



Satellite & Cable
Broadcasters' Group

Submission from the Satellite and Cable Broadcasters' Group to Ofcom's Review of the Television Production Sector

The Satellite and Cable Broadcasters' Group (SCBG) is the trade association for satellite and cable programme providers. Its members are responsible for over 100 channels in the UK and in addition broadcast many more services from the UK to continental Europe and beyond. SCBG channels remain highly targeted, with audience shares ranging from less than 0.01% to 2% of digital viewers, but with a combined share approaching 20% of all UK television viewing. They provide a range of entertainment channels, specialist factual and educational services for viewers interested in history, music, nature, art or science, as well as broadcasting to cultural and ethnic minorities in their own languages. They are also developing innovative enhanced and interactive services and increasingly attracting audiences migrating away from traditional channels.

Satellite and cable broadcasters operate in an extremely competitive and volatile environment, without privileged access to scarce Government-controlled spectrum or to the must-carry status afforded to terrestrial networks. They depend entirely on their own programming investments and marketing initiatives to attract and keep audiences across a range of different broadcasting platforms. Their viability depends on an ability to adapt to technological developments, respond directly to audience preferences and quickly absorb commercial pressures.

Satellite and cable broadcasting is the fastest growing sector in the UK television industry, employing over 6,000 people in the UK with revenues of nearly £5 billion. This sector produces more originated programming than the terrestrial channels combined, accounting for more than half the UK's total spend. Satellite and cable channels are also providing a huge boost to public service output, broadcasting 14,000 hours of public service programmes in a typical month.

1. Introduction

The emergence of a digital channel sector independent of the terrestrial networks has been a UK success story, and has played an important part in achieving the Government's objective of a dynamic, competitive communications economy. The sector comprises over 200 channels whose ambitions to acquire, co-produce and commission UK content have increased as the sector matures. The last five years have seen a rise of 19% per year in original UK commissioning on multi-channel services, as documented in Ofcom's Review of the Production Sector. Furthermore, this sector is developing innovative content propositions for new media platforms and is well placed to offer flexible arrangements for these uses of producers' intellectual property.

SCBG believe that the development of the independent channel sector, and its strategy towards UK content commissioning and acquisition, will be vital in maintaining plurality and diversity in UK broadcasting. In the area of programme rights, policy intervention is required to ensure independent digital channels are protected from predatory activities by incumbent terrestrial broadcasters.

Our submission to the Review is a positive one, illustrating the potential benefits that fair and effective competition in the market for rights can deliver for producers, content providers and, most importantly, UK citizens and consumers.

By ensuring the development of a competitive market for independently produced content rights, Ofcom can give the UK's independent production sector an opportunity to end its dependence on the terrestrial broadcasters and remedy the market failure caused by their collective buyer power. It can also thereby provide support for market entry of new and diverse sources of investment for UK content production, and help independent producers find innovative ways to bring their work to consumers.

2. Consumer Interest (Qs 1&2)

SCBG agree that Ofcom should focus on the viewers' interest in its oversight of the production sector, but believes more emphasis should be placed on its obligation to stimulate competition and plurality. This reflects Ofcom's objective as specified in Section 3 (2) of the Communications Act to secure:

“the availability through the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;

the maintenance of a sufficient plurality of providers of different television and radio services”

and in carrying out this duty to have regard to:

“the desirability of promoting competition in relevant markets”

and

“the desirability of encouraging investment and innovation in relevant markets.”

Instead, we observe Ofcom focusing only on the viability of the terrestrial broadcasters in their arrangements with independent producers rather than acknowledging the wider impact of revised Terms of Trade on the whole broadcasting and production economy.

The five terrestrial networks are at present able to contribute the majority of expenditure on UK programme commissioning because of their public service status and privileges. This puts them in a position of enormous strength in relations with independent producers, as discussed in more detail below. However, the consumer interest demands a broadcasting environment that offers the greatest choice across a number of providers and in a variety of different environments. If terrestrial broadcasters exploit their dominant position anti-competitively, it will damage existing independent channels and stifle the emergence of new media businesses. This will be to the detriment of consumer choice and the development of long-term value generation for UK independent producers.

We believe that Ofcom is not making sufficient distinction between the incumbent major broadcasters’ terrestrial channels, whose public service role and obligations justify supportive regulatory intervention in the short term, and their digital channels, which are purely commercial enterprises but are being allowed to benefit from PSB privileges.

