

## Your response

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, audio artists, 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. Equity is focussing its remarks on some, but not all, of the consultation questions, indicated below.

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

- Equity would like to take this opportunity to reiterate how the market works for underlying rightsholders such as performers, the potentially detrimental effect the BBC's Proposals will have on commercial revenues in the secondary market and the knock-on effect this will have on reducing royalties and secondary payments that are vital to the ability of performers to making a living from their work.
- Chapter 3 of Ofcom's 'BBC iPlayer Consultation Assessment' details many of the key developments in the sector to which the BBC's Proposals are responding – such as the growth of Video On Demand (VOD) services providing exclusive content – trends that present particular challenges for Public Service Broadcasters and may in fact result in diminishing public value. It must be noted that the BBC's Proposals also represent a fundamental change to the market that will accelerate these developments, by very likely raising demand for VOD and increasing the pressure on linear players.
- 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 overall effect of many of the developments outlined in Chapter 3 have 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, these Proposals and more recent wider developments are moving to a model where the buyer and seller are the same and where content is exclusive to the platforms that hold them. Equity has concerns about BBC's role as creator, seller and buyer of content through BBC, BBC studios, UKTV, Britbox. This could have a detrimental impact on competition, on onwards sales and secondary use markets, and on remuneration of performers. 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. In addition to the large on-line platforms, new SVODs are about to launch on the market – including services from Apple and Disney – which are withdrawing content from rival SVODs for exclusive use on their new platform. As there will be a limit on how many SVODs each household will subscribe to, it's unclear what this market will look like when it settles down and whether an extended iPlayer or Britbox will find its place in it.
- In the absence of clear evidence – with much of the research used based on hypothetical assumptions and assessments about audience and market behaviour which is rapidly changing – it cannot be concluded that the Proposals will deliver significant public value to the extent that it would justify the adverse impact on competition identified by Ofcom. Equity would urge Ofcom to closely monitor the implementation of these Proposals, to assess whether and to what extent the Proposals deliver public value and fulfil the BBC's core public purposes and their impact on competition. In addition, it would urge Ofcom to assess their impact on the whole secondary rights market value chain, the loss of revenue to producers and secondary payments to performers, authors and directors, that are critical issues to the future health of the industry and the people who work in it. It is welcome that Ofcom has highlighted its potential role in monitoring developments in the round across the UK AV sector; as set out in para 6.36, which concludes that: "To the extent that there are broader underlying issues in the production sector, we have ongoing PSB duties and can therefore consider these separately in the future if appropriate". Equity would urge that it monitors these very far reaching changes very carefully and intervenes if there's a problem.

**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.

- In Chapter 5, Ofcom recognises a number of key issues that could prevent the Proposals from delivering on the BBC's public purposes to such an extent it is surprising it still draws the conclusion that the public value of the changes justifies the adverse impact on fair and effective competition. Linear TV still has the biggest share of people's viewing habits and it's unclear whether additional viewing time will assist the BBC in its core mission to inform and entertain the public.

- Firstly, Ofcom is right to highlight that individuals engage with a narrower range of content than on linear and are less likely to engage with news and current affairs. This weakens the public value of the proposals, specifically Purpose 1 which is to provide impartial news and information to help people understand and engage with the world around them.
- Secondly, it also rightly raises the concerns expressed by Equity and many others about whether the BBC has a budget to pay for the rights associated with an extended window – and, we would add, to compensate for the loss of secondary rights sales - as there would be no subscription to the service for British licence fee payers. This would reduce its ability to commission new content and therefore to meet its public service broadcasting remit to serve the nations and regions of the UK and the wider diversity of the UK. 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 (5.48). If the Proposals are approved, this must be a condition of that approval and remedial measures taken if needed.
- Indeed, the individual will be less well served than at present by the move towards a proliferation of new VOD services entering the market, which is resulting in removal of content from platforms such as Netflix for exclusive use on new platforms. For example, Netflix has failed to secure the rights to The Office beyond January 2021 when it will go to a new NBC Universal platform, Friends is likely to disappear behind a new WarnerMedia streaming service and Disney+ will pull together content from Disney Films to The Simpsons, alongside new scripted Marvel shows. A survey in Advanced Television ([here](#)) has found nearly half of consumers (47 per cent) are already 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 seems likely that the popularity of services such as Netflix to the consumer has been less about how the content is accessed, and more because consumers are able to access lots of content they want to watch at a relatively affordable price. There will be a limit on how many of these platforms to which each household can afford to subscribe, which will result in individuals most likely accessing less content in future, that will affect the number of viewers that get to see BBC content and that of the other public service broadcasters and their ability to attract and grow new audiences. While a subscription isn't required for BBC iPlayer for UK licence fee payers, the plan is to introduce a subscription fee for Britbox, the proposed joint streaming service with ITV. The potential effect of Britbox needs to be included in Ofcom's assessment, that also needs to clarify how the two proposals relate to one another (i.e. if content would go to Britbox after 12 months on iPlayer, and for how long it might be held on Britbox). Equity is also concerned about the diversion of funding from content production to establish an extended use iPlayer and Britbox, 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, especially as the cost of VOD subscriptions has been predicted to rise.

