



Ofcom response to the European Commission Consultation on Content Online in the Single Market

Consultation

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Section 1

Executive Summary

- 1.1 Ofcom welcomes the opportunity to respond to this consultation on Content Online in the Single Market. The European Commission launches this consultation against a background of rapid convergence of audiovisual media, electronic communications networks and services and myriad electronic devices and it is therefore timely to consider whether there are any policy and regulatory implications. We understand the Commission intends to publish a Communication early 2007.
- 1.2 The Commission's consultation asks a very broad range of questions intended to identify any obstacles to the development of a competitive, pan-European online content industry which might usefully be addressed at EU level. The consultation touches on many critical issues, each of which merits in-depth analysis going beyond the scope and timeframe for this response. Therefore, at this stage Ofcom's response to the Commission's consultation concentrates on those issues which we feel are of particular importance, and where our contribution may be most effective; however, we would also welcome the opportunity to respond in greater detail, were the Commission to carry out further, developed work on some of the specific issues raised.
- 1.3 Ofcom agrees with the Commission's hypothesis that content online could play a crucial role for the growth of Europe's information and communication technologies sector and as well as strengthening Europe's media markets.
- 1.4 As communications services converge and new services emerge Ofcom agrees that the existing framework for content regulation needs to be re-examined. While the principles and objectives of regulation in the area of consumer protection (and especially protection of minors) remain valid, the means to achieve them might be different, and the approach to regulation may need to change. Ofcom believes that the response to the challenge of convergence should not necessarily be the extension of traditional broadcasting rules and principles to the new media services. While the principles and objectives of regulation in the area of consumer protection remain valid, the approach to regulation may need to change. However this does not necessarily mean that significant new or additional regulatory measures will need to be put in place at this stage.
- 1.5 As the Commission is aware the responsibilities for assessing public policy objectives and imposing regulation of content has traditionally rested with Member States - owing to the principle of subsidiarity. As a general principle Ofcom favours refraining from intervention where possible; although, there may be areas where public policy goals which cannot be delivered by the market alone. The broadcasting sector has been one such example. In such cases Ofcom would argue that intervention should be targeted and proportionate to the issue or objective identified. Generally speaking, in relation to new and emerging content markets Ofcom's approach has been to avoid premature intervention. This predisposes us to avoid regulation until a clear problem has been identified. Even then there is a need to consider what form of intervention would be appropriate.
- 1.6 Ofcom recognises that, increasingly, content services will be cross-border and this may challenge the effectiveness of regulation at a national level. However it cannot be assumed that effective and appropriate intervention should therefore always be

set at EU level. In some cases the most effective level for intervention may be national and in other cases it is possible that global solutions may be required.

- 1.7 Ofcom strongly urges the Commission to examine carefully whether real issues, particularly market failures, exist in the market for online content, bearing in mind both the state of development of this content market online and the potential for initial market obstacles to be resolved through market forces, before proposing any specific action in its communication.
- 1.8 Ofcom, in responding to the questions in the consultation document, emphasises the need to strike the delicate balance of stimulating investment, facilitating innovation without unnecessarily constraining or restricting market developments through regulatory intervention and on the other hand facilitating a framework where business can flourish and consumers can be protected. The response addresses the following points in particular:

Regulatory Forbearance

- 1.9 Ofcom would argue that as much consideration needs to be given to the risks of intervention, and the value created by open competition, as to the case for specific interventions aimed at facilitating the development of new content markets.
- 1.10 We would also stress the need to determine, through evidence and beyond doubt, the necessity for any particular intervention and to be convinced of the benefits that any intervention will bring both to European consumers and to Europe's industry.
- 1.11 New content markets will be characterised by risk-taking and innovation, and it is important that the rewards that flow from such risk-taking and innovation is not prematurely capped, or redistributed amongst other industry players by regulation. At Ofcom we believe for instance that it is particularly important not to intervene too early on behalf of one party in the content value chain at the expense of another, unless there is clearly an enduring problem of market power that will otherwise harm the interests of consumers. We think such a precautionary approach is equally valid at European level.

Coherence within existing regulatory frameworks

- 1.12 Ofcom would suggest that the key task in the first instance should be to review and assess all related costs and benefits of measures operating at different levels (e.g. multiple EU frameworks, national measures and international agreements).
- 1.13 Ofcom would suggest that prior to identifying any new measures which could be introduced a thorough review of the effectiveness and purpose of the existing regulatory structures at EU level should be conducted. In effect there is already a wide range of regulatory instruments in place at EU level concerning the communications sector (i.e. Audiovisual Media Services, Electronic Communications Framework, eCommerce, Copyright and Television Standards, Commercial Communications) in addition there are important soft law instruments (e.g. Recommendation on Protection of Minors) and other measures such as policy guidelines on Safer Use of the Internet, Media Literacy and Self and Co-Regulation initiative, which are key elements of the European regulatory ecology for the media sector.