A healthy outcome from the Review would support a continued diversity of supply, a new diversity in sources of investment for independent production as well as a continued high level of original commissioning for the main networks. But it should also enable independent channels and new media companies to create and sustain complementary programming businesses.

3. Current position of television production sector and likely future developments (Qs4&5)

As Ofcom’s report acknowledges, the multi-channel sector is of growing importance to UK production. The sector has been steadily increasing its levels of first run commissioning, providing opportunities for new producers and often breaking new talent. Thematic channels are quick to respond to producers’ approaches, are able to build audiences for content that might not naturally find a mainstream audience and have a track record of bringing additional investment to the table for major network series.

From our discussions with a range of independent producers it appears they, like us, would like to see an environment where there is a diversity of funding

sources for producers in order that this type of investment can continue and develop.

Many independent channels have built their businesses and therefore their potential to invest in original production on the basis of free market acquisition, co-production or pre-purchase of content. Their increased commissioning of UK independent production has developed on the basis of this stable business model. But its stability is currently under threat.

PACT's recent Oliver and Ohlbaum report on "UK TV Content in the Digital Age" comments:

"Independent channels not aligned to networks or major pay TV platform owners may struggle, especially if they cannot get access to key sources of programming rights".

Independent research commissioned by SCBG from Digital-i confirms this. It looked at trends in UK acquisitions across forty-five independent channels and demonstrates that their ability to buy UK content at competitive market prices dropped around 2004, when the terrestrial networks began to launch their digital portfolios, and that this decline is set to continue (see Annex 1: SCBG Survey of the UK Secondary Rights Market).

For some channels, this decrease has been dramatic:

"Our investment in programmes that first aired on Channel 4 and Five has declined over 50% in the last 12 months".

Furthermore, where thematic channels are investing and innovating, this R&D role often goes unrewarded because of the terrestrials' negotiating strength:

"We took a series to the table and persuaded ITV to take an interest in the show. But ITV are now insisting [the producer] accepts an all rights deal (despite our willingness to share) and [the producer] is obviously concerned that by going with us they taint their relationship with ITV."

"We have an established series that we share with Five but whilst negotiating for a second series they have asked for some secondary rights as part of the primary package which conflict with ours. Five has "suggested" to [the producer] that they may not pick up further series unless these rights are given to them and have even hinted they will not look at other titles either".

"We have an established property that sits across both [our channel] and [a BBC digital channel]. On the new series we had to battle to keep the rights for [our channel] as the BBC tried to take exclusivity".

This situation has resulted in many cable and satellite broadcasters increasing their investment in US content, which runs counter to the objectives of Ofcom's Review. It is driving up the price of US content at the expense of investment in original UK content and in co-production or acquisition of UK content. We would prefer a more competitive environment in which our

channels could add quantity and value to the overall investment in UK independent production.

Finally, we acknowledge that there is work to do to ensure that producers of all shapes and sizes are aware of opportunities to exploit their intellectual property. Independent producers do not always seem aware of their entitlement under the new Terms of Trade and there may be cultural barriers to dealing with secondary channels, as one channel describes:

“Some smaller producers don’t know that there is value in second windows or other territories outside the UK and some don’t really care – they just want their programme produced so they give up a lot”.

However, this is all the more reason for Ofcom to ensure the new Terms of Trade settlement leaves rights open and accessible to stimulate increased competition. SCBG believe the potential of the secondary market to bring new finance to UK production has not yet been fully realised, partly because we are early in the new Codes of Practice cycle but also, crucially, because of these hurdles described below.

4. Codes of Practice (Qs 7&13)

SCBG do not agree with Ofcom’s contention that the Codes of Practice are working well, because they have failed to stimulate a fair and competitive secondary market, and is disappointed that its views were not reflected in the Review document.

SCBG consider that the holdback is the most problematic element in the current Codes and our chief concerns are the ability this gives to broadcasters to warehouse programming and the onerous release terms that are applied in any case of the holdback being waived.

The ability of the terrestrial broadcasters to circumvent the spirit of the Codes of Practice with holdback policies that favour their own digital channels is well documented in the Oliver and Ohlbaum report, which acknowledges that the problems of buyer power in the primary market are now acute in the secondary market too:

“The main broadcasters’ ability to secure secondary rights for their channels can be reinforced by the holdback provisions of the primary licence, which allow a broadcasters to veto sales to third parties...

