

UK Film Council

**Submission to
Ofcom Pay TV second consultation
Access to premium content**

11 December 2008

A. Introduction & Executive Summary

1. The UK Film Council is the Government-backed lead agency for film in the UK. Our 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.
2. The UK Film Council welcomes the opportunity to comment on Ofcom's Consultation on pay TV ("the Consultation").
3. Given its remit, the UK Film Council has again focused its comments mainly on those aspects of the Consultation which impact upon and relate to premium movie content.
4. As noted in its previous submission, the UK Film Council considers the current structure of the pay TV market raises a number of potential competition law concerns. In particular the UK Film Council is concerned that the current lack of competitive offerings in the premium content market has had an adverse effect on consumers. The latter has appeared to inhibit new entrants, limit choice, discourage innovation and generally dampen competition in all aspects of pay TV to the detriment of many, including the independent film industry (including both independent production and distribution) in the UK.
5. Accordingly, and in light of Ofcom's wider investigation into the pay TV market, the UK Film Council welcomes the measures proposed by Ofcom to address the concerns. Whilst recognizing that it is usually preferable for the market to develop its own solutions, the UK Film Council considers that the present structure of the pay TV market is such that proportionate and targeted regulatory intervention is likely to be the most effective way of addressing the competition concerns and remedying the resulting harm to consumers.
6. On that basis, the UK Film Council considers that in principle the proposed licensing obligation would appear to offer a practical solution which would result in enabling new entry (or expansion by existing players) and increased access to premium and other content for consumers in the short term. This would in turn create the conditions necessary for fostering and enhancing a more competitive market (in terms of price, content and innovation) in the medium to long term including making a wider range of content, such as independent produced and/or distributed film more widely available.

1. *What characteristics should the pay TV sector display in order to serve consumers best?*
 - 1.1. The UK Film Council believes that the pay TV sector needs to be competitive and innovative offering consumers a wide choice of content of all kinds – including but not limited to premium content.
 - 1.2. In particular, the ability for consumers to access content in new ways which optimizes the technological benefits of the digital era is important.
 - 1.3. With these criteria in mind, we think that the summary at paragraph 1.12 (laid out in more detail at paragraphs 2.52-2.56) offers a good description of the characteristics which help to produce desirable consumer outcomes. We would also note that many of these characteristics, not least that of encouraging innovation, may also operate to advance Ofcom’s dual objectives of furthering both the interests of citizens in relation to communications matters as a whole and the interest of consumers in the relevant markets (Section 3(1) Communications Act 2003).
 - 1.4. At present, the UK Film Council would note that the markets are not performing as they should. As Ofcom notes at paragraph 7.32, “from a consumer perspective however the issue is simple: consumers on a number of platforms are currently unable to access the most valuable sport and movie content and this must be a source of concern.” As such, Ofcom’s proposed characteristics of the market do not reflect the current situation and intervention may be required to address these concerns.
2. *Do you agree with the amendment to our criteria for assessing the pay TV market?*
 - 2.1. Yes, we strongly support the idea that, as expressed at paragraph 2.50 that

“Innovation is not limited only to technical platform features. It can also take the form of new types of retail packages – creating new combinations of services, implementing new charging structures for existing content, or bundling content with technical features in new ways.”
 - 2.2. We believe that the debate around innovation, especially in relation to broadband for example, has focussed excessively on technical issues and insufficiently on the ways in which innovation has the potential to transform the delivery of content and therefore value for money for consumers and wider benefits to citizens. Paragraph 2.50 is particularly welcome therefore.