Role of Self and Co-Regulation

- 1.14 As illustrated by parallel debates taking place at the EU level on the regulation of audiovisual media services and new online media, Ofcom believes that greater emphasis should be put on the responsibility of both content providers and recipients of services through the development of codes of conduct and self-protection systems such as filtering, rating or access controls. As the EU has recognised on a number of occasions self-regulation and co-regulation can prove very efficient in delivering public policy objectives and consumer protection. This is particularly the case in the area of internet delivered services, where statutory regulation alone cannot deliver on a promise of consumer protection.

Content Classification and Media Literacy

- 1.15 Ofcom considers that any new approach to audio-visual content control will require a shift towards ensuring consumers are in a position to take greater responsibility and through the provision of more effective measures of control over digital content consumed. It will become essential that consumers have adequate information to enable them to make informed viewing choices, at the point of content consumption; at a minimum this will require content to be adequately described. Players across the EU should build on progress made to date and more importantly extensive research should be carried out on the most appropriate model(s) for content labelling going forward.

Digital Content Rights – Release Windows

- 1.16 In analysing the place for release windows for digital content Ofcom describes a model adopted in the UK through its recent review of the television production sector. Ofcom identifies this as a model which highlights the value of a can have in terms of setting the framework, fostering debate, encouraging commercial negotiations without resorting to formal intervention.
- 1.17 Ofcom nonetheless agrees there cannot be a one-model-fits-all as different product and national markets exhibit different characteristics.

Digital Rights Management

- 1.18 Ongoing initiatives in the development of interoperable digital rights management systems suggest that specific regulatory intervention is unlikely to be required. It is Ofcom's view that the most efficient role for regulators would be to establish and maintain conditions that encourage the development of innovative services to meet consumers' demand for downloaded content, for example by facilitating technical trials.

Net Neutrality

- 1.19 There has been much focus on the issue of net neutrality in the US though it may be less of a problem in Europe. We consider that there are sufficient powers under the current EU electronic communications regulatory framework to address issues relating to network neutrality, which may or may not emerge in the future.

Section 2

Introduction

- 2.1 The Commission rightly identifies the substantial opportunities that digital technologies offer Europe's content industry, by enabling new business models and the creation of entirely new markets.
- 2.2 Ofcom is a converged communications regulator - with responsibilities across telecoms fixed and wireless services, television, radio and spectrum – with the power to apply regulation and competition law.
- 2.3 Ofcom has been giving considerable thought to the new challenges that it faces in regulating converged businesses. Below we explore some of these ideas in response to some of the questions in the consultation document. We note the Commission's intended approach to hold an open consultation on this broad range of issues and hope to be able to return to more detailed assessment and discussion of the key issues at a further stage.
- 2.4 Before tackling the specific questions raised, we set out below the basic principles which inform Ofcom's approach to the evolving regulation of traditional platforms and the regulation of emerging platforms:
- an expectation that where possible market solutions are preferable to regulatory intervention.
 - a commitment that where intervention is necessary it should be evidence-based, proportionate, consistent, accountable and transparent and the least interventionist possible.
 - regular review of existing regulation and where appropriate the removal of regulation, in line with a light-touch approach to regulation.
- 2.5 Ofcom has a duty to promote and protect the interests of consumers and citizens¹. Ofcom favours refraining from intervention in most cases however there are certain public policy outcomes which cannot be delivered by the market alone. In such cases intervention should be targeted and proportionate to the market failure identified. In developing our regulatory strategy we are guided by our regulatory principles:
- Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives.
 - Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve.

¹ Communications Act 2003, 3(1): It shall be the principal duty of Ofcom, in carrying out their functions; (a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition"

- Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.
- Ofcom will strive to ensure its interventions are evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.
- Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.
- Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding.
- Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market

2.6 Media and communications markets are highly dynamic – they are being driven at a very rapid pace, by massive technological change, and by consequent developments in consumer and industry behaviours. This means that decisions made on the basis of static analysis or the examination of a narrow set of evidence may often be overtaken by events. The pace of change means that careful assessment is required before regulatory intervention is taken. This is to ensure that regulatory intervention does not cause unintended or unanticipated consequences.

2.7 Although the questionnaire seems focused largely on industry respondents, Ofcom welcomes the opportunity to submit some general observations and to provide a commentary on the themes which emerge from the questions posed by the Commission in Section I.

