

CBS Submission in Response to the Public Consultation on the European Commission's Preliminary Report on the E-Commerce Sector Inquiry (18 Nov 2016)

Introduction

- CBS Studios International (“**CBSSI**”) appreciates the opportunity to respond to the European Commission's Public Consultation on its Preliminary Report on the E-Commerce Sector Inquiry which was published on 15 September 2016. CBSSI also welcomes the “case by case” approach suggested by the European Commission in reviewing its findings.
- The Commission will be aware that, following a request, CBSSI has previously filed a response to the questionnaire for rightholders which it received as part of the sector inquiry. As a contribution to the dialogue launched by the Public Consultation, CBSSI would now like to share some general points as well as a few specific observations in response to the main findings of the Preliminary Report.
- The CBSSI reply is focused on the findings in Sections C and D.2 which relate to "E-Commerce in Digital Content". In so far as audiovisual content is concerned, we understand that films have been excluded from the questionnaires sent to rightholders as a result of the Commission's ongoing investigation into the Pay-TV sector (Case AT.40023). While CBSSI is predominantly engaged in the distribution of TV content, from our review of the Preliminary Report though given the multiple references to films therein, it seems that the exclusion of films did not extend to the questions sent to digital content providers ("**DCPs**"). This approach appears somewhat incongruous and we hope that this has not obscured certain matters/skewed the data obtained – for example with regard to issues around the funding of films versus TV programming and general conclusions drawn regarding “windowing” of programming.
- Some important points related to methodology: We understand, of course, that there are inherent limitations in the conducting of this kind of an inquiry which are linked to the time and resources available to the Commission. Notwithstanding this:
 - We note that the audiovisual content sector, particular as regards licensing in the online space is evolving at a rapid pace. Indeed, the industry is reinventing itself every 12 to 18 months. Thus, responses to the questionnaire are but a snapshot in time and are now approaching two years out of date. In this regard, the findings of the Preliminary Report are therefore in many respects simply historical, and not in sync or reflective of current practices in the sector; a sector which has been completely transformed in the interim with the rising trend to pan-European and even global OTT services.
 - As noted in paragraph 617, DCPs were asked to provide agreements with their 30 most important suppliers, with rightholders requested to provide their eight most valuable agreements. It should be expected that an individual rightholder's eight most valuable agreements will usually include grants of exclusivity. Exclusivity is extremely valuable. It is the factor that drives investment in production of audio-visual works, the acquisition of that content and the infrastructure required to deliver it customers, who increasingly expect to be able to enjoy it in multiple formats and on multiple media. Many of the preliminary conclusions of the review are therefore based upon a small and wholly unrepresentative sample of agreements in place for this kind of content; the questions, if framed differently, would likely have produced very different data. Rights holders were not asked to supply a broad-ranging sample of the kinds of agreements in place showing the range of their business; merely they were asked for the eight most valuable. The data obtained by the sector enquiry is therefore to some extent skewed by this and needs to be read accordingly.

