



**European Commission  
Public consultation on “Creative Content in a European Digital Single Market:  
Challenges for the Future”**

**Response of British Sky Broadcasting Group**

**1. About Sky**

- 1.1 BSkyB Limited (Sky) operates a direct-to-home satellite (DTH) platform in the UK and Republic of Ireland. Sky retails pay-TV services over this platform, as well as over other (DSL and IPTV) networks to residential and commercial customers. Sky channels are also provided on a wholesale basis for distribution by cable in the UK and Ireland.
- 1.2 With Sky Broadband and Sky Talk, Sky is also the UK's fastest growing broadband and telephony provider. As at 30 September 2009, Sky had over 9.5 million domestic subscribers to its satellite TV business<sup>1</sup>, Sky Broadband had reached 2.3 million customers, and Sky Talk had 1.9 million customers.
- 1.3 Sky broadcasts a variety of television channels in different genres, including the Sky Sports and Sky Movies suites of channels, Sky1, Sky Arts, Sky News, Sky Real Lives and Sky Travel. Three of Sky's channels (Sky News, Sky Sports News and Sky3) are also broadcast free-to-air by Sky on the digital terrestrial television (DTT) platform. Sky News is also distributed in other European territories and outside the EU on a wide variety of platforms by third party distributors. We are committed to providing our customers with great content and invest over £1.4 billion a year in our channels.
- 1.4 In line with our belief that viewers respond to more choice, Sky also makes a number of linear channels and on-demand content available in the UK via its online Sky Player service and on mobile devices. Our Sky Player service is also available on Xbox 360 consoles, on Windows Media Center in Windows 7 and will be launched on Fetch TV in early 2010.
- 1.5 In November 2009 Sky launched an online music subscription and download service, called 'Sky Songs'. Sky Songs is a subscription service that offers customers the ability to stream unlimited amounts of music online with a limited number of inclusive downloads, and the ability to purchase music on a download to own basis.

*Full details of Sky's activities can be found in its published corporate reports, available from [www.sky.com](http://www.sky.com).*

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<sup>1</sup> Sky also offers a number of services to commercial DTH subscribers (offices, retail outlets, hotels, pubs and clubs) in the UK and Ireland.

## **2. Introductory remarks**

- 2.1 Twenty years of relentless investment and constant innovation have given Sky a leading position in the digital media world. Sky believes that the market is delivering for consumers today and can deliver even more in the future. At Sky we are excited about the opportunities brought by the digital revolution, both for consumers and for our business. We invest in attractive content, products and services because that is what our customers want, and we know that satisfying our customers is the only path to sustainable commercial success. Many other companies in the media and communications industries are similarly embracing the digital opportunity.
- 2.2 The Commission's strategy for a European Digital Single Market must not prevent this digital opportunity from being exploited to its full potential. We are convinced that the any policy framework should allow for commercial incentives to continue to provide increased choice for consumers and promote vigorous competition between efficient service providers.
- 2.3 We therefore welcome this opportunity to provide views on those aspects of the Commission reflection document on creative content in the European Digital Single Market which we consider to be crucial to delivering the digital opportunity identified above.
- 2.4 Our position, which we explain in full below, can be summarised as follows:
  - 2.4.1 Exclusivity is a means by which broadcasters distinguish their content offerings from those of their competitors.
  - 2.4.2 Exclusive rights (including copyright), territorial licensing and nationally determined release windows enable content owners and service providers to maximise value, and hence achieve a return on investment;
  - 2.4.3 Illegal downloads on a large scale do not result from a lack of consumer access to audiovisual content services, particularly on a cross-border basis; rather, they can be explained to a degree by consumers' reticence to pay for content when it can be downloaded illegally for free;
  - 2.4.4 Convergence in delivery methods (linear, IPTV, VOD) means there is no such thing as a separate online market for audiovisual services – however, the online world represents a real opportunity for the development of legal content services and should therefore be allowed to flourish without undue regulatory intervention;
  - 2.4.5 Regulatory intervention would be highly disruptive and is not warranted;
  - 2.4.6 Each sector (music/books/audiovisual/games) needs to be the subject of a separate impact assessment before any new regulation is seriously considered.