Section 3

Response to Questions

Questions 1 to 11: Exploring the types of creative content and service online and the emerging business models in a digital world

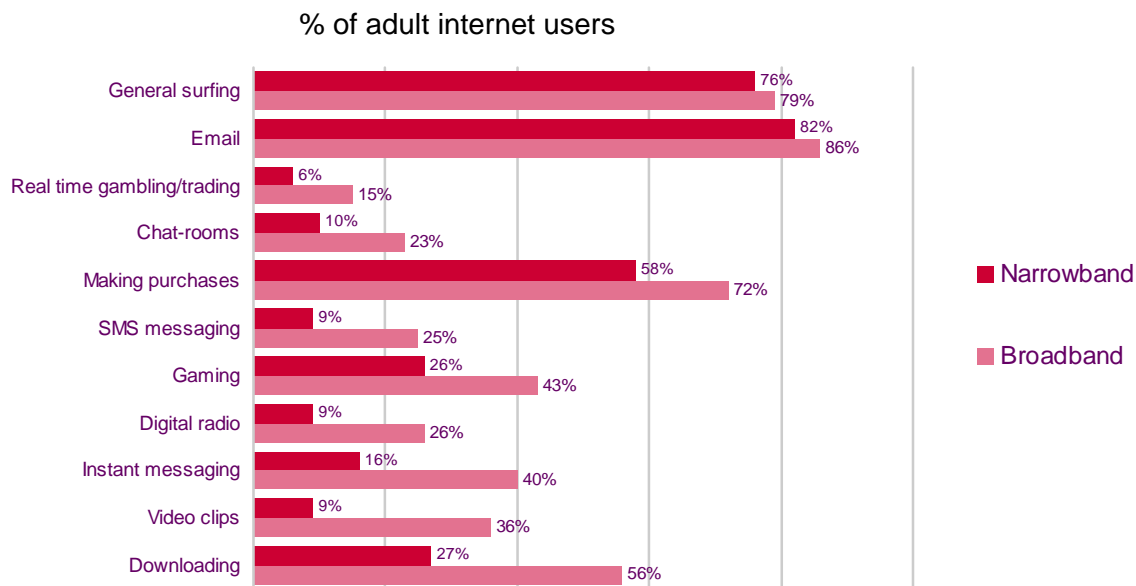
- 3.1 We include here, as part of our commentary on these questions some of the key themes which emerged from our recently published Communications Market Report 2006. Not surprisingly the overall conclusion that might be drawn from the work is that consumer behaviour and models of service provision of communications services are changing at a greater rate than ever before.

New audiences

- 3.2 A new generation of consumers is emerging for whom online is the primary medium and convergence is instinctive. The Report reveals a striking new 'networked generation' which is turning away from television, radio and newspapers in favour of online services, including downloadable content. Young adults in the UK use the internet for 21 minutes more than the UK average per week. These are young people of the internet age many of whom have never known a life without home computers, games consoles, mobile phones and online connectivity.

New opportunities

- 3.3 Overall, the communications sector is being transformed by greater competition, falling prices and the erosion of traditional revenues and audiences. The UK communications sector represents 4.1% of UK GDP. Retail revenues in 2005 exceeded £50bn. Total online revenues have increased almost eight-fold in real terms between 2001 and 2005 to £1.3bn per year. Online advertising revenue is now almost three times greater than radio advertising revenue and over one third that of television advertising revenue, which stands at £3.8bn.
- 3.4 By the end of March 2006, 11.1 million UK homes and business had broadband internet connections. We estimate that DSL broadband is now available to over 95% of homes and business in the UK. The average broadband speed for many of these connections rose during 2005. 2005 also saw a rapid increase and usage of social networking websites (e.g. MySpace, Friends Reunited, and Bebo) which allow users to create online profiles and connect with friends or others with similar interests. Our research shows that over 40% of adults with internet access have used these sites. That figure rises to 70% among 16-24 year olds with over half in this age group using them at least weekly.
- 3.5 The continued rapid uptake of broadband to the home has provided a significant addressable base to which rights holders can distribute their content. This will benefit not just the major broadcasters, for whom the internet offers a new way to reach new audiences, but also smaller rights holders (companies) and individual content creators who can distribute their programming through the internet platform.
- 3.6 The internet is also used increasingly as a distribution platform for services that were traditionally delivered on other communications networks.
- 3.7 **Figure 1: Online applications used by broadband and dial-up users**



Source: Ofcom Residential Tracker Survey, 2005

- 3.8 A growing number of operators, both from the media sector and outside it are offering audio-visual content over the internet, while Voice over Internet Protocol (VoIP) services have delivered consumer benefits through lower prices and increased competition in voice markets.
- 3.9 Over the course of 2005 and 2006 the internet has become an important element in the distribution strategies of many broadcasters. New services are helping to improve the internet viewing experience.
- 3.10 The market for right holders is also changing. As this market evolves it is evident that there is a willingness to make rights available on demand, to change new business models, to opt for multi-territory licensing, to introduce new release windows and digital rights management.
- 3.11 During the course of the year broadband technologies and speeds continued to improve, with up to 2Mbits becoming increasingly common and up to 8Mbits available to consumers in some areas. These developments, along with continued improvement in video compression technologies have resulted in a growing number of operators offering video services streamed in real time as well as content for download. Examples of new TV innovations that are available, or will soon be available, include:
- the creation and sale of audio-visual content specifically for mobile consumption – the mobisode
 - on-demand TV services already available to about 1 in 12 UK homes
 - hundreds of TV and radio channels broadcasting on the internet
 - applications or services, from the podcast to Al Gore's Current TV service², which give content creators direct access to audiences

