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## Public service broadcasting, streaming services and the future for “terms of trade”

Response by CREATE ([www.create.ac.uk](http://www.create.ac.uk)) to the Parliamentary Inquiry by the Digital, Culture, Media and Sport Committee into ‘The future of public service broadcasting’<sup>\*</sup>

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### **CREATE**

*CREATE is the UK Copyright and Creative Economy Centre, based at the University of Glasgow. In 2012 CREATE was established as an RCUK Centre jointly by the Arts and Humanities Research Council (AHRC), Engineering and Physical Sciences Research Council (EPSRC) and the Economic and Social Research Council (ESRC). From 2018-2023, CREATE is leading work on Intellectual Property, Business Models, Access to Finance and Content Regulation as part of the AHRC Creative Industries Policy & Evidence Centre (PEC). From 2020-2023, CREATE also leads the creative industries stream of a major EU H2020 research consortium: reCreating Europe – Copyright law, cultural diversity and the Digital Single Market.*

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## Summary

This submission addresses whether current obligations placed on public service broadcasters (PSBs) with respect to the assignability and licensing of intellectual property rights from independent producers (so-called ‘terms of trade’) should be introduced for streaming services.

We offer evidence in response to Question 1 of the call by

- reviewing historical precedent for limiting the assignability of intellectual property rights;
- assessing, in particular, the empirical effects of the introduction of ‘terms of trade’ following the Communications Act 2003;
- evaluating current exploitation practices of streaming services.

We find that

- intervening on the assignability and licensing of intellectual property rights is a powerful tool, shaping investment decisions and industry structure, with strong cultural effects (for example on diversity);
- the introduction of ‘terms of trade’ following the Communications Act 2003 led to a period of investment and growth of the UK screen production sector, in particular accelerating international exploitation;
- the introduction of ‘terms of trade’ following the Communications Act 2003 led to a number of unintended consequences, in particular the consolidation of the independent production sector and the acquisition of independent production houses by multinational firms.

We recommend that

- corrective regulatory interventions with respect to the assignability and licensing of intellectual property rights from independent producers are required following the entry of streaming services as commissioners into the sector;
- a thorough review of the current production system be undertaken before ‘terms of trade’ type interventions are applied to streaming services.

From existing empirical research, we anticipate that ‘terms of trade’ applied only to the UK within a global streaming system could lead either to the reduction of inward investment in the screen production sector, or to a wave of vertical integration.

## Introduction

This submission focuses on the regulation of public service broadcasters during a period of sector-altering business model innovation by Video on Demand (VoD) platforms, such as Amazon and Netflix. More specifically, the response concentrates on the regulation of intellectual property transactions between commissioning entities (PSBs and VoDs) and the operators that create the content, TV production companies. CREATE is currently undertaking relevant research as part of the AHRC Creative Industries Policy & Evidence Centre ([PEC](#)).<sup>1</sup>

There is considerable overlap and interplay between all five questions included in the call for evidence. This submission refers specifically to the critical matter of effectively and equitably regulating PSBs and VoDs identified in Question 1.

*Regulation: Are the current regulations and obligations placed on PSBs, in return for benefits such as prominence and public funding, proportionate? What (if any regulation) should be introduced for SVoDs and other streaming services?*

This response considers the extent to which a ‘levelling up’/‘levelling down’ of the regulatory framework is desirable inasmuch as it applies to incumbent PSBs and new-entrant VoDs (including subscription video models (SVoD), ad-funded video models (AVoD) and various other iterations of the VoD model). The regulatory oversight of VoDs in Ofcom’s remit is markedly less stringent in respect of VoDs than it is for PSBs (Ofcom 2018: 18). While on-demand content must comply to certain standards regarding harmful content, VoDs are not compelled to provide specific types of content for specific audience demographics, such as news and current affairs or content depicting regionally specific themes. Similarly, and more relevant to this submission, there is far less oversight of how VoDs operate within the TV production system. Of primary concern is the relative bargaining power of VoDs in their negotiations with independent TV production companies. This question revisits the criticism made of PSBs prior to the 2004 introduction of ‘terms of trade’ that now govern agreements

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<sup>1</sup> The work stream led by CREATE focuses on [Intellectual Property, Business Models, Access to Finance and Content Regulation](#). Early findings relating to Platform Regulation can be found here: <https://www.create.ac.uk/platform-regulation-resource-page/>

between PSBs and independent producers. In this context, a ‘qualifying independent’ is defined as a production company where a broadcaster owns no more than 25% share.