- The Preliminary Report refers frequently to the complexity of licensing in the sector, almost to the point of criticising undertakings for the way in which they conduct business. Indeed, it is a complex and well developed sector. It is one that is crucial to the economy but also serves a vital public interest. As noted above the eight most valuable agreements of a rightholder should be expected to be the most detailed in all respects and therefore the most complex.
- Again, by focussing on the most valuable deals and in light of the small sample of rightholders, the Commission appears to have missed out on the bigger picture. Particularly, in smaller Member States and in respect of the smaller, local platforms which operate there; as agreements with these platforms are highly unlikely to fall into the category of “eight most valuable” and accordingly it may be that the Commission has overlooked a whole sector of the market in the enquiry. Such local platforms provide crucial funding to the production of local content – content that would not otherwise get made. These platforms attract subscribers/viewers to their local services and thereby earn revenues by licensing premium international content on an exclusive basis in their own territories. Their offerings are tailored to local tastes, cultures and needs. If these platforms cannot continue to rely on exclusive deals for the internationally acquired content, one of the key drivers of their business will be very adversely affected, they will lose subscribers/viewers, no longer be able to finance local content and local digital players bringing more competition to the market will be lost. International platforms are not going to make up the shortfall in locally produced content as this content is unlikely to travel so well and therefore will cease to be made.
- The Preliminary Report does not appear to have given consideration to “downstream” rights – i.e. the underlying rights in audio-visual works and the origination of the works, but rather has assumed that this programming if available in one Member State, it should be made available in all. The reality of course is quite different. The rightholders may simply not own and control all rights for the whole EU, in which case structuring territorial agreements for the licensing of this programming is necessary to reflect the ownership of the underlying copyright.
- The Preliminary Report continually refers to territoriality in pejorative terms; the assumption appears to be that any territorial arrangement for the licensing of content must be a bad thing. However this structure is the bedrock of the content sector and serves as the principal source of financing for the production of content in the EU; resulting in a flourishing market both for content providers and consumers and providing choice to the consumer. Further, there is at least an undertone in the Preliminary Report that a pan-EU licensing model is some sort of a panacea. For industry, the ability to engage in both in an environment of contractual freedom and strong copyright protection is critical. For many large operators, pan-EU licensing and distribution is attractive but they too will seek exclusivity given the significant investments they are making in their technology, infrastructure and business. At the same time, smaller operators may prefer to focus only one or two territories for a number of reasons not the least of which is a commitment to creating local content tailored to local demand. In an environment where local players either cease to exist or are thwarted in their ability to compete, the consumer faces a negative outcome; less choice, fewer places to legitimately view this content, less local programming being made and less competition in the market.
- In the Annex, we have listed a number of studies which are supportive of the positions taken by CBSSI in this submission. The Commission will have received these submissions from other stakeholders previously and it is likely that it will have its attention drawn to them again in connection with this Public Consultation. We note also that certain of these studies were commissioned by the Commission itself.
- Finally, we have not responded to points relating to portability given the expected adoption of a Regulation next year which will mandate it.

Background

- CBS Corporation (“CBS”) is listed on the New York Stock Exchange and is a mass media company that creates and distributes industry-leading content across a variety of platforms to audiences around the world. CBS owns the most-watched television network in the U.S. and one of the world’s largest libraries of entertainment content. CBSSI is the division within CBS that handles the international distribution of television programs produced by CBS Studios Inc. and Showtime Networks Inc., which are CBS’s principal production companies. The responses in this submission relate to the distribution activities of CBSSI within the European Union and, in particular, the licensing activities of CBS’s European head office CBS International (Netherlands) BV.
- In the EU, CBSSI licenses CBS content to platforms in all 28 Member States and has distributed content in the Europe for decades. CBS content available in the EU includes: international TV programming such as the "CSI" and "NCIS" franchises, "Hawaii Five 0" and "Elementary" ; premium programming from the Showtime cable network including shows such as "The Affair", "Billions", "Dexter" and "Californication"; programming from the CW broadcast network such as "Jane The Virgin" and "Crazy Ex Girlfriend". In addition to this programming, CBSSI licenses content from CBS’s extensive library into the EU. CBSSI licences CBS programming to public service, commercial and pay television broadcasters as well as national, multi-territorial and pan-EU on-demand and digital platforms.
- CBS has had its European headquarters in the Netherlands for almost fifty years. At present, CBS is substantially developing and expanding its CBSSI Amsterdam HQ, including focusing on local co-production within the EU as well as other strategic initiatives focused on the EU's internal market. In addition to our HQ in Amsterdam, CBSSI has offices in London, Munich, Paris and Rome. Over the years, CBS has partnered in a number of successful co-productions with partners in the EU including recently “Penny Dreadful”. This activity is expected to increase but is of course incumbent upon the right market conditions and regulatory environment.
- It is important for the European Commission to have some background with respect to the costs of production of international TV programming. The cost of producing programming is obviously an important consideration in the context of regulatory and legislative policy affecting the sector and we note that industry trade publications estimate that the average direct cost to make an hour of drama is roughly 3m -5mUS\$ with 10mUS\$ for a pilot on mainstream channels respectively whereas the costs for premium pay TV programming being even higher. These figures also ignore the huge investment in infrastructure of all content producers to enable production to occur. Given these financing requirements to produce high quality content there needs to be a successful economic return to ensure the continued supply of high quality content.