The importance of premium content

3. *Why do consumers pay for TV services?*
 - 3.1. This is a very broad question. However, to summarise, in relation to film, we think that the availability of premium content for viewing in the home is the key driver.
 - 3.2. In short, we agree with the assertion at paragraph 3.34 that “Content is the major driver behind consumers’ selection of their pay TV service.” We stand by the assertion, quoted from our submission to the earlier consultation at paragraph 3.27 of this document that “it is very difficult to build critical mass without access to premium content”.
4. *Do you agree with our assessment of the relative importance of platform features and content?*
 - 4.1 Yes, the UK Film Council agree with Ofcom’s assessment of the relative importance of platform features and content. We believe that the choice of content available from the retailer or in a particular platform is the primary reason behind a consumer’s choice of a particular retailer or platform whilst platform features are designed to enhance the way in which that content is viewed.
5. *Do you agree with our views on the importance of premium sports and premium movies content for competition in pay TV?*
 - 5.1 Yes. As stated in our response to Ofcom’s earlier consultation, the UK Film Council believes that it will be very difficult for new platforms and new services to build critical mass without access to premium content which is both exclusive to pay TV channels and is of sufficient appeal to persuade consumers to pay to watch it.
6. *Are there any other international examples to which you would draw our attention?*
 - 6.1. We are not aware of any examples which add significant value to the argument.

Market structure and market definition

7. *Do you agree with our overall approach to market definition analysis?*
 - 7.1 Please see the response to question 9 below.

8. *Do you agree with our definition of the market for Core Premium Sports channels or do you believe it to be narrower or wider than we have suggested? If so, what specific evidence do you have to support your view?*

8.1. The UK Film Council is not best placed to comment on this question.

9. *Do you agree with our definition of the market for Core Premium Movies channels or do you believe it to be narrower or wider than we have suggested? If so, what specific evidence do you have to support your view?*

9.1. We support the market definition offered for the Core Premium Movie Channels. We support the assertion at paragraph 4.235 that:

“On balance, we believe it likely that the wholesale supply of channels including first run movies from the Major Hollywood Studios in the first pay TV window lies within its own market at present, but we observe that the constraint from other ways of watching films is growing and may grow further in the future.”

9.2 We think Ofcom is right to say that there may be constraints from new ways of watching films – e.g. streaming, download-to-own, download-to-rent. However, these constraints are relatively weak at the moment, since these new markets are in a nascent state. Much will also depend on the evolution of release windows in a digital age. Ofcom has rightly noted the importance of these windows at paragraphs 4.152 and 4.153. If, for example, material is available via new delivery methods at the same time that it is available in the pay-TV window then this clearly would act as a constraint – but to what extent will clearly depend upon the availability and take-up of such new services.

9.3 Thus we agree with the statement at paragraph 4.219 but analysis of current consumption suggests that the current indirect constraint is relatively weak. The scale of the constraint is likely to grow as more homes have broadband internet connections and the average connection speed increases. Accordingly, at this point in time, we are of the view that these new technologies do not provide an effective constraint and that consequently, first run movies do form a narrow but distinct market.

9.4 For completeness we would note that we disagree with the assertions of Sky that movies shown on free to air TV form part of the same market. Such a statement ignores the impact of release windows. Films are released through a sequential series of windows. For example, films are released to traditional analogue terrestrial television and DTT services at least 12 months after they are released to pay TV. Thus, whilst free-to-air TV does show “blockbusters” they are not as recent as Sky simply because free-to-air TV sits behind pay TV in the sequence of windows. For that reason, we do not consider free-to air TV forms part of the same market.

- 9.5 Windows are a very important means of enabling content creators and distributors secure optimum economic value from each medium in which a film is released. The detrimental impact on consumer choice arises if, as is the case with pay TV in the UK, a provider has a very dominant position within a given window, not from the presence of windows as such. We would argue that the assertion in Ofcom's earlier pay TV consultation that "for certain types of content the extent of real choice available to consumers is rather more limited," is true in respect of films available in the pay TV window.
- 9.6 However, we think Ofcom is wrong to include in its analysis, any consideration of illegal file downloading (paragraphs 4.217 and 4.218). As the consultation notes, this activity is illegal, and is the subject of a Memorandum of Understanding between key stakeholders from the ISP industry, the content industries, Ofcom and the Government.¹ As such activity is illegal, whether it acts as a constraint to the market for premium content (or any other kind of content) is irrelevant.
10. *How would you see the future development of consumers' viewing habits for sports and movies, and of the ways movies will be delivered to them? How would this affect market definition?*
- 10.1. These are very large and complex questions. We would however observe at the outset that both price and ease of access are issues which will have a significant influence on the future development of consumers' viewing habits.
- 10.2. In broad terms, with regard to film, the ability to create and distribute content in a much larger variety of ways will tend to accelerate the segmentation of the film sector such that there will be many more different business and cultural models, each based on different sets of aims and objectives. Just as the audience's ability to choose between different ways of consuming product is greatly enhanced by digital technology so too is the ability of rights holders to create different kinds of models both for content creation and the dissemination of that content to audiences.
- 10.3. In particular, the development of the development of legitimate digital services - streaming and download - services delivering films offers enormous opportunities for UK providers and producers of film. These services should deliver benefits to citizens and consumers since they will allow service providers to offer a much wider range of films (the so-called "Long Tail" effect) because the physical constraint of shelf space does not exist in a digital environment.
- 10.4. Such new services will also help to stimulate the development of new business models within the UK film industry thereby significantly benefiting the UK's creative economy. They will also help to stem copyright theft and infringement in

