which cannot be extended further without consideration of the market impacts and in consultation.
63. We are concerned that Ofcom’s assessment supported stakeholders’ concerns that the BBC did not provide sufficient information in its PIT consultation and the observation that “in particular did not make any mention of its proposals for children’s television in its proposal.” This is disappointing practice and not transparent.
64. We are surprised that the BBC tried to push through additional functionality changes “including to increase the extent of personalisation on the service and to improve the experience of live content” (P7) as part of this process and support Ofcom in requiring the BBC to put forward functionality changes in a separate assessment because “stakeholders do not have sufficient transparency over these types of changes”. This is disappointing practice and questions the transparency of the BBC in this process.
65. Directors UK strongly believes that Ofcom should commit to conducting a review of the impacts and in particular a review of the secondary rights market within a period of time (e.g. two years)

¹³ https://www.ofcom.org.uk/__data/assets/pdf_file/0024/149280/pact-bbc-iplayer-changes-response.pdf

after the implementation of these proposals, with a view to recommending remedial action if required.

66. This is particularly important given the degree of uncertainty at this point in time about the delivery of any potential benefits and the recognition that there will be an impact on fair and effective competition and on the secondary rights market. The assessment of the secondary rights market must include underlying rightsholders as well as the impact on producers/production companies.
67. We would ask Ofcom to also conduct a review with underlying rightsholders to assess whether the BBC has fairly entered into negotiations regarding the extended use of their work and whether compensation has been fairly provided for increased primary use/reduced secondary market.
68. As part of any review Ofcom should examine:
- i. What is the impact on audiences? What are the actual viewing habits? Are different types of audiences engaging with the content? Are they delivering the BBC's mission and public purpose?
 - ii. What programmes are being made available and how are they being accessed and viewed? Are different genres being better represented? Are viewers favouring particular genres? How discoverable is a wide range of content? Is this impacting on their access to other news and services?
 - iii. What is the impact on competition? How are other channels and services being affected?
 - iv. Has there been an impact on investment in new productions by the BBC or others?
 - v. Has there been an impact on the secondary rights market? Are underlying rights holders being adequately compensated for the extended use? Is this use being adequately reported?
69. To that end we agree with the stipulation set out in the Consultation document that Ofcom will require the BBC to provide performance measures (p47, 7.18): *"We propose to impose conditions on the BBC requiring it to set out how the mission and public purposes will be delivered for people engaging with the BBC increasingly through BBC iPlayer; performance measures including availability, consumption and impact; and how the BBC has had regard to the effects of iPlayer on competition in the UK. We will consult with the BBC on the details of these conditions"*
70. We believe that these measures should not just be based on data provided and assessed by the BBC, but should be independently assessed by Ofcom, and taken in a wider context by requiring comparable, robust data from other sources that indicate developments across BVOD and SVOD providers in the UK. In this context we – and other rightsholder groups – would welcome a further discussion with Ofcom on improving the data it publishes on programme spend, hours broadcast and VOD availability. The current data is highly regarded as an independent and valid source of information to inform rights negotiations but is now insufficiently detailed to assist the proper consideration of these discussions.
71. We also agree that Ofcom has a role in monitoring the BBC in relation to competition and should intervene if necessary (p47, 7.19) *"We monitor the BBC in relation to competition and performance on an ongoing basis....We expect to continue with this programme and include*

consideration of BBC iPlayer within it. If we identify evidence of concerns, we have the ability to step in and act should we consider it appropriate. In addition, to the extent that the changing market conditions threaten the quality of public service broadcasting, that is something we will continue to assess as part of our ongoing PSB duties”

72. We also ask Ofcom to add a requirement for the BBC to agree and report on data on VOD consumption and use which rightsholders can use to determine and reward the relevant right holders.

**Directors UK
10 July 2019**

www.directors.uk.com