

**UK Film Council**

**Submission to Ofcom  
Consultation on Proposed  
BSkyB Digital Terrestrial  
Services**

**December 2007**

## **Executive Summary**

1. The UK Film Council is the Government-backed agency for film in the UK ensuring that the economic, cultural and educational aspects of British film are represented effectively at home and abroad.
2. The UK Film Council's goal is to, "help make the UK a global hub for film in the digital age, with the world's most imaginative, diverse and vibrant film culture, underpinned by a flourishing, competitive film industry."
3. The UK Film Council welcomes the opportunity to comment on Ofcom's Consultation on the Proposed BSkyB Digital Terrestrial Services.
4. The UK Film Council believes that the proposal as framed presents potential competition issues, and would be to the detriment of consumers, as regards price and the range of films offered.
5. We believe that remedies are required to address these concerns. However, some of these remedies may be beyond the scope of the present Consultation and may need to be considered within Ofcom's larger Investigation into the Pay-TV Market.

## **Responses to Consultation questions**

### ***1. To what extent do you consider that DTT, DSAT, cable and IPTV are in competition with one another for subscribers of pay TV services - either at present or in the future?***

The UK Film Council believes that these services are, in principle, in competition with one another for subscribers of pay TV services. When compared to DSAT, pay TV services are still in their infancy on DTT. We do however consider that due to the forthcoming digital switchover, DTT has the potential to become an increasingly important platform for Pay-TV and provide an alternative competitive offering for subscribers. But we also believe that allowing the overwhelmingly dominant provider of pay-TV channels (notably film channels, including premium film channels) on the DSAT platform, namely BSkyB (hereafter "Sky"), to become the dominant provider of pay-TV channels (including a premium film channel) on the DTT platform could potentially lead to a undesirable reduction in competition

across platforms to the detriment of consumers. Whilst it may be possible to impose conditions to address such concerns, we consider that any conditions would need to be carefully considered and examined to ensure they addressed both short and longer term competition concerns. Please see our response to Question 10 below.

**2. To what extent do you consider the Proposal is likely to deliver benefits to the consumer?**

The UK Film Council believes that care should be taken to ensure that any benefits to the consumer in the short term which arise from the Proposal are not outweighed in the longer term, because the operator of the proposed channels is already the dominant operator on the DSAT platform.

We agree with Ofcom's observation that "given the capacity constraints of the platform, it is also possible that features of the pay TV market make it likely that a single retail provider of pay TV services will emerge on DTT. As a result, more effective competition may be between vertically integrated companies on competing pay TV platforms. If the NGW/Sky proposal foreclosed the opportunity for a pay TV provider on DTT emerging to compete with providers of pay TV services on other delivery platforms (e.g. satellite and cable), leading instead to the emergence of Sky as the main provider of pay TV services on DTT in addition to the satellite platform, this might be the source of significant concern and potential consumer detriment in the long term." [Consultation document, Paragraph 1.12]

In particular, we are concerned about the negative impact that the emergence of a single operator that has dominance on both the DTT and DSAT platforms could have both on consumers and on the upstream market for the acquisition of films. For example, the presence of a single operator could mean that the consumer would pay more for film channels than they would otherwise.

Ofcom refers to Sky's proposal as offering "premium sports and movies content" (para. 1.4) and later defines "[P]remium content...e.g. first run Hollywood films." We would note that while the overwhelming majority of the films shown on Sky Movies SD1 are Hollywood films it includes independently produced and/or distributed British films, such as *Stormbreaker* which has aired on a number of

days in November and December; and also a film such as *Wallace and Gromit: The Curse of the Were Rabbit* (aired December 4) which while distributed to cinemas in the UK by United International Pictures (UIP) was produced by Aardman Animations, a Bristol-based company.<sup>1</sup> Both these films were qualifying British films for the purpose of tax relief.

We consider that Ofcom must look beyond a narrow definition of "premium content" to understand fully the potential impact of Sky's proposals for a film channel on DTT upon the consumer. We believe that the dominance of a single pay operator within both the DTT and the DSAT platforms will, over time, lessen upstream competition for the acquisition of rights for films, including British films (whether distributed by an independent or a studio), and including non-British films distributed by UK independent distributors, and this may lead to a lesser range of films being made available (or being made available at a much higher price) than would otherwise be the case.

However, we believe it is unlikely that these upstream issues can be effectively addressed within the scope of the current Consultation as such issues also relate to Sky's dominance of the pay-TV market more generally. We look forward to setting out our concerns on this issue in more detail in our response to the forthcoming Ofcom Consultation on the pay-TV market in the UK.<sup>2</sup>

We believe that of the options for imposing additional conditions identified by Ofcom, there is an attractiveness in requiring Sky to make some or all channels available to other retailers on a wholesale basis as described at bullet point 2, para 1.20 of the Consultation. Nonetheless, the UK Film Council thinks that it is important to ensure that Ofcom carefully considers the impact of such remedies on the upstream market as well as the more direct impact upon the downstream operations. It would be unfortunate if such a remedy were in fact to increase the buyer power of Sky in the upstream market, with the result that independent distributors were effectively foreclosed from this important avenue of distribution.