² The Current TV network features "pod" videos segments of between 5 seconds and 15 minutes, which are created by the network's viewers. Viewers are able to pick their favorite videos and get instructions on the Internet on how to construct and submit their own segments

- Traditional broadcasters introducing new services, like the BBC's iPlayer³

Question 17 and 32 and 33: Legal and regulatory barriers and the role of Governments/Regional entities in fostering new business models in an online environment

- 3.12 The Commission's consultation questionnaire addresses the question of legal and regulatory barriers. It asks whether such barriers exist which hamper the development of creative online content and services and how this country (UK) encourages the development of online content services.
- 3.13 Over the past decade, the internet has grown to become a central part of the cultural and economic life of many people around the world. As set out above the UK is no exception. Internet is a powerful platform for the distribution of services to their intended audiences. It spans the world and connects a global audience with a globally provided set of content and services. The internet's flexibility means it has been an engine for innovation, enabling the development of new businesses and new business models, new content and new communications services; and its openness has allowed operators of every scale, from multinationals to individuals, to create and offer content and services as well as benefit from them. Alongside global reach, openness and flexibility, many observers attribute the success and importance of the internet to the limited extent of internet service regulation.
- 3.14 The international nature of the internet has generated new opportunities for consumers but it has also put them within easier reach of those seeking to take advantage of them. The internet has given rise to many new types of crime – for example, identity theft by phishing, malicious virus dissemination via SPAM, and online grooming of children. It has also made it easier for criminals to circumvent the law by taking advantage of the impersonal nature of the internet to misrepresent or disguise their true identity.
- 3.15 In response to both the growing role the internet plays in delivering services to consumers and the risks it exposes them to, there has been an immense amount of activity at national and international levels in developing legislative and regulatory frameworks to deal with internet-specific issues. While some of these efforts have sought to achieve international cooperation and harmonisation of laws, many have also been tailored to suit the particular circumstances, and cultural and political norms of local markets.
- 3.16 There are a number of specific areas where (media) regulators might have a role in responding to the development of new content markets: (i) competition issues, and (ii) content regulation issues, and, in some cases (iii) consumer protection measures. As new markets and new business models emerge, they may give rise to new sources of strategic advantage and potentially to new bottlenecks or anticompetitive behaviours. There are a number of areas flagged in the consultation, where commentators have identified such risks – for example in relation to DRM technologies, and net neutrality.

³ The BBC's internet media player trialled an offering of on-demand access to a range of downloadable television programmes and radio content; BSkyB's 'Sky by Broadband' service; AOL launched its IPTV service In2TV in November 2005 with full-length episodes of TV shows and interactive programmes; Channel4 launched FourDocs in June 2005 which gives viewers an opportunity to showcase their own four-minute documentaries; MTV launched Overdrive in April 2006 featuring music, news and video trailers

- 3.17 In line with its regulatory principles outlined above, Ofcom is committed to regulating with a “light-touch”. However, where Ofcom finds that there are regulatory concerns (including competition concerns) with the aspects of the communications sector, Ofcom has the power to deal with these concerns:
- ex ante powers under the EU Regulatory Framework, in relation to electronic communications networks and services (e.g. the ‘net neutrality’ issue identified above);
 - ex ante powers in relation to broadcasting and content under our national legislation (the Communications Act 2003), and
 - ex post competition law powers under the Competition Act 1998.
- 3.18 Ofcom conducts extensive ongoing research into the communications sector and also undertakes competition analysis of the sector. This enables Ofcom to identify potential concerns that need a regulatory response.
- 3.19 Generally speaking, in relation to new and emerging content markets our approach has been to avoid premature intervention. This predisposes us generally to rely on competition law rather than ex ante regulation. Content markets will be characterised by risk-taking and innovation, and it is important that the rewards that flow from such risk-taking and innovation are not prematurely capped, or redistributed amongst other industry players by regulation. It is particularly important not to intervene too early on behalf of one party in the content value chain at the expense of another, unless there is clearly an enduring problem of market power that will otherwise harm the interests of consumers. We think such a precautionary approach is equally valid at European level.
- 3.20 In earlier sections we describe in more detail our concerns with potential interventions either at national or at EU levels given the current state of development of the market – for example, in relation to DRMs and to the question of net neutrality.
- 3.21 Ofcom recently completed a brief survey⁴ of different approaches to the regulation of some of the key consumer protection issues that the internet raises – such as privacy and security, and protection from illegal or inappropriate content, or from malicious software. Although this work was not intended to develop policy, it did highlight some important ideas:
- The traditional role of the regulator will not translate across to the global reach and open nature of the internet.
 - The broad range of internet services – from e-commerce to VoD to email – will require a broad and flexible set of industry-led protection initiatives.
 - Successful consumer protection on the internet has generally involved a much higher degree of co-regulation and self-regulation than has been the case for other media.
 - The internet inevitably places a much greater responsibility on consumers to take action to protect themselves.

