



Ofcom Consultation on the BritBox Materiality Assessment

About us

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. Directors UK works closely with fellow organisations around the world to represent directors' rights and concerns, promotes excellence in the craft of direction and champions change to the current landscape to create an equal opportunity industry for all.
3. We welcome the opportunity to comment on Ofcom's BritBox Materiality Assessment.

Directors UK comments

4. Directors UK recognises that the BBC, ITV (and other potential partners) are looking to develop BritBox to address the changing viewing habits of consumers and the desire to meet these needs. We are generally positive about the BritBox proposal, as it creates a home and a brand for UK Content in the SVOD space. As the recent Ofcom Media Nations report¹ highlights, given the high level of investment the UK PSBs put into original UK content in comparison with their international SVOD counterparts, we see it as generally positive for UK PSB content to be readily accessible and clearly signposted for UK audiences. However, there is still a great deal of detail about how BritBox will operate yet to be finalised. In addition, new details have emerged in this paper regarding the proposed changes the BBC is intending to make to the Public Service's "Programme Release Policy" which are not yet finalised and raise concerns. It is the application of this policy that will define our position.
5. Our support for BritBox is based on the expectation that it remains a commercial entity entirely separate from the BBC's Public Service arm and that Ofcom will be monitoring and regulating this accordingly to ensure the process is fair and transparent.
6. We agree with the risks identified by Ofcom in paragraph 1.16 regarding the separation of the BBC's Public Services and BritBox. Ofcom must carefully monitor compliance according to the Trading and Separation requirements and commissioning requirements under the BBC Charter and Framework Agreement to ensure these do not occur and to take remedial action if these are not being adhered to.
7. As outlined in our response to the recent iPlayer proposals, it had not been clear how the iPlayer proposals for content would relate to the proposals for BritBox. In this consultation Ofcom has set out the intention for relevant programmes "*to move seamlessly from TV transmission to BBC iPlayer or ITV Hub, onto BritBox*" (Para 1.2). We are primarily concerned with how these

¹ <https://www.ofcom.org.uk/research-and-data/tv-radio-and-on-demand/media-nations-2019>

combined changes affect fair and effective competition in the secondary use market for the onward sale of content and the remuneration of rightsholders. We are alert to the disruption that BritBox may cause to the market and to current royalty-remuneration models for rightsholders. The launch of BritBox will change how BBC and ITV shares its content with audiences longer-term. The big question for us is how it might affect onward sales of programmes to other channels and SVODS such as Netflix and Amazon; how it will affect repeats, DVD and Blu-ray sales; as well as its relationship with and impact on the existing PSB-run VOD platforms such as the iPlayer and ITV Hub, All4 and My5. Whether it will positively or negatively encourage viewers to UK content, and how this will be measured and reported, and whether this impacts on international sales, are all yet to be determined.

8. Directors UK's priority is ensuring that underlying rightsholders continue to be fairly compensated for the use of their work on BritBox alongside all these other uses. We expect to treat sales of programmes to BritBox just like sales to other third party platforms. We have been assured that programmes will always be sold to BritBox as a genuine third-party transaction and rightsholders will be compensated accordingly. We expect this to continue to be the case.
9. We do share the concerns expressed by others as to whether BritBox will have the budget to afford to purchase the rights to content at market value in the current competitive marketplace. We would look to Ofcom to seek assurances from BritBox that negotiations and acquisition of content for use on the service will be conducted at fair market rates and according to trading and separation regulations.
10. We agree with the risks highlighted in paragraph 1.18 regarding the proposed changes to the Public Service's 'Programme Release Policy' and any Public Service cross-promotion of BritBox.
11. In terms of the proposed changes to the programme release policy (as outlined on p10, para 1.40) we have no opposition to the opening of the sales window as long as the market rate is honoured and BritBox, or other qualifying SVODs, pay a fair price for the use of works in that window.
12. However, we are concerned about the potential impact on the value of the works during the 12-18 month window being proposed in the new programme release policy if BritBox is the only qualified potential purchaser for BBC commissioned content during that period, as it risks them being able to drive down the price of the content. The qualifying criteria means that it is highly likely that BritBox will be the only service to meet these conditions. We note that Ofcom has concluded this risk may be limited as producers may choose to withhold the content until the end of the 18 month window, however this assumption is as yet untested. We are concerned that in reality the changes to the programme release policy mean BritBox will be the only available purchaser and will be able to set the sales price in the absence of competition.
13. Ofcom must ensure that this risk of impact on the market rate for onward sales in the secondary market is monitored and reviewed to ensure that BritBox is not able to exploit its position and unfairly dictate the price during the 12-18 month window, or that the BBC is able to create commissioning terms that mean producers are obliged to sell content on to BritBox. This is particularly important as the setting of market rates for transactions is one of the key benchmarks for setting the remuneration value to be paid to underlying rightsholders.

14. It is also essential that the BBC is fair, transparent and non-discriminatory in its assessment of applications from services seeking to qualify for access to content in the 12-18 month window. This must be regularly monitored and reviewed by Ofcom. As this new programme release policy is still being agreed, the final policy terms must be assessed by Ofcom to ensure they are reasonable and fair.
15. Regarding cross-promotion there is not enough information available to make an informed view. We will continue to monitor BBC and Ofcom for information on these proposals.
16. In addition, there is currently uncertainty regarding original commissions for BritBox. This is not an area addressed in this current consultation. We will monitor for developments relating to new commissions for BritBox. Our intention would be that we would seek similar rights and royalty arrangements for new commissions for BritBox as we would for other SVOD operators.
17. Given the uncertainties surrounding the Public Service's programme release policy, the Cross-Promotion of BritBox and the stated intent to commission new content for BritBox, Ofcom should continue to have regulatory oversight of these policies and review them as appropriate.
18. There should also be a requirement for Ofcom to undertake a timely review of the impact of BritBox, alongside the recently approved changes to the BBC iPlayer, to assess how the combined changes to BBC activities are affecting the flow of content to audiences and impacting on fair and effective competition in the wider market and the secondary rights market. It is a concern that, if Ofcom determines that the BritBox proposal is not a material change, there would be no further assessment under the Charter. The combined impacts of the iPlayer changes and BritBox cannot be viewed in isolation and should be subject to review as part of the ongoing BBC Operating Licence requirements, in order to identify and address any issues arising.

Directors UK
www.directors.uk.com
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