General Observations

- The Digital Single Market strategy announced by the European Commission on 6 May 2015 set out a bold plan for creating a competitive European online marketplace and CBS is supportive of many elements of this initiative.
- We believe that many elements of this Strategy are vitally important and will benefit all stakeholders. However, CBS is concerned that the DSM Strategy, despite the promise to **[respect] the value of rights in the audio-visual sector**, still does not fully comprehend nor cater for the functioning of the audio-visual sector. This is about more than territorial exclusivity – it is about *meaningful* territorial exclusivity for both DCPs and rightholders.

- The DSM Strategy - both as regards its legislative and regulatory components - falls short of keeping that promise. The Commission's approach, both in terms of competition policy and copyright reform, risks severely harming the functioning of the audio-visual sector, particularly EU SMEs, by undermining the structures that ensure the effective financing, production and distribution of content. At risk is not only economic growth and job creation but also cultural diversity, a principle protected by the Treaty for the Functioning of the European Union. Moreover in CBS's view the erosion of the ability to effectively license audio-visual content on a territorial basis will ultimately result in a less competitive marketplace and an infinitely inferior consumer experience.¹
- It is our view that the Commission's intervention in this sector could actually create new barriers to entry rather than diminishing them by provoking a concentration of market power in the hands of major Internet companies while reducing cross-border access to European content and harming consumers.²
- One possible outcome, of course, is that attractive content may simply become less available or if made available it will come directly from the producers of that content via OTT services; such a development potentially reducing, not increasing competition in the market.

The Functioning of the Audio-visual Sector – the Role of Copyright and Contractual Freedom

- While the Preliminary Report is clearly the result of a comprehensive review of a mountain of responses received from an important yet still not fully representative cross-section of industry, in our view, it falls well short of appreciating how the audio-visual sector functions while underestimating the role of copyright and contractual freedom in the sector. Copyright and contractual freedom are the cornerstones of the financing, production and distribution of audio-visual content.
- We note that the Report indicates that insufficient information was received in respect of financing production (of course as noted above film was excluded from the questions sent to rightholders). In this regard, please see above estimates from trade publications.
- Another troubling aspect of the Report is the qualification of key elements of licenses as “contractual restrictions”. In our view, these clauses, which usually relate to exclusivity, are inextricably linked to the grant of exclusive rights protected by EU and international copyright law as well the Charter of Fundamental Rights of the EU (Article 17(2)). Thus, rather than being “restrictions”, they are actually inseparable from the rights granted pursuant to contracts governing the online distribution of audio-visual content between DCPs and rightholders. As a result, the contractual terms are consistent with the legitimate exercise of exclusive rights under EU law.

¹ See e.g., page 59 of the The impact of cross-border access to audiovisual content on EU consumers, Oxera and O&O, May 2016: "Customers in high-income countries would be paying less for less, whereas consumers in territories where prices rise would be paying more for less, exacerbating the welfare loss experienced by these consumers. The overall impact on consumer welfare is therefore expected to be negative, with consumers in smaller countries experiencing significant declines in welfare."

² See e.g., page 61, *ibid*: "Consumer switching to the pan-EU platform would cause a large reduction in local platform revenues and a correspondingly large reduction in local output, up to 35% and 21% for film and TV, respectively.[FN omitted] Following these changes to platform revenue there would also be a reduction in revenues for producers of internationally focused content; this is the result of an inability to price differentiate between territories as they can at present, as well as the reduction in their bargaining power vis-à-vis the pan EU operator. We estimate that international content could fall by up to 15% and 17% for film and TV, respectively. However, as we have noted before, based on detailed data made available to us on green-lighting procedures and the underlying revenue expectations, the proportion of local and international content put at risk could in reality be significantly higher and in certain circumstances, it could be more than 20 percentage points higher.[FN omitted]"

The summary of effects and concluding remarks start on page 74 – re consumers it says:

"Therefore, in the medium to long run, our analysis suggests that there would be significant consumer welfare losses of up to €4.5bn per annum, as well as a reduction in content production of up to 35% for some types of content (in some scenarios an even higher proportion of content being put at risk)."