...current market structure and terms of trade in the UK market give main commissioning broadcasters both the ability and the incentives to achieve an anti-competitive outcome”.

SCBG members’ anecdotal accounts further support this conclusion, that it is not in the terrestrial broadcasters interests to release the holdback in practice:

"We have run into a problem with the implementation of the Communications Act... [the public service broadcasters] feel that since they are being forced to pay a slotprice, they won't do any favours regarding holdback".

"The BBC has never allowed a second window without a minimum holdback for 12 months. The latest production we tried to do with them they originally said six month holdback but then rescinded".

"We have a co-production budget which allows us to commit up to 20% of the programme budget but few production companies appear in a position to take it as they to wait for terrestrial channels to make holdback decisions once the programme has aired".

"We currently have over £150k of programming which we cannot get through the BBC holdback process"

Although shorter holdback provisions were recently agreed with the BBC and Channel 4, these remain problematic due to the terms and conditions for release.

Firstly, in the case of "landmark" programmes, secondary rights can be held back indefinitely as long as the programme is categorised as landmark within six months of transmission. But we have serious concerns about this "landmark" status, whose definition lies entirely with the broadcaster and whose process of selection and recording lacks any transparency. Firstly, in the absence of a clear definition, and with no obligation to select programmes for landmark status at the time of commission, terrestrial broadcasters are able to cherry pick programmes based on ratings alone. Furthermore, although Channel 4 has set a threshold of 5% for potential landmark programming, the BBC has not set a threshold at all. This uncertainty precludes pre-sales of certain genres and is limiting investment by independent secondary channels. It is clear that definitions, thresholds and selected programmes should all be transparently agreed and in the public domain.

Secondly, the provision in current holdback policies to exclude established strands on from secondary exploitation is also being over-used. In particular, the BBC is defining increasing volumes of its product under branded strands to restrict potential secondary sales.

Thirdly, it seems to be accepted that five years is an acceptable holdback period for children's programming. However, this is a much worse position than the situation prior to introduction of recent terms of trade when typically market forces led to holdbacks of between six months and a year. Similarly, a five year holdback period for children's programming also precludes pre-sales of this genre of programming.

Finally, the BBC's criteria for an approved secondary channel are onerous, for example channels have to sign a hold back release agreement that requires prior written approval for each transmission, all marketing and publicity, incorporation in a generic channel promo and sponsorship.

We believe strongly that the holdback is an anachronism. We would urge Ofcom to resist any Terms of Trade agreements that do not significantly reduce or eliminate the holdback. In the case of a short holdback period, it must be agreed at the point of commission rather than transmission, to enable third party investment.

5. Rationale and framework for intervention by Ofcom (Qs 3,6,8,9&10)

SCBG agree that concerns over the terrestrial broadcasters' negotiating strength are a key reason for intervention, and we seek reassurance that the terrestrials' dominant position is regulated not only in relation to negotiations with independent producers but also with a view to maintaining plurality in the rest of the broadcasting market.

The ITC's Review of the Programme Market, commissioned by the Department for Culture, Media and Sport in 2002, argued that a competitive secondary market for UK content would play a vital role as counterweight to the dominance of the terrestrial buyers, and as a means to help capitalise the independent production sector.

However, just as the ITC report predicted might happen, the vitality and competitiveness of this crucial secondary market is being threatened by the terrestrials' ability to leverage rights from independent producers for their own digital services. Nearly all of the growth in multi-channel viewing over the last two years has come from the terrestrials' digital channels¹. Much of this growth has been the result of terrestrials leveraging their position with producers to acquire high performing UK content for their digital channels. As one SCBG member describes:

"A difficulty is the other nonstandard channels being launched by these terrestrials, such as More 4... I can see the landslide coming".

We accept that independent producers may sometimes prefer to sell secondary rights to a primary commissioner's wholly owned channel, but this must be on the basis of free and open competition. Free market access to programme rights after a reasonable primary window is paramount if independent channels are to go on investing in UK content, building relationships with independent producers and increasing their own production slates.