- If Ofcom approves the Proposals it is welcome it would put in place conditions on the BBC to assess how these proposals are implemented and to what extent they deliver on the mission and public purposes (para 5.50). This should include: monitoring public engagement with an extended platform; scrutinising whether a budget has been allocated for extended rights; the impact on costs and the commissioning of new content; if the range of content individuals view is actually reduced; if younger audiences are watching more and content they would not otherwise have accessed.

**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.

- Equity does not agree with Ofcom’s provisional conclusion that the potential effect of the Proposals on reducing the value of secondary rights and on underlying rights holders is unlikely to significantly harm competition or to ultimately effect audiences.
- The baseline for extending the exclusive window is very widely defined; covering making most BBC content available for 12 months, with children’s programmes available for 5 years and some content available for longer. This time period also directly coincides with the most valuable period for secondary rights, that will result in the loss of this revenue to producers and underlying rightsholders. In general, the value of secondary rights typically decreases over time – with the exception of notable break out successes such as Game of Thrones - with a sliding scale of value as content ages. In its submission to the first consultation, Pact said a 5-year exclusive window for children’s programming would foreclose any possible secondary rights recoupment and secondary UK sales form an important part of the producer’s assessment of whether a project is viable or not. Equity does not have the empirical evidence to identify a tipping point of value, without data on secondary sales during this timeframe, so would ask that Ofcom therefore reviews secondary market impact and speaks to underlying rights holders to determine whether there has been fair negotiation and compensation for any losses. The BBC and Ofcom’s own modelling of BBC iPlayer viewing shows that most VOD viewing takes place in the first month after transmission and after 3 months the viewing is limited, with usage nearing zero after 6 months in what is described as a ‘decay curve’. The 12 month window therefore seems disproportionate and unjustified in light of the loss of secondary rights revenue it may cause.
- These parameters are unclear for industrial negotiations with the BBC. 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”.

- Ofcom puts forward a number of mitigating factors that would reduce the potential harm from the reduction in secondary rights values. In 6.35(a) it says that this would be partially offset by “a rise in primary payments and/or a rise in other sources of funding” to ensure programmes get made and the shortfall in income to performers, authors and directors is found from alternative sources. However, the latter, alternative source of funding, are not identified. Indeed, the document does not respond to the concerns raised by Equity and others about the effect of the Proposals on co-productions and the ability to leverage additional funding from these deals. 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. 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. Ofcom also says it does not expect the value of international secondary rights to be significantly affected, even though UK VOD rights are often a significant component of any global deal negotiations.
- Equity also questions from where alternative sources of income will be found to partially compensate for loss of secondary payments and would like to take this opportunity to reiterate the importance of ensuring 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. As the majority of performers are freelance, royalty payments are a crucial part of their incomes and livelihoods. If only those who are able to draw on independent wealth can work in the sector, this will harm its ability to reach new audiences and grow commercially. Equity would urge that Ofcom includes an assessment of the impact of these Proposals on the rights and royalties model for rightholders for the repeat use of their work.
- The Copyright Directive is instructive in providing a model for future payments in a SVOD business model. This Directive includes: the “principle of appropriate and proportionate remuneration” by which authors and performers will be able to seek compensation for the exploitation of their work, proportionate to the revenues generated by their material, rather than based on a flat rate; requirements on the transparency in royalty accounting (to show how much revenue is being derived from a work); and makes clear that lump sums should not to be the rule.

**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.

- As set out above, Equity does not share Ofcom’s assessment that the Proposals will deliver significant public value that would justify the adverse impact on competition identified.
- Nonetheless if these changes are approved by Ofcom, conditions should be attached on identified areas of concern, notably:
  - Those set out in para 7.18: requiring the BBC to set out how the mission and public purposes will be delivered for people engaging with it 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.
  - Those set out in para 7.15 that would prevent the BBC from increasing the number of exclusive titles it makes available on iPlayer without further consultation.
    - Currently, viewing is tiny in comparison to that on linear, just 1.9minutes per person per day. This assessment should therefore include setting targets for increased meaningful viewing on the platform, especially for achieving much greater engagement among younger audiences, i.e. engagement of younger audiences that are currently not using iPlayer and increased viewing among those that are. The target on greater audience engagement should indicate viewing of content that would not have otherwise been accessed, including educational and factual content.
- This assessment should also monitor sales. The BBC has said that sales to secondary TV channels will continue, UKTV in particular, and has suggested that content will not all be exclusive and early release will continue. Equity would urge Ofcom to review sales to UKTV and commercial platforms and secondary market impact and speak to underlying rights holders to determine whether there has been fair negotiation and compensation for any losses.
- As Ofcom highlights, delivery of public value is conditional on how these changes are implemented, and Equity would add that there are so many unknowns currently, these changes should be subject to a timely review to assess impacts and to take remedial action if the effect is more negative than anticipated.