⁴ Ofcom Consumer Survey Online Protection
<http://www.ofcom.org.uk/research/technology/onlineprotection/>

- 3.22 Ofcom believes that the response to the challenge of convergence should not necessarily be the extension of traditional broadcasting rules and principles to the new media services. While the principles and objectives of regulation in the area of consumer protection remain valid, the approach to regulation may need to change. As illustrated by parallel debates taking place at the EU level on the regulation of audiovisual media services and new online media, stronger emphasis should be put on the responsibility of both content providers and recipients of services through the development of codes of conduct and self-protection systems such as filtering, rating or access controls. Self-regulation and co-regulation⁵ can prove very efficient in delivering public policy objectives and consumer protection. This is particularly the case in the area of internet-delivered services, where statutory regulation alone cannot deliver on a promise of consumer protection.
- 3.23 We need to rely on a combination of instruments which include: effective criminal laws, greater consumer empowerment through self-protection tools, the development of media literacy, and the establishment of reliable self and co-regulatory structures representing all relevant stakeholders. This is, in our view, a superior and more effective alternative to deliver on that promise.
- 3.24 Currently, there are a number of successful self-regulatory and co-regulatory initiatives which will have a positive impact in the protection of consumers in an online environment. Examples of these are: the Independent Mobile Classification Body (IMCB), which sets a Classification Framework for commercial mobile picture-based content; ATVOD, which self-regulates in the area of video-on-demand, the Internet Watch Foundation (IWF)⁶ which identifies and takes action against images of child pornography as well as criminally obscene and racist content; and the Advertising Standards Authority (ASA), in the area of advertising.
- 3.25 On an international level an example of an international self-regulatory initiative is the Internet Content Rating Association (ICRA). ICRA encourages content providers to self-classify their content using its rating system, which in turn enables end-users to use filtering software to block access to any websites which they deem undesirable based on the rating information. Over 100,000 internet content providers have already self-labelled using ICRA's rating system, including Microsoft, AOL, T-Online and Hustler. However, the vast majority of internet content is still not labelled
- 3.26 Ofcom is aware that developing reliable and successful self-regulatory or co-regulatory structures is not an easy task. It requires a significant commitment and investment of time and effort by government, regulators, industry and indeed consumers themselves. Furthermore, the success of self-regulation and co-regulation will, to a large extent, be determined by the specific regulatory culture and traditions of each country, and of the sector in each country.
- 3.27 Ofcom would warn against regulatory interventions that could jeopardise current or future initiatives in this area, by giving the wrong signal on what should be the direction of travel for this industry. Rather, greater efforts should be made, both at

⁵ There are a number of models of co-regulation being developed. However there are certain defining characteristics which they all share – notably some process of entrustment combined with some legal underpinning of approach by a regulatory authority.

⁶ The Internet Watch Foundation (IWF) in the UK is one such example of self-regulation. The IWF operates a hotline for reporting illegal content on the internet. Once content is ascertained by the IWF to be illegal, it issues take-down notices to hosting service providers, when these are based in the UK. Additionally, it supplies ISPs with details of websites containing internationally hosted illegal content, and of online user groups dedicated to disseminating illegal and offensive material. Most UK ISPs have already voluntarily agreed to block those sites and user groups. The IWF has been a successful self-regulatory strategy – in 2005, only 0.4% of potentially illegal child abuse images reported to the IWF were hosted in the UK⁶. However, the international problem of dealing with content hosted in third countries remains.

national and EU level, to encourage and support the development of these structures.

- 3.28 Ofcom also believes that as self-regulatory and co-regulatory schemes mature, and as consumers develop the media literacy skills that they need in order to make effective use of self-protection techniques, there will be less need for direct intervention in the regulation of online multimedia content.