Therefore, although we agree with Ofcom that commercial negotiation is a preferable means of resolving the current Terms of Trade issues, we are nevertheless concerned that these negotiations should have regard to the availability of UK content across the entire ecology, and the ability of the "independent" secondary market to buy and commission content from UK

¹ BARB data shows that those digital channels available on Freeview, which are predominantly terrestrial spin-off channels, increased their share of viewing in all multi-channel homes by 26.5% between 2004 and 2005.

independent producers as a competitive spur to the terrestrials' wholly owned digital channels.

We believe Ofcom should intervene to ensure that:

- (i) Terrestrial broadcasters' purchase of primary rights for their terrestrial channel(s) does not confer automatic rights to broadcast on their digital channels. The purchase of secondary rights for wholly-owned channels should be separate, separately paid for, and open to competition under the control of the independent producer. The terrestrial channels' proposal to bundle their wholly owned channels into the primary rights package will preclude competition altogether.
- (ii) Terrestrial broadcasters' purchase of secondary rights must be monitored and regulated to ensure that they are acting fairly. It is a widely held perception amongst SCBG members that independent producers are being coerced into selling the secondary rights to terrestrials' own digital outlets – even if they would get a better price in the secondary market – because of the importance of maintaining good relationships with the primary broadcasters:

“The BBC eventually raised their offer to [the production company] to get us out of the deal although I don't think they put in the same amount we were paying. My feeling is that they bullied [the production company]”.

We recognise that a balance must be struck that enables primary commissioners to get value from their investment, but in most cases this value is returned on first transmission. There is no evidence that terrestrial broadcasters are valuing additional rights separately and increasing their payments to producers accordingly, nor affording producers an opportunity to seek alternative offers. Without these practices, there is no fair and competitive market. It is therefore imperative if Ofcom is to fulfil its duty to promote a dynamic, competitive secondary market that it applies this objective to any approval of new Codes of Practice or Terms of Trade.

- (iii) No broadcaster should be able to use holdbacks to warehouse secondary rights, preventing market access to competitors and programme access to consumers. For example, with the exception of regional productions, there is no potential to co-produce or acquire networked ITV product within five years of production. Under previous arrangements, secondary rights would be released after a year. This applies even in the case of recurrent series where a secondary channel has put up risk investment for the first series. Similarly, Five are currently not accepting co-production investment from any secondary channel. We understand that the BBC also has a policy that no commission can have a UK co-producer attached. These policies give immediate advantage to digital channels owned or controlled by terrestrial broadcasters which have early information and are able to tie up rights before independent channels can compete. They are anti-competitive behaviours that demand intervention.

Our preference, which is echoed by many new media businesses, is for the concept of holdback to be abolished entirely. We believe the application of holdbacks acts counter to the public interest, because it denies consumer access to productions, prevents creators of intellectual property exploiting it fully, and creates a window that invites piracy.

Available evidence illustrates that television production faces a similar problem from piracy that has been encountered by the music and film industries (See Annex 2: Television Piracy, An Envisional Briefing Note). As a result of piracy, many consumers will have already viewed programmes from illegal suppliers within hours of initial transmission so the exploitation value of these rights is dramatically reduced for producers. Furthermore, consumers will be denied the benefits of legitimate innovative exploitation because investment will be curtailed.

The film and music production sectors have responded to the illegal theft of their intellectual property by seeking, where practicable, to remove holdbacks from their distribution agreements. In contrast, the collective purchasing power of the UK terrestrial broadcasters is undermining the ability of the independent producer to manage how their content is exploited. Abolition of holdbacks will therefore be a powerful tool in the prevention of piracy as well as supportive of the independent production economy.

6. Collective dominance

A principal concern that lies behind many of the issues we have described is the ability and incentive that the terrestrial broadcasters have to leverage into secondary or new markets their existing collective buyer power over free-to-air television rights. We question whether it is appropriate for Ofcom to sanction such an extension of buyer power without representation of either multi-channel or new media interests, whose business models are most likely to be impacted by any reform of the Terms of Trade.

The ability to leverage rights from independent producers is just one outcome of terrestrials' collective dominance in the market, which also includes their use of public service incumbency and privileges to cross-promote, cross-brand and cross-sell. This anti-competitive behaviour will inhibit diversity, plurality and growth in the independent channel market and should be considered by Ofcom outside this Review as part of a wider set of anti-competitive practices by incumbent terrestrial broadcasters.