### **3. Digital Single Market**

- 3.1 The Commission's starting point is the desire to create in Europe a "modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online". While the reference to a "genuine Single Market" (or implied lack thereof) is correct in recognising that broadcast markets are largely national in character, this statement implies that the legal framework is neither modern, competitive, nor consumer-friendly.
- 3.2 The reality is quite the opposite, as supported by a study carried out by Analysis Mason on behalf of the UK Department for Culture, Media and Sport<sup>2</sup>:
  - 3.2.1 Converged media companies such as Sky are at the forefront of innovation and seek to make their content available on as many platforms and devices and in as many formats as possible. According to Analysis Mason, "the UK professional creative content industry is large and well developed throughout the value chain. The industry is characterised by a strong independent TV and film production sector, large broadcasters with international reach, strong domestic demand for content and a well developed advertising industry. In the purely digital part of the value chain, the UK has a highly developed Internet access market";
  - 3.2.2 Content delivery across Europe is very dynamic, with companies either experimenting with new free and pay business models and/or having launched innovative new content services (e.g. Sky Player and Sky Songs). Analysis Mason reports that "while current revenues available online are limited, market players are continuing to pursue new monetisation options, and some interviewees believe there are good opportunities in this respect". We concur with Analysis Mason's view that "intervention must be considered carefully to limit market distortions";
  - 3.2.3 Consumers today have more choice than they have ever had before, whether in terms of pluralistic information or culturally diverse content, which they can consume thanks to an ever increasing number of platforms and devices. In fact, Analysis Mason reveals that "consumer spending provides the single largest inflow of funds into the value chain, representing 75% of a total GBP 55.6 billion of inflows, with spend growing by 2% during 2008". This demonstrates that the market is delivering according to consumer expectations.

### **4. Consumer demand**

- 4.1 The Commission claims in its Reflection paper that "efforts by consumers to circumvent territorial restrictions of transmission rights and the growing grey market for devices used for that purpose suggest that there is a demand for

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<sup>2</sup> Analysis Mason, "Final report for the Department for Culture, Media and Sport on Fostering creative ambition in the UK Digital Economy - Analysis and development of policy recommendations", 26 May 2009. [http://www.culture.gov.uk/images/publications/analysismason\\_fosteringcreativeambition.pdf](http://www.culture.gov.uk/images/publications/analysismason_fosteringcreativeambition.pdf)

multi-territory distribution of audiovisual media services”. We call on the Commission to substantiate this view with data demonstrating the existence of significant unmet demand.

- 4.2 Eurostat’s statistics<sup>3</sup> reveal that intra-Community migratory flows of ‘foreigners’ from other EU Member States remain at a low level across the EU. According to the data, the share of all non-nationals from other Member States living in the five most populated EU countries (i.e., France, Germany, Italy, Spain and the UK) does not exceed 3% of the total populations of these countries. The share of all non-nationals from other Member States living in these five Member States ranges from 0.9% in Italy to 3% in Spain.
- 4.3 This data helps to explain why there is limited commercial interest in providing cross-border audiovisual services in Europe. There can be no roll-out of multi-territorial services without consumer demand and a strong prospect of a successful return on investment. However, where there is a business case, multi-territory distribution of audiovisual media services is already taking place (e.g. Sky in the UK and Ireland, Sky Deutschland in Germany and Austria, etc.).

## 5. Copyright

- 5.1 We welcome the Commission’s opening statement that “European policymakers have the responsibility to protect copyright, including in an evolving economic and technological environment”. Indeed, we view the existing copyright framework as an enabler rather than a barrier to the launch of innovative services, as it allows businesses, including rights holders, to achieve a return on their investments in content acquisition and delivery. Technical protection measures, such as DRMs, watermarking or conditional access technologies, also contribute to safeguarding content and services underpinned by copyright.
- 5.2 Moreover, in our view, the Commission, national governments, and industry all have a role to play to better educate consumers on the importance of respecting creators’ copyright, taking into account the fundamental role copyright plays in ensuring the latter are appropriately remunerated for their work. The importance of protecting copyright is a cornerstone of the 2001 Copyright directive<sup>4</sup>, which provides: “the investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment”<sup>5</sup>.
- 5.3 Furthermore, we note that in the Commission’s view “the problem lies more on the side of commercial and contractual practice which is based on the existing fragmentation of copyright legislation in the EU.”
- 5.4 In Sky’s experience as a cross-border operator, potential disparities between national copyright laws (which the 2001 Copyright Directive was successful in

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<sup>3</sup> EUROSTAT “Statistical portrait of the European Union 2008” (data for 2006)

<sup>4</sup> [Directive 2001/29/EC](#)

<sup>5</sup> In recital 10 thereof.

reducing while providing for a high level of protection of intellectual property) do not raise any particular issues such that commercial/contractual solutions cannot be reached.