*Question 24: Content Rating or Classification
(Refer also to response above)*

- 3.29 Traditionally, content control for free-to-air television in the UK has functioned by means of the Broadcasting Code (including the watershed), pre-transmission announcements, text descriptions (on the EPG or in listings) and consistency of scheduling by channel.
- 3.30 Changes in audio-visual content distribution and creation are driving changes in consumption, rendering traditional models of content control increasingly less effective. Key changes are:
- growth in multichannel television
 - growth in on-demand viewing functionality
 - traditional TV-only content being created to work across multiple platforms
 - new audio-visual content being developed for new platforms
 - consumers beginning to make their own content
- 3.31 Combined, these changes significantly decrease the ability of consumers to rely on existing content control measures to protect themselves and their families from harmful or offensive materials. Existing mobile and internet content control models do not provide the same level of content control as the traditional broadcast environment:
- mobile operators only rate content as over or under 18
 - internet content controls function by means of:
 - i) labels and filters (Server side and PC based)
 - ii) walled gardens (access to selected content only)
- 3.32 Current internet filtering and mobile control models are not as granular, or pervasive, as TV content control models. The watershed is not effective when content is viewed outside the broadcast stream.
- 3.33 Therefore, Ofcom considers a new approach to audio-visual content control is likely to mean that consumers will need to take greater responsibility and have more effective measures of control over the content consumed.
- 3.34 It is important therefore that consumers have adequate information to enable them to make informed viewing choices, at the point of content consumption; at minimum this will require content to be adequately described.

- 3.35 Ofcom recently commissioned a research project to better understand what people's current and where possible, future information needs are likely to be⁷. Overall the feedback suggested that the amount of programme information that is currently available is just about enough (57% say it is adequate) with one-third of respondents (39%) stating that they would like some more. Perceived needs for information increase in a multi-channel viewing environment and for parents when commenting on their children's viewing choices. When asked what kind of content information they would prefer a significant portion (46%) expressed a preference for text based information – as it gives more detail on the nature of the content. Finally 84% of those surveyed expressed a preference for information uniformity.
- 3.36 Building on the insight gained from this audit Ofcom has invited stakeholders to contribute to the drafting of a common framework to be used across the audio visual content industries on a self regulatory, voluntary basis by providers. This framework will then be made available by Ofcom to all interested parties - and Ofcom would encourage it to be used, although its use would be voluntary. This approach is consistent with Ofcom's regulatory principle to always seek the least intrusive regulatory mechanisms to achieve its policy objectives.
- 3.37 The Broadband Stakeholders Group in the UK have agreed to establish a group to bring all key players together (including broadcasters, online content aggregators, mobile operators etc) to take forward the discussions about such a common labelling framework.
- 3.38 Ofcom is keen to continue to exchange views and to research further with partners in the UK and across Europe into the most appropriate approach and means of content labelling.

Question 19: Do Release Windows make sense in the online environment?

- 3.39 Ofcom does not have direct responsibilities or powers in relation to copyright or piracy. However in addition to the general powers under the Communications Act 2003, Ofcom has specific duties regarding the television production sector. The Act requires all Public Service Broadcasters (PSBs) to have in place Codes of Practice which sets out the principles which the PSBs will use when commissioning from independent producers. These codes aim to create a more level playing field in the programme commissioning process – i.e. in the negotiation of rights between PSBs and independent producers - to ensure the a more effective operation of the television rights market. In considering the need for regulatory intervention in the TV rights markets we describe here Ofcom's recent approach to developing this model governing the exploitation of TV programme rights in the UK to accommodate new media rights development.
- 3.40 In the case of 2005 Ofcom carried out the Television Programme Sector Review (TPSR). The looked again at the rationale for intervention in the TV programme rights market, given the existing market structure (i.e. negotiating strength of the PSBs, the existence of vertical integration and geographical concentration)⁸.
- 3.41 The TPSR also looked in particular at the issue of exploitation of content originally commissioned for television broadcast across new media platforms e.g. on the

⁷ Link to Ofcom media literacy audit

⁸ The review's particular focus was on the key production quotas, the operation of the commissioning system between producers and broadcasters, and the Codes of Practice.

internet, on VoD platforms, mobile networks etc⁹. Broadcasters and producers both raised issues concerning the lack of clarity and the uncertainty over the exploitation of new media rights arguing that this was obstructing the development of new services.

- 3.42 In a consultation document issued in January 2006¹⁰ Ofcom proposed a move to a time-based windowing approach, however Ofcom was not prescriptive about the exact way in which content should be windowed, nor about the respective allocation of rights between independent producers and broadcasters. Rather, we set out a framework of high level objectives for new arrangements in the programme rights markets and invited broadcasters and producers to negotiate arrangements which satisfied these objectives. For example, that they should incentivise all parties to exploit new platforms and markets for distribution rather than enabling or incentivising rights “warehousing” (i.e. acquiring and holding unexploited rights in a way which forecloses the development of new markets) and the arrangements should maintain the current levels of investment in original programming.
- 3.43 The consultation set the goal for PSBs and independent producers to resolve matters for themselves through commercial negotiation, though with a backstop that if they were not able to reach agreement on a new framework for themselves then Ofcom would be forced to intervene. Against the background of the objectives set by Ofcom, negotiations were satisfactorily completed: so far this non-interventionary approach appears to have been successful. Heads of agreement are in place and Ofcom has not had to intervene to impose a regulated solution. What is also noticeable is that the arrangements which have been negotiated appear to be more sophisticated and detailed than would have been the case had Ofcom had to intervene to set terms for all PSBs at the same time.
- 3.44 Ofcom had from the outset expressed a strong preference for broadcasters and producers to reach a negotiated settlement, and this appears to have been the outcome. Ofcom therefore did not need to intervene to impose a solution. Furthermore, the flexibility offered by the negotiated model also allows the distinct objectives and roles of the BBC and the commercial broadcasters to be reflected in different windowing and exploitation arrangements.
- 3.45 Ofcom mentions this approach in context of this consultation to highlight the value of a regulator’s involvement in establishing the framework, fostering the debate without necessarily resorting to formal intervention.