### **Public Service Broadcasting and the ‘Digital Revolution’**

Historically, PSBs enjoyed a broadcasting and commissioning field largely uncontested by the presence of disruptive new-entrants. From the initial launch of BBC television programming in the mid-1930s, the subsequent addition of ITV in the 1950s, the BBC’s second channel in the mid-1960s, Channel 4 in the 1980s and Channel 5 in the 1990s, change occurred at a gentle pace following protracted periods of debate, lobbying, consultation and legislation (Lee 2018). The deregulation that permitted the entry of satellite and cable operators in the 1980s and 1990s and the subsequent development of digital television in the UK led to an acceleration in the rate of change in modes of TV production and consumption. Crucially, this period also saw the foundation of the independent production sector. However, by comparison to what was to follow, the pace of change was still comparatively sedate. Conversely, the ‘turbulence’ caused by the large-scale digitalisation of culture post-1999 and the advent of the filesharing platform Napster, coupled with widespread availability of high-speed internet had rapid and profound catalytic effects. In an age of multiplatform, on-demand streaming of content, linear viewing on television sets has become increasingly anachronistic. But has not been pushed entirely to the margins of consumption as recent changes to viewing habits evident during the Covid-19 lockdown measures have shown.

As audiences become increasingly fragmented and disaggregated in the digital age and as new-entrants such as the so-called FAANGs (Facebook, Amazon, Apple, Netflix and Google) operate new business models in a new technological landscape, they have become increasingly influential both on the supply-side and demand-side of the market. Consequently, the role of PSBs has come under increasing scrutiny. Not least in respect of the licence fee funding model of the BBC, which has been under attack for decades by its detractors.

The call for evidence states that PSBs enjoy ‘benefits such as prominence and public funding’ and in return are subject to ‘regulation and obligations’. In terms of production, aside from a remit to provide national and regional content made by local producers and to ensure

plurality and diversity of content and voice, PSBs are also required to commission a proportion of content from tightly-defined independent production companies by way of a quota system and to adhere to a code of conduct known as the 'terms of trade'. VoDs, on the other hand, are not bound by these obligations. Moreover, they have rapidly become commissioning powerhouses both in the domestic and global markets (Oliver and Ohlbaum 2019). Whereas in other sectors, music streaming for example, platforms such as Spotify have operated as intermediaries engaged in the algorithmic matching of content to consumer preferences, with limited involvement in the creation of content, VoD platforms have been far more actively engaged in content production. This has created a new set of dynamics for the TV production sector.

Identifying and implementing appropriate regulatory interventions for this rapid expansion of the scale and influence of the VoDs has proved challenging. In the case of Intellectual Property (IP) in general, and copyright in particular, legislative responses to technological and business-model innovation invariably and inevitably lag behind the technology. This is nothing new. The printing press, sound recording, moving pictures, radio, television, filesharing and now 'on-demand' streaming are all examples of innovations that have disrupted the dominance of incumbents and had legislators 'playing catch-up'.

### **The 'Terms of Trade': Past, Present, Future ...**

We wish to underline the importance of the 'terms of trade' dimension for television production of the current regulatory landscape. The 'terms of trade' were established following the *Communications Act 2003*, largely as a means of correcting the imbalance in bargaining power between PSBs and independent television production companies (Doyle and Paterson 2008; Lee 2018).

Historically, the public service broadcasters BBC and ITV, were characterised as a duopoly that wielded excessive bargaining power in negotiations with production companies that had few alternatives in terms of buyers. Operating in such an uncompetitive market and funded by domestic licence fees and advertising revenues, it was contended, the PSBs had little or no interest in actively exploiting or even passively administering much of the content they controlled. To the frustration of production companies, they were precluded from actively exploiting these works.