- In the audio-visual sector, the contractual terms described in the Preliminary Report are intrinsic not only to the distribution of content online, but also to the financing and production of audio-visual content. This point holds for both film and TV content. The production value and costs of some TV programming surpasses that of feature film particularly for independents. Thus, license agreements cannot be viewed in isolation. The contractual freedom must be seen not only in the context of licensing arrangements between rightholder and DCPs, but also at every stage of the value chain.
- The E-Commerce Sector Inquiry is concerned with all types of content (though we note that video games appear to be excluded) and is necessarily focused on contracts and licenses. It is vital however that the Commission carefully parse not only the differences between the various content sectors but also the reasons for these differences. In many instances, comparisons to music or news vis a vis audio-visual content are, simply put, inapt; music, lacking the visual components and news being a much more quickly consumed type of content.
- Rightholders benefit from the exclusive rights of making available and reproduction in all of the Member States under current law. However, the Commission's Proposed Broadcaster Regulation would expropriate of these rights through the imposition of the country of origin principle.
- At the same time, contractual freedom, which the Proposed Regulation reaffirms, is at risk through the application of competition law. While rightholders are repeatedly told that territorial licensing of content is not challenged, the Commission appears to target the exact tools necessary to ensuring meaningful exclusivity.
- CBS and other rightholders also depend on copyright to combat the unauthorised making available of their content by so-called structurally-infringing websites. These pirate sites, which tend to operate anonymously and are therefore very difficult to locate, do not invest in content yet make millions in advertising revenues while basically giving away content for free.

Barriers to Entry

- The main concern expressed in the Preliminary Report is the possibility that current licensing practices may result in difficulties *"for new entrants to secure licenses to provide digital content online"*.
- In the digital environment, the costs of entry are negligible compared to the costs associated with the building and maintenance of the infrastructure necessary to the physical distribution of tangible content. Technology has levelled the playing field. Consumers have never before had access to such a wide variety of content, services and functionalities.
- The sheer number of online platforms in the audio-visual sector in the EU belies the notion that new entrants are currently being deterred. There is active competition between Amazon, Netflix, Wuaki.tv, Now TV, CanalPlay and numerous other local players. According to multiple sources, the SVOD sector for example continues to experience steady growth and projected growth is impressive. OTT subscription video services in some major territories (Denmark, Finland, France, Germany, the Netherlands, Sweden and the U.K.) is expected to reach nearly 25 million by the end of the year, and then rising to more than 38 million in 2020, a CAGR of 11.7%. Traditional operators, by means of bundling rights, are also able to join the melee. All this is to the consumer's benefit.

- CBS's concern is that the Commission's policy will actually erect new barriers to entry by obliging platforms to acquire rights on a multi-territorial or even pan-EU basis. Major internet companies may be able to absorb the costs related with such licenses but smaller platforms, which are often the principal funding arms for local content in their Member States but at the same time rely on access to exclusive premium content to attract subscribers or viewers may find themselves shut out. Ultimately, smaller platforms in smaller Member States will not be viable.
- While the Commission may take the view that such is the nature of competitive markets, there are other considerations including the need for local content and the protection of cultural diversity. CBS is committed to supporting both the production of local content and the principle of cultural diversity.
- CBS has embraced a wide range of new business models as the market has evolved and continues to: CBS licenses to all tiers of the television market, whether free, commercial or pay linear services, pan-regional SVOD platforms such as Netflix, local SVOD platforms like Canal Play, Now TV, Showmax, C-More, Viaplay and D-Play, or TVOD and EST platforms such as Apple, SF Anytime and Amazon. The rights granted encompass linear rights, catch-up, internet simulcast and all forms of on-demand and EST or download to own rights. Much programming is licensed across multiple platforms and for multiple viewing types. There has never been so much choice for the consumer in how they consume content and how much (or indeed whether, in a free or ad-funded environment) they pay for this access. All of this is as a direct result of the healthy evolution of the market, based on a territorial licensing model and in spite of the enormous and increasing problem of unfair competition from pirate websites (as briefly described above) which should continue to be the key focus of the Commission in its DSM Strategy. Copyright provides the crucial means of fighting this problem. The illegal availability of content presents the most significant threat to EU consumers' access to and consumption of content; it also undermines the ability of smaller players to enter the market. A further impediment for start-ups and other innovators in the digital arena in the EU stems from powerful international internet companies already active in the market. The Commission's Proposal on Copyright in the DSM contains several measures aimed at levelling the playing field. These risk being undermined by the Proposed Broadcaster Regulation and potentially competition policy.