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<sup>1</sup> UIP, a partnership between Paramount and Universal for distributing their films to cinemas outside the United States was dissolved at the end of 2006.

<sup>2</sup> Ofcom Update sent by email, December 6, 2007.

We also believe it would be desirable to require that any retail and/or wholesale provision of channels by Sky is made subject to certain conditions which address concerns relating to the incompatibility of pay TV services and set-top boxes and wholesale access as described at bullet point 3, para 1.20 of the Consultation.

**3. To what extent do you consider that there is scope for sustainable competition in pay TV on the DTT platform and, more broadly, across all pay TV platforms?**

The UK Film Council believes that the capacity constraints of the DTT platform, as evidenced at Para 2.22. - whereby the EPG for DSAT lists 500 TV channels, that for Virgin Media 200 channels and that for DTT only 50 channels - suggests that the scope for sustainable competition in pay TV on the DTT platform is currently more limited than DSAT. We consider the scope for sustainable competition would be adversely impacted if Sky were also to become the dominant provider of pay TV services on the DTT platform.

We believe that the scope for sustainable competition across all pay TV platforms is limited. It must be recognised that Sky, as the overwhelmingly dominant incumbent with regard to pay-TV services on DSAT, has a very significant competitive advantage - not least because the barriers to entry for a pay-TV operator are very high.

**4. What are likely to be the key aspects of competition between providers of retail pay TV services on the DTT platform? E.g. what is the role of premium sports and movies content?**

The UK Film Council agrees with the Director General of Fair Trading's finding, in the Review of the wholesale pay TV market in December 1996 that "premium sports and movies were the main drivers of subscription to pay-TV."<sup>3</sup> This view is also shared by the European Commission in its more recent reviews of the market and indeed is likely to remain the case in a digital age<sup>4</sup> - films intended for the

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<sup>3</sup> Paragraph 1.4, Director General's Review of BSkyB's position in the Wholesale Pay TV Market, December 1996

<sup>4</sup> See for example paragraph 21 of Commission Decision of 13 October 2000 in Vivendi/Canal+/Seagram Case No. IV/M2050, [2000] OJ C311/3 and paragraph 61 of Commission Decision 2004/311/EC of 2 April 2003 in Newscorp/Telepui in Case COMP/M.2876 [2004] OJ L110/73.

cinema are likely to continue to have production values which will be attractive enough such that consumers will be willing to pay for them.

**5. Do you consider that if Sky were to become the only provider of pay TV on the DTT platform it would be likely to have a significant detrimental effect on competition in the long term? How might this affect the development of other platforms for the delivery of pay TV services?**

As stated in answer to question 2, the UK Film Council believes such a detrimental effect is likely, although it is perhaps possible that conditions could be designed to address a number of these concerns we refer to in our response to Question 10 below.

**6. To what extent, if at all, do you consider that the Proposal would be likely to lead to any of the public policy concerns outlined at Section 4?**

The UK Film Council has some sympathy with the view of Ofcom that "given the strong presence of the PSBs on the DTT platform, there are few reasons to think that the Proposal would be likely to have a significant detrimental effect on the FTA channels that are available on DTT."  
[paragraph 41.3]

Notwithstanding the involvement of PSBs, we are however concerned that the Proposal may nonetheless have a detrimental impact on DTT output in the longer term and potentially reduce the attractiveness of free-to-air outlets for films on this platform. There may also be a risk that over the longer term this Proposal may directly or indirectly discourage future investment in the DTT platform more generally, thus reducing the scope for competition still further.

**7. Specifically, to what extent do you consider that the Proposal would be likely to lead to consumer confusion?**

The UK Film Council believes that such confusion is a possibility given the proposed need to buy a separate Set Top Box.

**8. To what extent do you consider that it is beneficial for consumers to be able to obtain Sky and existing DTT pay TV content without having to purchase separate STBs?**

The UK Film Council believes that it would be beneficial if consumers were able to purchase only one Set Top Box (STB) at a reasonable cost, in order to help optimise access to pay-TV services on the DTT platform, including film channels.

**9. Do you consider that the Proposal might lead to any additional public policy concerns?**

The UK Film Council believes that additional public policy concerns may arise but that these are linked to Sky's overall position in the pay-TV market and are therefore best addressed in the round in the context of Ofcom's forthcoming Consultation on its review of the pay-TV market as a whole.

**10. If Sky becoming the only provider of pay TV services on the DTT platform were likely to have a significant detrimental effect on competition, do you consider that it is possible to address this through a set of additional conditions and/or directions? If so, what form should those conditions/directions take?**

Overall, it is the UK Film Council's view that given the structural nature of the concerns raised by this proposal it may in fact be very difficult to design any conditions which would adequately and effectively address both the upstream and downstream competition concerns which have been raised. Again, we are likely to look to Ofcom's overall review of the pay-TV market for remedies which address broader aspects of market dominance in pay-TV.