Questions 5 and 25-29: What are the risks/advantages of interoperability between content and devices in the online environment? What is your opinion on the current legal framework? Are DRMs used/appropriate for securing distribution of copyrighted material in the online environment?

- 3.46 As the UK Government’s response to this consultation points out, an independent review examining the UK’s intellectual property framework is currently underway. This review is being led by Andrew Gowers and is due for completion over the next few months. Ofcom has made a submission to this review including on the DRM and interoperability issues. Ofcom includes some extracts from this response here:

⁹ It should be noted that until then the existing code of practice in place since 2004 did not apply to material commissioned specifically for new platforms.

¹⁰ <http://www.ofcom.org.uk/consult/condocs/tpsr/>

- 3.47 *It is Ofcom's view that the most efficient role for regulators may be to establish and maintain conditions that encourage the development of innovative services to meet consumers' demand for downloaded content: equal access to networks; regulatory requirements that are not so onerous as to discourage investment in new services; competition in both content and network access markets; supporting the development of experimental and innovative services for example by facilitating technical trials.*
- 3.48 In principle, DRM technologies enable innovation, by allowing rights holders to realise income from their IP assets in new ways – most obviously, by distribution online. Digital rights management systems simply translate and enforce the consumer usage rights the content distributor has negotiated with the content creator or owner, enabling distributors to restrict the use of their content – for example to a specific class of consumer devices, such as those in which they may have a commercial interest. This creates two potential areas of concern:
- consumers may only be able to use digital content on some but not all of the digital consumer equipment they own
 - third-party content distributors may be prevented from delivering their content to some consumer devices
- 3.49 In considering these concerns, it is important to take into account on the one hand the legitimate economic interests of right-holders - which are essential to the development of viable business models, and to ensure the continued flow of attractive innovative content services - and on the other hand to consider consumer interests, recognising the risk that digital rights management technologies may be used to create bottlenecks which distort or restrict competition, limiting choice and consumer access to content.
- 3.50 One instance of DRM giving particular concern is the relationship between Apple's iTunes digital music service and Apple's iPod portable devices. Music bought from iTunes cannot be transferred directly onto third party consumer devices.
- 3.51 However, Ofcom does not believe that regulatory intervention is required to mitigate these risks, at this stage of development of digital content markets. The need to meet the legitimate usage expectations of consumers who have paid to access content can be reasonably expected to drive the development of interoperable digital rights management systems, capable of functioning on a variety of different consumer devices.
- 3.52 The industry is already responding to this challenge through the development of interoperable digital rights management standards in the Open Media Alliance and the European Digital Video Broadcast group. Commercial digital rights management technology providers including Microsoft are also developing interoperable solutions.
- 3.53 Furthermore, in the specific case of the iTunes-iPod platform, the vast majority of the digital content offered by iTunes is not exclusive: it is available from other content providers, in formats compatible with other devices. Consumers who are particularly frustrated by the effort required to make iTunes content play on third party devices, are free to buy the content elsewhere.
- 3.54 The current proliferation of digital content providers is evidence that digital rights management technology has not created any new significant barriers to entry for new operators in the digital content distribution market. Even if such barriers were to

develop they could be potentially addressed through competition law (or where this involves access to or interconnection with electronic communication network) or with corresponding national legislation.

- 3.55 In conclusion, the deployment of digital rights management technology is playing an increasingly important role in the future growth of the digital content distribution market. Different usage models are being trialled and refined both to meet consumer expectations and to support the development of commercially viable digital content distribution models. Ongoing initiatives in the development of interoperable digital rights management systems, a commercial need to meet consumer expectations and existing platform access legislation, suggest that the specific regulation of these technologies is unlikely to be required. As noted above, the specific harm which could result from the abuse of a dominant market position in the provision of DRM (or in other parts of the digital content value chain) should be addressable under existing competition law. Regulators will of course need to continue to watch the digital content market to ensure that not such distortions are emerging.