¹ Ofcom's statement in footnote 124 that the "British film industry" is a signatory is misleading. While a number of organisations involved in the British film industry are signatories, these do not cover the entire sector.

respect of film by providing a legitimate offer to meet consumer demand. At present the take-up of legitimate services offering films is slow however, as noted at paragraph 5.97.

- 10.5. We would also note however that paragraph 5.97 does not refer to the development of advertising-supported services, only to services which enable consumers to rent or to own. The development of such advertising-supported services could also become a relevant factor in determining market definitions and market power.
- 10.6. It is too early to try to predict how this will affect market definitions. As noted in answer to question 9, the role of windows will be key in this regard.

Content aggregation and market power

11. *Does Sky have market power in the wholesale of Core Premium pay TV channels?*
- 11.1. Yes. We would reiterate our response to the earlier consultation in which we stated that “We agree with the conclusion that “distinct narrow economic markets exist for pay TV subscription channels containing premium sports and movies content at both the wholesale and retail level of the value chain, and that Sky has market power in these markets.” (para. 1.25, original consultation).
12. *Do you agree with our conclusion that Sky has market power in the wholesale of Core Premium Sports channels? What specific evidence would you provide to support your view?*
- 12.1. See response to Question 11.
13. *Do you agree with our conclusion that Sky has market power in the wholesale of Core Premium Movies channels? What specific evidence would you provide to support your view?*
- 13.1. See response to Question 11. We note that at paragraph 5.5 it is stated that “No company other than Sky has ever won any of the relevant rights from the Major Hollywood Studios, giving Sky 100% market share.” Historically, this is inaccurate.
- 13.2. Paragraph 5.94 provides a more accurate reflection of the situation where it is stated that:

Sky currently has a 100% market share in the wholesale supply of Core Premium

Movies channels. Since the early 1990s, Sky has persistently enjoyed an extremely high market share – no other firm has won rights to films from the Major Hollywood Studios for the first TV subscription window.

Competition issues related to Core Premium content

14. *Can retailers and / or platform operators get sufficient access to Sky's Core Premium channels?*
- 14.1. No. Whilst we have no first hand experience, the limited availability of the relevant premium channels which are known to be of interest to consumers (and therefore of value to retailers/platform operators) speaks for itself. We therefore agree with Ofcom's analysis.
15. *Have we presented a factually correct picture of current distribution of premium sports and premium movie channels?*
- 15.1. As regards film the analysis appears factually correct. We are not qualified to comment as regards sport.
16. *Do you agree with the list of factors we present as being relevant when Sky considers whether to supply?*
- 16.1. Although not within our expertise, the UK Film Council considers the factors identified would seem broadly consistent with the general economic thinking on the incentives applicable to vertically integrated organizations.
17. *Do you agree with our presentation of the longer-term factors in Sky's decisions to supply?*
- 17.1. Again, whilst the UK Film Council does not have any first hand experience of this issue, we consider Ofcom's conclusions would appear to reflect general economic thinking on such matters.
18. *Do you agree with our discussion of the role of vertical integration?*
- 18.1 The UK Film Council is not best placed to comment on these issues.
19. *Do you agree with the figures we have presented to illustrate the playing-out of incentives to supply?*
- 19.1. The UK Film Council is not best placed to comment on this.