## **6. Territorial licensing**

- 6.1 We welcome the recognition by the European Commission that “the present legal framework does not in itself prevent rights holders from commercialising their works on a multi-territory basis”. We fully concur with this statement.
- 6.2 We also agree with the Commission’s assertion that “territorialisation is a way to maximise revenue” and would add that by maximising revenue private sector business is incentivised to invest in the content, services and technology that deliver what consumers really value. Selling rights on a territorial basis is also a means of satisfying the need for cultural diversity.
- 6.3 In our view European rights holders benefit in the same way as major foreign producers do from territorial licensing and will likewise make business assumptions based on consumer demand (or lack thereof).
- 6.4 We also welcome the European Commission’s recognition based on the ECJ ruling in “Coditel I”<sup>6</sup> that “owners of films can continue to license their rights territorially under the present state of Community law”.
- 6.5 We assume that the Commission shares the ECJ’s view that rights holders have a “legitimate interest in receiving fees on the basis of the number of repeat performances of the film”.
- 6.6 The Commission has also commissioned a study to assess options relating to the licensing of audiovisual works, including the option of creating an EU-wide or multi- territory licence, in addition to the one for the territory – or territories – where the audiovisual work was (co)produced. According to the Commission, “first findings indicate that legislative innovations appear necessary in order for content distributors and consumers to benefit fully from the transition from an analogue to a digital world”.
- 6.7 However, it is unclear how a “Community an EU-wide or multi- territory licence” would work in practice, and how such a title would be compatible with exclusive licensing, which inter alia is a means by which broadcasters distinguish their content offerings from those of their competitors and can provide rights holders with revenue to be reinvested in content.
- 6.8 In the light of the above, we would therefore call on the Commission to consult and carry out a full impact assessment before going too far in designing regulatory intervention which would undermine territorialisation in any way.

## **7. Illegal downloads**

- 7.1 Sky has a unique perspective on the problem of illegal file sharing. We are one of the UK’s most significant investors in content, amounting to £1.4 billion last year - more than any other commercial broadcaster. As well as acquiring and

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<sup>6</sup> Case 62/79 [1980] E.C.R. 881.

producing content for our own channels, such as Sky 1 and Sky Sports, we also support the significant investment in content made by our channel partners, such as National Geographic and History.

- 7.2 Sky is also the UK's fourth largest Internet Service Provider (ISP) with over 2.3 million broadband customers gained since launch in 2006. In a highly competitive market, Sky Broadband has become the UK's fastest growing ISP, offering customers a fast, reliable and attractively priced service.
- 7.3 Illegal file sharing has the potential to erode value, undermining investment and innovation in the creative industries and with it ours and others' ability to continue to provide our customers with the content that they value.
- 7.4 The success of new services, and many existing ones, is threatened by the easy access to illegal free content. That is why the UK Government was right to conclude in its Digital Britain Report<sup>7</sup>, that action needs to be taken collectively to reduce the prevalence of illegal file sharing. As an ISP and a content owner Sky has always seen this as a shared problem and the solution will have to be a shared solution. We therefore agree with the premise that ISPs and rights owners have a role to play in tackling it.
- 7.5 However, we dispute the Commission's assumption that illegal downloads on a large scale are fuelled by a lack of consumer access, particularly on a cross-border basis. Infringement notifications by ISPs, combined with a widespread education and awareness campaign by rights owners and legal action taken against the very worst repeat infringers will, we believe, go a long way to reducing the level of illegal file sharing in Europe.

## **8. Release Windows**

- 8.1 According to the Commission, "pan-European availability of audiovisual content, such as VOD services, is hindered by nationally-determined release windows that prevent simultaneous availability across the EU." The Commission also considers that "statutory and contractual provisions relating to release windows for VOD can act as a barrier to the availability of content on digital platforms across borders, because of the time lapse between VOD and other releases. Release windows that are too long can hinder the emergence of attractive legal offers and stifle innovation".
- 8.2 In line with the recently adopted AVMS directive<sup>8</sup>, which retains a non-interventionist approach to media chronology<sup>9</sup>, discussions are ongoing in various member states between rights holders and commercial users on the time lapse between the VOD window and other windows, with a view to optimising the financial potential of the audiovisual value chain. Regulatory intervention here would not only contradict the AVMS directive, it would also be nonsensical at a time when new VOD platforms offering multi-territory services are emerging, as duly noted by Commission in its Reflection document on p20.

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<sup>7</sup> <http://interactive.bis.gov.uk/digitalbritain/report/>

<sup>8</sup> Directive 2007/65/EC

<sup>9</sup> See Article 3(d) of said Directive

- 8.3 There is, moreover, no demonstrable link between the pan-European availability of audiovisual content and nationally-determined release windows, which are an essential means to sustain investment in content production, to avoid the cannibalisation of one type of service by another, and to allow for the exclusive distribution of audiovisual content.
- 8.4 Any proposal to move away from this model would need to be underpinned by a rigorous impact assessment.