The intervention of the Communications Act 2003 has ensured that producers of programming, as opposed to the public service broadcasters that commission the content, retain control of secondary IP rights that subsist within productions. In effect, producers are free to seek opportunities for the exploitation of their IPRs, principally selling ‘canned content’ and format rights to international markets. Revenues must be shared with the commissioning broadcaster depending on the type of use but crucially, the production company is empowered to instigate such deals, or appoint a third party to do so.<sup>2</sup>

The ‘terms of trade’ intervention was effective in adjusting the balance of power between PSBs and small producers. This is not always the case with such interventions in the cultural industries. Term extension for sound recordings, for example, achieved after a prolonged and fractious period of lobbying, has had minimal short-term impact other than to benefit those high-profile artists and corporate investors that have already benefited most from the exploitation of the copyright monopoly right (Harkins 2012; IPO 2018). In contrast, the implementation of ‘terms of trade’ which required no amendments to existing copyright law, had a radical, sector-altering impact on television production in the UK.

Independent production companies, often micro operations, endowed with portfolios of potentially valuable IP assets, became adept at developing and exploiting programmes and formats with genuinely global appeal, leading to an explosion of activity and growth in the years since 2004 (Oliver & Ohlbaum 2018). Allowing primary creators and content-creating companies to retain copyright, or to have these revert to these stakeholders after a fixed-term licensing period, is known to have considerable positive effects, not only for rightsholders but also for audiences and follow-on users.<sup>3</sup> Although a retention mechanism rather than a reversion right, the ‘terms of trade’ intervention is analogous in significant ways and serves as a valuable ‘real-world’ test of the effect of controlling the assignability of IP rights.

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<sup>2</sup> Detailed evidence how rights transactions are currently structured for an independent production company is offered in Alae-Carew (2020).

<sup>3</sup> The notion that primary creators or, in this case independent TV production companies, are better served to control rights than corporate assignees dates back to the earliest years of the copyright regime. The first copyright statute, the *Act of Anne* of 1710 established an initial copyright term of 14 years. After expiry, the ‘sole Right of printing or disposing of Copies’ returned to the author for a second term of 14 years. *The Bill for the Encouragement of Better Learning 1737* proposed that authors could not assign copyright in their works to a third party for a term greater than 10-years after which the copyright should revert to the author (Deazley 2004; Bently and Kretschmer 2008). Although the 1737 bill was ultimately unsuccessful in achieving this aim, copyright reversal has returned recently as an attractive policy option (Kretschmer 2012, Barr 2016, Heald 2017, Giblin and Weatherall 2017).

However, a principal unintended consequence of the ‘gold rush’ that followed the implementation of the ‘terms of trade’ was that independent production companies became attractive targets for takeover by larger consolidating operators, often transnational media conglomerates (Doyle & Paterson 2008; Esser 2014; Chalaby 2019; Alae-Carew 2020). This resulted in increasingly concentrated patterns of ownership in the UK production sector. A considerable body of compelling empirical evidence demonstrates the potentially negative effects of the accumulation of vast rights catalogues by a small number of vertically- and horizontally-integrated media companies. This has led to inertia and stagnation as copyright works are ‘warehoused’ in order for rents to be extracted from follow-on users seeking to access and use these works. In this sense, television conglomerates and VoD platforms act as aggregators that are ‘first and foremost intellectual property management companies that protect, exploit, and promote the brands (programs, formats, etc.) they own (when possible) and rent (when necessary)’ (Chalaby 2019: 185).

The ‘terms of trade’ intervention was successful in loosening the grip of PSBs on the sector and securing a measure of plurality and diversity of ownership of IP rights. However, an unintended effect has been the reconsolidation of ownership of rights catalogues into the hands of so-called ‘Super-Indies’ and multinational media companies that have acquired independent producers in order to secure their assets. The evidence on the effects of the introduction of the ‘terms of trade’ in the UK suggests that caution must be applied when consideration is given in the present inquiry to extending such terms of trade to VoD companies.

### **Regulating the Contemporary TV Production Sector**

The television production sector remains an oligopolistic market dominated by a small number of PSBs and, increasingly, VoD platforms. From the perspective of production companies that create TV content, the situation is more correctly represented as an oligopsony, a market dominated by a small number of powerful buyers. But the two principal types of buyer, PSBs and VoDs, operate very differently in terms of the conditions they attach to their dealings with producers. PSBs are bound by the ‘terms of trade’ while VoDs are not. There is a clear disparity in the regulatory oversight. However, it is not appropriate to draw like-for-like comparisons between PSBs and VoDs. While they may be engaged in similar

activities and in some respects operate in direct competition, the mechanisms that underpin them are in many ways fundamentally different.