Commercial realities and specific elements

- **Release Windows** – while these are typically more of a factor in respect of feature films, which were excluded from the questionnaire for rightholders (although as noted, data is included in the Preliminary report regarding films conversely), windows are also important for TV content. It is a standard practice to protect the experience of a "premiere" – even as we move to increased day and date release for TV programmes aired in the US. Release windows, even short ones, protect important investments made by rightholders and also the platforms which need exclusivity to recoup costs not only flowing from acquisition but also marketing and infrastructure. Exclusivity increases choice. The alternative is less content and fewer platforms. In any event, in many cases as the content becomes "less new", the content moves through multiple windows, which has the effect of making the content very widely available rather than locked-up in a single environment, where no doubt the consumer is required to pay subscription fees. In lots of cases there will be "shared" windows, again increasing availability of content to the consumer.

- **Geographic Rights** – if a DCP is not operating in a given territory, then naturally it will not seek to obtain rights for other territories. Each DCP (or indeed traditional provider) is licensed the rights for what they ask for and can support. For rightholders, the evaluation turns on whether the DCP can support a given territory, are they local? Can/do they guarantee quality reception and ensure content protection? Are they bespoke and producing local language versions? The key is to ensure that DCPs provide the highest quality customer experience. In some cases also, rightholders will simply not have the rights for all territories – e.g., in the case of co-productions or for older programming where perhaps internet rights were not cleared.
- **Technology and Usage Rights** – The Preliminary Findings seem to ignore an important challenge that affects all rightholders and DCPs, i.e. the fight against unfair competition from pirate websites. Rightholders need to be able to ensure appropriate content protection to prevent illicit access (e.g., in the pay-TV space only for authenticated subscribers) and to deter the unauthorised redistribution of their valuable works. Rightholders also want to ensure that their content is delivered with the highest quality reception across all devices. Agreements further up the value chain with producers and other rightholders may also stipulate content protection requirements, retain certain territories and/or be segmented by language considerations. These all need to be reflected in the onward licensing of programming.
- **Explicit Terms and Conditions** – This really just depends on the form of exploitation. While it is very normal to grant a particular number of runs to a linear platform, of course there are no such considerations in the case of SVOD where the content can be made available on an unlimited basis during the licence period. As with the many different offerings and functionalities, this is about meeting the consumers' insatiable appetite for variety.
- **Bundling of Rights** – the bundling together of linear, internet simulcast, catch-up and perhaps other rights is very much a feature of the way in which the sector has evolved. Over the last few years, many existing platforms have expanded their offerings to include a significant online component (e.g. TV everywhere type services) and some services have literally gone online. By platforms continuing to operate traditional services (e.g., satellite) but also offer online services, this increases value and choice for the consumer. The bundling of rights in this way accrues to the benefit of consumers who, as a result of this expansion, can view content on the move and via various devices rather than just the home TV set. This avoids the need for a consumer to hold multiple different subscriptions and avoids the stark choice for the consumer of needing to jump ship (but if they do there is plenty of choice out there). As stated, of course, rightholders have to be specific about the type of rights they grant – what does the platform want to do? What rights does the rightholder have? What rights were retained up the value chain? What about Guild agreements (with performers, writers and directors)? We vehemently disagree with the notion that bundling of rights is anti-competitive. It is pro-consumer and pro-choice.
- **Consumer Choice** - The above elements, the various modes of delivery and technology, all are about providing choice to consumer. From DTO to VOD (whether it is subscription or transactional), the consumer can choose whether to buy, to rent or subscribe. Other functionalities like catch-up and network PVR provide even more choice. This is also why rights splitting is so important. The fact that there are a wide variety of offers and functionalities also contributes to increasing competition – again to the benefit of the consumer. There are many channels, many services and many opportunities. There are justified distinctions to be made between standalone services and broader services that offer a variety of services. Consumers should be able to switch services when they want but they should not have to switch between providers just to get new functionalities.
- **Cable Platforms** – these operators tend to retransmit and as such typically the license the carriage of entire channels from broadcasters whereas content for services like VOD is licensed directly from rightholders.