## **9. Cable and Satellite Directive**

- 9.1 The cable retransmission provisions of the Cable and Satellite directive<sup>10</sup> fail to provide due regard to the nexus between copyright and contract in the sale of television rights and have the potential to disrupt the freely negotiated sale of exclusive television rights on a territorial basis. We therefore do not consider that the compulsory collective licensing provisions are a necessary or suitable way of clearing the underlying rights in TV programmes across borders and should not be extended to new platforms.
- 9.2 A proposal by the Commission to extend the scope of the Directive is likely to lead to a prolonged period of legal uncertainty which is likely to inhibit rather than encourage the development of legal television services online.
- 9.3 In addition, as mentioned above, the linguistic and cultural differences between Member States, amongst other things, explain why there is little demand from UK audiences for channels from other Member States. It is notable that of the 650+ channels on Sky's DTH platform, about 25 are licensed outside the UK and Ireland and of these channels only a handful contain a significant proportion of programming in a European language other than those indigenous to the UK (despite the platform being "open" to all channels on fair, reasonable and non-discriminatory terms).
- 9.4 As recognised by the Commission itself, "the present legal framework does not in itself prevent rights holders from commercialising their works on a multi-territory basis". This also applies to on-line distribution of audiovisual services.

## **10. "European Copyright Title"**

- 10.1 The Commission suggests that the creation of a "European Copyright Title" with "Community-wide effect" would establish "a truly unified legal framework that would lead to direct benefits for the coherence of online licensing". It adds that "a Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights".
- 10.2 Notwithstanding the ability for the Commission to be able to propose a regulation establishing a European Copyright Title under new article 118 of the Lisbon Treaty, which has yet to be demonstrated, it is unclear how such a title would work in practice, and how it would be compatible with exclusive licensing, which inter alia provides the necessary revenue to be reinvested in content.

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<sup>10</sup> Directive 93/83/EC

- 10.3 Again, any shift away from the current system based on national implementation of copyright laws would need to be underpinned by a thorough economic impact assessment to be carried out by the Commission.

## **11. Music Rights Clearance**

- 11.1 Our starting point is that fair and adequate remuneration of rights holders is essential to the sustainability of a vibrant market place for culturally rich and diverse content in Europe.
- 11.2 Sky currently licenses the global music repertoire for use in its services irrespective of whether they are delivered via digital satellite, cable, Internet or digital terrestrial television broadcast. By licensing across all distribution platforms, this has enabled broadcasters like Sky to launch new and innovative services quickly and efficiently.
- 11.3 If access to the global music repertoire becomes fragmented, future development of such services will be hindered and the launch of other new services could be compromised. Sky's over-arching concern is therefore that, as a mass user of music, it continues to be able to access the global music repertoire on a 'one-stop shop' basis for use in all its services as far as possible, irrespective of the means of distribution.
- 11.4 Were Sky to have to negotiate with several collecting societies and/or right managers in order to obtain the same rights that it currently obtains from one, there is a risk that access to parts of the repertoire will become more difficult, and therefore, more costly in terms of administration, and potentially, in terms of rights costs. For example, if one society/manager had a sufficiently broad and attractive portfolio of rights but chose to license rights in that portfolio at a 'premium' to commercial users.
- 11.5 The Commission suggests that "freely accessible ownership and licence information on world repertoire is an option that has the potential to ease the operation of multi-territory and multi-repertoire licensing and thus help overcome current market fragmentation". In our view, transparent identification of the collective right manager's music repertoire would provide a greater degree of certainty, which is desirable. We would however caution against any obligation to divulge license information which could compromise confidentiality of licence terms in the absence of apparent justification.
- 11.6 The Commission also suggests that "a central repository, or an obligation for CMOs to make available a list of their repertoire, would help increase transparency and could be useful as a dispute-resolution mechanism". It is not clear to Sky that a central repository or database for music rights would be of significant assistance. However, such a repository could be helpful for the operation of Sky Songs. Given that the rights data of the global music repertoire is currently held on a multiplicity of systems and databases, Sky would anticipate that such systems would need to be consolidated or linked in some way to enable a central point of access. The entity controlling access would need to be independent of other industry stakeholders in order to avoid negative distortions of competition.



- 11.7 For the Commission, “the introduction of an extended or mandatory collective management system” could “have the potential to create more effective protection and a stronger position for creators in their negotiations with their production companies.” In Sky’s view, extended or mandatory collective management systems impede the ability for rights holders and commercial users to reach a one-off deal at a negotiated price and should therefore be avoided. In the UK, “one size fits all” tariffs or schemes tend to be referred to the Copyright Tribunal as they can seriously impede certain business models (this is particularly the case for new/innovative business models).

**SKY**

**5 January 2010**