PSBs are required to satisfy numerous obligations such as the provision of news, serving local interests and ensuring diversity of representation in order to fulfil the ‘public service’ dimensions of their brief. However, PSBs are also required to compete and operate as commercial entities in an increasingly globalised marketplace. BBC Studios and ITV Studios are key examples of this. While within the UK the BBC’s ‘free at the point of use’ platform iPlayer has been remarkably successful both in terms of its popularity and in defining what consumers expect from an on-demand service, the launch of the SVoD platform Britbox, a joint enterprise between BBC and ITV, has proved far more problematic.

SVoDs are not required to fulfil public service obligations, represent local culture, adhere to commissioning quotas or share the control and ownership of IP rights with production companies. By contrast, streaming services such as Amazon and Netflix have invested in lavish production budgets to attract new audiences and have a policy of securing exclusive rights to content on a ‘buy out’ basis. This ensures they retain maximum control, enabling strategies for imposing scarcity on desirable content. While the generous ‘front-end’ fees paid by SVoDs to production companies are well-documented, this leaves little scope for producers to develop a portfolio of residual intellectual property assets in ways that previously were central to the success of the sector post-2004.<sup>4</sup> While large fees hold considerable short-term attractions for producers, as VoDs become increasingly influential in the commissioning environment, there are unclear long-term ramifications of this key inconsistency in how PSBs and VoDs conduct intellectual property transactions. However, given that offering subscribers access to bundles of exclusive content on a multi-territory basis is at the heart of the VoD model, allowing producers to retain control of secondary rights presents significant challenges to a coherent and effective windowing strategy by the platform owners. It is plain, therefore, that simply attempting to transpose existing ‘terms of trade’ onto VoDs is both unwise and unworkable. It may well lead to VoD investment into new production leaving the UK.

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<sup>4</sup> Trade-offs involved in negotiating right deals with SVoDs are documented in Naysun Alae-Carew’s public lecture “Intellectual Property and ‘Terms of Trade’: The Challenges for Entertainment Businesses in the Emerging Platform Economy” (Alae Carew 2020, available at <https://zenodo.org/record/3901129#.XuyR2uco9hE> )



The recent Covid-19 outbreak has also brought a multitude of unforeseeable consequences to the television sector that pertain both to PSB and VoD operators. After a prolonged period of decline, predictions of the death of television, largely attributed to the proliferation of multiplatform, 'on-demand' viewing, appear to be exaggerated. During the pandemic, linear viewing and ratings for PSBs programming have seen a resurgence of viewer numbers. This has not, however, been matched by a similarly upward trajectory for the advertising revenues of those PSBs with a commercial dimension. VoDs have also experienced such demand that bandwidth limits have been imposed. While the overall demand for content has risen markedly, production in many areas, drama and live sport in particular, has been brought to a halt by lockdown measures. Broadcasters and SVoDs therefore have become even more reliant on searching their archives for material to screen to 'locked-down' audiences. Repeats of classic comedies, drama and movies have been used to fill the schedules as the supply of new content has become exhausted. Indeed, 'watchalongs' have become a new form of programme for the lockdown age, where participants from historic sporting occasions comment on the real-time rerun of the event. This new form, though, is entirely dependent on the control of IP rights. In the production standstill, it is plain that catalogues of archive content, as opposed to the provision of new material, have achieved major significance to PSBs and VoDs alike. In turn, this makes questions around ownership and control of IP rights in television content even more pertinent.

## **Conclusions**

This submission argues that in the light of evidence drawn from historical precedents and contemporary sector practices, any proposals for the reform of the UK broadcasting sector should carefully consider the far-reaching implications and practicalities of extending aspects of the 'terms of trade', or some similar mechanism, to include various iterations of the VoD model. On balance, a greater degree of regulatory parity between PSBs and VoDs in respect of their dealings with content-producing companies is desirable. There is a considerable weight of empirical evidence that limiting the assignable dimensions of copyright, or implementing reversion rights can have positive effects in balancing the interests of creators, investors and consumers of cultural works. Considerable caution is required when devising and implementing interventions designed to address power imbalances in the television

production sector. Given the different business models of PSBs and VoDs, it would be unwise simply to apply the 'terms of trade' as they currently apply to PSBs to VoDs. Instead, a comprehensive review and appraisal of the existing system is required.