Question 20: Networks (Net Neutrality)

Definition of network neutrality

- 3.56 The Internet has never really been 'neutral'. Operators, content providers and consumers all make payments to access content in various ways.
- 3.57 There have been a number of business models requiring inter operator payments for the delivery of content to end customers. Examples include content provider payments to backbone network providers to host content, either with or without quality of service level agreements (SLA's) or with or without content caching close to the customer.
- 3.58 Whilst there are examples where these relationships do not require payments between operators (notably peering arrangements on IP interconnection), a number of the relationships do result in a flow of funds between parties. Whilst some of these payment flows may not exist within vertically integrated businesses, they remain for other players in the value chain.
- 3.59 Customers have always paid differential amounts for different quality of service from service providers. These can take the form of higher prices for higher bandwidth services, guaranteed quality of service, greater usage caps or managed services. These different pricing models have been witnessed in both consumer and business markets, and from both wholesale infrastructure owners and retail service providers.
- 3.60 In addition, traffic management and prioritisation is already undertaken by ISPs, with some ISPs routinely degrading specific traffic e.g. peer-to-peer services, given the implications this traffic can have on other users of the network.
- 3.61 There are a range of approaches operators may adopt to prioritisation of traffic or charging for delivery, including:
- applying customer usage caps that exclude on-net traffic;
 - prioritisation of services which require low latency;

- prioritisation of a specific service providers applications and content e.g. operators hosting a partner's content 'on-net', close to the consumer for quicker delivery;
- operators charging content providers extra for higher quality of service (but everyone gets a basic level); and
- operators blocking access to specific third-party services (e.g. VoIP).

3.62 Net neutrality implies there is absolutely minimal differentiation. It is therefore at the extreme end of this continuum of different approaches that could be adopted. Net neutrality is usually used to mean:

- no prioritisation of traffic by ISPs; and
- no charging of content providers by ISPs.

Quality of service payments may promote investment

3.63 One way that operators may plan to monetise investments in next generation access is through offering content providers different levels of quality of service to deliver their applications to consumers. For example, if a service provider wished to provide a high definition TV on-demand service, the access provider might charge a premium for offering to guarantee the quality of service with which subscribers received that service.

3.64 This could make a substantial difference to the business case for such infrastructure investments. In this regard, broadband access is what economists call a two-sided market. Just as magazines charge both advertisers and subscribers, broadband access providers may seek to secure payments from both consumers and application providers.

3.65 In practice, quality of service differentials will be required in order to support a number of emerging products and services, including VoIP and HDTV services. Enabling differential quality of service may increase product and service innovation. Supporting new products and services for end customers is one of the key rationales for operators to invest in next generation core and access networks. The application of differential quality of service results in clear consumer benefit, allowing the effective delivery of new content and services.

3.66 Without this additional revenue stream, the business case for investment in telecoms networks, including next generation core and access networks may worsen.

Net neutrality and SMP operators

3.67 Concerns about the implications of net neutrality may be greatest where an operator with SMP in the relevant market undertakes to prioritise the delivery of its own services over those of its competitors. However, the ECS provides a range of tools to address operators attempting to abuse market power in the delivery of content and services.

Net neutrality and non-SMP operators

3.68 For those operators without SMP in the relevant market, we consider that efficient working of a competitive market will address the risks posed to consumers from non-

network neutral approaches. An effectively competitive market at the retail level, with relatively low barriers to entry, means that customers have a range of choice in their ISP.

- 3.69 Therefore, if a single operator without SMP were to introduce charging for the delivery of third party content services, or to block specific services, consumers would be able to move supplier. This reduces the incentives for operators to charge consumers excessively high prices or block specific services.
- 3.70 However, for this to constrain potential harm there need to be no artificial barriers preventing consumer from switching. Therefore, it is important to ensure that:
- consumers are fully informed of the application of quality of service charging or other net neutrality approaches being applied by their service provider;
 - there are no artificial barriers to consumers, reducing their ability to switch service providers; and
 - the migration process from one service provider to another does not unduly influence consumers' decision to switch service provider.
- 3.71 If this is not the case, then there may be a role for regulatory intervention to protect consumer interests. However, any intervention would be best focussed on addressing the lack of consumer information, consumer empowerment or migrations processes. Addressing any issues within these three areas should then allow the efficient working of the market and enable consumer choice to address the concerns of the proponents of net neutrality.
- 3.72 The need for regulatory intervention may be further lowered through self regulatory approaches adopted by industry. Within the UK, the need for specific regulation is likely to be lower, with ISPs and VOIP providers working together through industry bodies to agree a self regulatory approach to providing consumers with transparency on whether service prioritisation or quality of service charging is being applied.

No need for additional regulatory powers

- 3.73 As a result of the arguments outlined above, we consider that there are sufficient powers under the current EU electronic communications regulatory framework to address issues relating to network neutrality, which may or may not emerge in the future.