20. *Do you agree with our proposal that it is important for multiple operators to have wholesale access to Core Premium content, rather than Sky retailing on others' platforms?*

20.1. Yes. We believe that this will have a positive impact on competition in the pay-TV sector, to the benefit of both consumers and rights holders. In our previous response, we have noted our concerns that the presence of only one significant operator in the pay TV market has been detrimental to consumer choice as it has, over time, substantially lessened upstream competition for the acquisition of film rights and therefore diminished the choice of films available.

20.2. By contrast, we consider that allowing multiple operators to have wholesale access to Core Premium content should level the playing field and enable those operators to more actively compete with Sky. In particular, the difficulties that a number of parties currently face in obtaining the critical mass necessary to effectively compete, should be eased. The more available the Core Premium content, the more platform neutral consumers are likely to become, thus further stimulating competition between retailers and platform operators. Stimulating competition in turn leads to greater innovation, choice of delivery mechanisms, range of content and pricing models for all stakeholders including the independent film industry.

21. *Do you agree with our analysis of the profitability of Sky's wholesale premium business?*

21.1. The UK Film Council is not best placed to comment on this.

Effects on consumers

22. *What is the effect on consumers of the current situation with regard to access to premium content, now and in the future?*

22.1. Choice is restricted as stated at paragraph 7.32, cited in answer to question 1 above.

23. *Do you agree with our analysis of the current situation with regard to choice, innovation, pricing and consumer satisfaction?*

23.1. In broad terms, yes.

24. *How would you see differently the future of pay TV as outlined in our "forward look"?*

24.1. We would refer Ofcom to paragraph 13.5 of our submission to the first consultation, where we stated that:

“In practice, the ability to set up such SVOD or advertising supported VOD services will depend on the ability to unbundle the SVOD or advertising supported VOD rights from the pay TV rights. In this regard, we note with interest the assertion by British Telecommunications, Virgin Media and other parties in their submission to Ofcom on the need for a market investigation into the pay TV industry that: “through the bundled acquisition of ancillary rights (including rights such as DSL) on an exclusive basis, Sky denies such rights to innovative new entrants such as BT Vision whilst not fully exploiting these ancillary rights itself. Because of the exclusivity provisions, these rights are not available directly from content owners.” [Paragraph 5.5. (b)].

This is a view which also has considerable currency in the UK film industry.”

- 24.2. The extent to which consumers may consider pay-per-view as a close or suitable alternative to a monthly subscription which entitles the customer to access a number of movies, also remains to be seen. Ultimately however the extent to which Core Premium content is widely available at a reasonable cost will play an important role in shaping the future of pay TV.
25. *Would you agree with our analysis of the likely effects of restricted distribution of Core Premium content on consumers?*
- 25.1. Broadly, yes. We very strongly agree with the assertion at paragraph 7.106 that “We would be concerned if the effects of limited distribution of premium content were to be extended to other markets such as broadband.” We consider that limiting the availability of Core Premium content in such a manner could significantly hinder the development of nascent technologies and delivery mechanisms and thus prevent or materially delay the emergence of rival operators and retailers (both in the Pay TV market and more widely) in the medium to longer term to the disbenefit of consumer choice and potentially limiting the availability of independent film.

Remedies

26. *What should we do, if anything, to tackle the problem we have identified relating to Core Premium content?*
- 26.1. As noted above, the UK Film Council is concerned that the current structure of the pay TV market does not result in an outcome which maximises competition or consumer choice. Nor, given Sky’s market power, does it appear likely that the structure of the market will shift favourably towards consumers in the short to medium term.