## References

- Alae-Carew, N. (2020) 'Intellectual Property and 'Terms of Trade': The Challenges for Entertainment Businesses in the Emerging Platform Economy', CREATE working paper 2020/5, available at: <https://zenodo.org/record/3901129#.XuyR2uco9hE>
- Barr, K. (2016) Music copyright in the digital age: creators, commerce and copyright – an empirical study of the UK music copyright industries. PhD thesis, University of Glasgow, available at: <http://theses.gla.ac.uk/7752/>
- Bently, L. and Kretschmer, M. (eds) (2008) Primary Sources on Copyright (1450-1900), digital archive available at: [www.copyrighthistory.org](http://www.copyrighthistory.org)
- Chalaby, J. K. (2019) 'Outsourcing in the U.K. Television Industry: A Global Value Chain Analysis', *Communication Theory*, 29, 169-190
- Darlow, M. (2004) *Independents Struggle*, London: Quartet Books
- Deazley, R. (2004) *On the Origin of the Right to Copy*, Oxford: Hart
- Doyle, G. (2016) 'Digitization and Changing Windowing Strategies in the Television Industry: Negotiating New Windows on the World', *Television and New Media*, 17(7), 629-645
- Doyle, G. and Barr, K. (2019) 'After the Gold Rush: Industrial Re-configuration in the UK Television Production Sector and Content', *Media, Culture & Society*, 41(7), 939-957
- Doyle, G. and Paterson, R. (2008) 'Public policy and independent television production in the UK', *Journal of Media Business Studies*, 5(3), 15-31
- Esser, A. (2014) 'European Television Programming' in R. Robertson (ed), *European Globalisation in Global Context*. London: Palgrave Macmillan
- Giblin, R. and Weatherall, K. (eds) (2017) *What If We Could Reimagine Copyright?* Acton: Australian National University Press
- Harkins, P. (2012) 'Extending the Term: The Gowers Review and the Campaign to Increase the Length of Copyright in Sound Recordings', *Popular Music & Society*, 35:5, pp. 629-649

Heald, P.J. (2017) 'Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books' (December 8, 2017), available at SSRN: <https://ssrn.com/abstract=3084920>

Intellectual Property Office (2018) 'Copyright Term Extension for Sound Recordings: Post Implementation Review', IPO, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/751001/Copyright\\_term\\_extension\\_for\\_sound\\_recordings.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/751001/Copyright_term_extension_for_sound_recordings.pdf)

Kretschmer, M. (2012) 'Copyright Term Reversion and the "Use It or Lose It" Principle', International Journal of Music Business Research, April 2012, vol. 1 no. 1, pp. 44-52, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2063759](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063759)

Kretschmer, M., Furgal, U. and Schlesinger, P. (2020) 'Platform regulation: Mapping an emerging regulatory field', CREATE web resource, available at: <https://www.create.ac.uk/platform-regulation-resource-page/>

Lee, D. (2018) Independent Television Production in the UK, London: Palgrave Macmillan  
Ofcom (2018) 'Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation', Ofcom, available at: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0022/120991/Addressing-harmful-online-content.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf)

Oliver and Ohlbaum (2018) 'The Impact of Terms of Trade on the UK's Television Content Production Sector', available at: <https://cmpa.ca/wp-content/uploads/2019/01/Appendix-C-Oliver-Ohlbaum-Associates-2018-The-impact-of-the-UK-te...-1.pdf>

Oliver and Ohlbaum (2019) 'UK Television Production Survey Financial Census 2019', available at: <https://www.pact.co.uk/news-detail.html?id=pact-uk-television-census-2019>

Paterson, R. (2017) 'The Competition Discourse in British Broadcasting Policy', CREATE Working Paper 2017/02, available at: <https://www.create.ac.uk/publications/the-competition-discourse-in-british-broadcasting-policy/>

[all web sources accessed 19/06/2020]