- **Online Rights** - The value of online rights has exploded in the last couple of years and by the same token, multi-territorial services are on the rise. However, the number of DCPs that are equipped to support multiple territories is severely limited. DSPs tend to be highly specialised and localised. They are not usually seeking multi-territorial rights as they do not operate on a generic pan-EU basis. The Report assumes pan-EU business and availability is the optimum outcome – this is not always the case and very few DCPs can support it. Pan-EU licenses tend to be exclusive and expensive. The cost of content production continues to rise. Consumers in each country have different needs which is why local players flourish – platforms prefer exclusivity. Even for international content, some types of shows work better than others in different countries.
- **Established Platforms, Longstanding Relationships and New Entrants** – There are positive elements that flow from longstanding relationships between rightholders and DCPs which are not reflected in the Report; such as investment in programming and growth and expansion of platforms. However the existence of longstanding relationships does not mean that there is no room for newcomers. As noted above, the number of new entrants in the online environment over last couple years is impressive. Rightholders have a right to expect that licensing new entrants makes economic sense. They need to be sure that such platforms are positioned to provide the experience that consumers expect as well as to protect the content against unauthorised use and piracy. It is worth noting that in practice that there are few full output deals.
- **Passive v. Active Sales in the Online Environment** - The distinction between active and passive sales in the online environment is indiscernible. Insofar as the e-commerce in the audio-visual media services sector is concerned, CBS takes the view that a large volume of passive sales is not pro-competitive or beneficial to consumers for the following reasons which are borne out by the studies referenced in the Annex:
 - Potential unilateral restrictions of supply and/or higher prices/lower quality in certain territories
 - Negative impact on cultural diversity
 - Harm to the window system and as a result the efficient distribution of content
 - Deter investment in distribution by broadcasters/platforms
 - Undermine the production financing for TV programming and other audio-visual works.
- **The Role of VPN/IP Routing Services** - The Preliminary Report is not able “to determine the extent to which such traffic relates to accessing commercial digital content services.” Moreover, it appears that only a handful of companies based outside the EU provided information. The issue of the VPN usage in the EU has been heavily politicised. We believe it is important to take a step back consider the actual reasons behind the usage of such tools and these services are problematic for the industry as a whole.

Preliminary Key Findings: Digital Content (page 285)

- CBS completely agrees that the main driver of competition is attractive content. CBS is completely dedicated to creation and licensing of compelling content to a broad range of platforms, for an increasing variety of functionalities, across multiple territories in the EEA. Everyone in the value chain benefits from competition.
- In order to finance and produce the content required by DCPs and their consumers, the ability to grant meaningful territorial exclusivity is absolutely critical as noted above.
- It is not correct to say that online distribution and demand for online rights have not altered the way in which rightholders license their content. The licensing practices of rightholders like CBS have undergone massive changes. The rise of pan-EU and OTT players has totally altered the complexion of the marketplace. Services and functionalities that barely existed two or three years ago are now commonplace features in licensing agreements.

- Rights splitting allows rightholders to service a wide variety of platform and functionalities. This allows content to be financed, distributed, windowed and tailored to customer choice.
- The Report refers to "contractual restrictions" but we view such terms as an inherent part of the positive grant of rights. They are completely justified by the structure of the audio-visual sector, the risk involved, the levels of investment required, the modes of financing but also in order to respond to demand not only from platforms but especially and ultimately from consumers.

Annex – List of Studies and Materials

1. [A study on the potential impact of the Digital Single Market on the sports audiovisual ecosystem in Europe](#)
Sports Right Owners Organisation (SROC), June 2016
2. [The impact of cross-border access to audiovisual content on EU consumers](#)
Oxera and O&O, May 2016
3. [Key Findings of the European Commission’s Eurobarometer 2015 on Cross-border Access to Online Content](#)
Creativity Works!, December 2015
4. [Study on territoriality and its impact on the financing of audiovisual works](#)
European Audiovisual Observatory, IRIS Plus, September 2015
5. [Economic analysis of the territoriality of the making available right in the EU](#)
Charles Rivers Associates, March 2014
6. [Why territories matter. Vertical restraints and portability in AudioVisual Media Services](#)
Olivier Bomsel & Camille Rosay, October 2013
7. [The value of territorial licensing to the EU](#)
Enders Analysis, October 2013
8. [The economic potential of cross-border pay-to-view and listen audiovisual media services](#)
PLUM study, March 2012
9. [Multi-territory licensing of audiovisual works in the European Union](#)
KEA study, October 2010