- 26.2. On that basis, we consider that proportionate and targeted regulatory intervention is likely to be the most effective (and possibly only) way of addressing the competition concerns and remedying the resulting harm to consumers. We therefore welcome Ofcom's proposal to introduce a "wholesale must-offer obligation". As ever, we appreciate that the "devil will be in the detail". Nonetheless, in principle this proposed solution appears to maximise access to the Core Premium content in a manner which minimises the practical difficulties surrounding the staggered expiry of rights to premium content and the need for critical mass.
27. *What would you see as the key objectives of any remedy in pay TV?*
- 27.1. To enhance the consumer outcomes identified at paragraph 1.12. including that of driving innovation and creating a market structure in which competition can flourish. In practical terms, to be beneficial any solution must result in an increase in the number of retailers across the relevant platforms who offer Core Premium content at a price which is competitive in the market.
28. *Do you believe we have identified the right list of regulatory options?*
- 28.1. Although the precise range of regulatory tools available to Ofcom is not an area within our expertise, the UK Film Council is not aware of any additional options which would materially assist in this case.
29. *Have we made a suitable assessment of the option of taking no further action?*
- 29.1. For the reasons set out above, we do not consider that a conclusion of "no further action" would be justified.
30. *Have we made a suitable assessment that it would be more appropriate to use our sectoral competition powers than to rely on ex post action under CA98?*
- 30.1. The UK Film Council is not best placed to comment on this. Please see the comments above.
31. *Have we made a suitable assessment of the option of pursuing a process under our sectoral competition powers?*
- 31.1. The UK Film Council is supportive of the proposed approach for the reasons set out above.
32. *Have we made a suitable assessment of the option of pursuing a reference to the Competition Commission?*
- 32.1. The UK Film Council is not best placed to comment on this. Please see the comments above.

33. *Do you agree with our discussion of the legal framework for a wholesale must offer remedy?*

33.1. The UK Film Council is not best placed to comment in detail on this.

34. *Have we captured the potential impact on consumers and stakeholders in our preliminary impact assessment?*

34.1. The UK Film Council does not have first hand experience of these issues, but would broadly agree with Ofcom's assessment

Details of a wholesale must-offer remedy

35. *If we were to pursue a wholesale must-offer, which retailers should be able to purchase what content on what terms?*

35.1. The UK Film Council is not best placed to provide comments.

36. *What is your view on which retailers should be eligible for any wholesale offer?*

36.1. The UK Film Council is not best placed to comment in detail, but please see our general observations above.

37. *What is your view on our decision to focus in this document on residential subscribers?*

37.1 The UK Film Council is not best placed to comment in detail, but please see our general observations above.

38. *Have we identified the right content and channels to be captured by any wholesale offer?*

38.1 Yes, although it will be important to ensure any remedy has sufficient flexibility to deal with possible changes to programming which could result in the removal or addition of particular channels from the wholesale must-offer obligation.

39. *Have we picked up all the relevant issues to do with defining the wholesale product – i.e. conditions on channels, technical distribution, format, interactivity, VoD? How would you suggest proceeding on any or all of these?*

39.1. We note with interest the statements that:

We would at the very least expect that, where Sky has the appropriate movie rights, and where it uses those as the basis of a subscription VoD service to its

own retail customers, it should make a wholesale version of this SVoD service available to other platforms. (paragraph 9.49)

and

“It may therefore be appropriate to consider requiring Sky to launch a wholesale SVoD service which includes all the relevant premium movies by a specified date, subject to ownership of the rights.” (paragraph 9.50)

39.2. We believe that such requirements might have a very beneficial impact on innovation across different platforms. We would be very interested to see further thinking from Ofcom on these proposals.

40. *Do you agree with our discussion of the need to set prices?*

40.1 The UK Film Council is not best placed to comment on this in detail

41. *Do you agree with our characterisation of the two main approaches to setting prices – retail-minus and cost-plus – and the practical issues with each?*

41.1 The UK Film Council is not best placed to comment on this..

42. *If we were to use a retail-minus approach, what would be the set of costs that we should take into account? Should we base the assessment on new entrant costs or on the costs of an efficient large-scale operator?*

42.1. The UK Film Council is not best placed to comment on this.

43. *Have we identified the important issues related to commercial terms? How would you suggest proceeding on any or all of these?*

43.1. The UK Film Council is not best placed to comment on this.

44. *In particular, how should we tackle the issue of security?*

44.1. The UK Film Council is not best placed to comment on this.

45. *Is three years the right length of time before the first review of this provision? What factors should cause us to review it earlier than this?*

45.1. The UK Film Council is not best placed to comment on this. We would however note that it is important to keep any proposed remedy under review. In addition, in setting the period for review, Ofcom should take account of how quickly any remedy can be put into effect.