

*“Working for quality
and diversity in
British broadcasting”*



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THE SYNDICATION OF ON-DEMAND CONTENT
A RESPONSE BY
THE VOICE OF THE LISTENER & VIEWER (VLV)
TO THE CONSULTATION ON SYNDICATION OF ON-DEMAND CONTENT
BY THE BBC TRUST, July 2010

Voice of the Listener & Viewer (VLV) is an independent, non-profit-making association, free from political, commercial and sectarian affiliations, working for quality and diversity in British broadcasting. VLV represents the interests of listeners and viewers as citizens and consumers across the full range of broadcasting issues. VLV is concerned with the structures, regulation, funding and institutions that underpin the British Broadcasting system.

Introduction

1. The BBC Trust published its Statement of Policy for the Syndication of On-demand Content in August 2007, following a public value test (PVT). When it did so, it established a Policy Review Process, as a result of which, the BBC Executive has now submitted proposals for change. This submission is an analysis and response by Voice of the Listener & Viewer (VLV), which seeks to take into account:

- The interests of licence fee payers, including user access.
- The protection of the BBC Brand.
- The maximisation of online reach for BBC programmes.
- Compliance with subsequent EU legislation.

2. In analysing what we consider to be the best interests of all licence payers, we have come to the conclusion that because, as things stand, a significant minority of licence payers are unable to access the BBC's online services, for which they have already paid, the BBC Trust may have to make difficult choices as it reviews its policy on the online syndication of BBC programmes.

Reshaping the BBC for Tomorrow's World

3. In a presentation which he gave to VLV on 30 June 2010, Sir Michael Lyons highlighted a number of ways in which today's BBC would need to be reshaped for tomorrow. These included a requirement for the BBC to focus more sharply on three key goals:

- Quality and distinctiveness.
- Outstanding value for money.
- And on becoming much more open and responsive, both to the public and to the wider media sector.

4. Sir Michael also highlighted that the BBC had to develop a strategy which took account of both the current climate of economic austerity and the very rapid pace of technological change across the media landscape. What he did not mention, however, was that any such strategy would also have to take account of both the competition policy of the European Union, and the UK's public service remit as enshrined in the BBC's Charter.

5. In this submission, VLV attempts to apply Sir Michael's principles and the EU's regulatory framework to the BBC's proposals for the syndication of on-demand content, in a world where there is a disruption of the traditional link between, on the one hand, the production and selection of broadcast programmes, and on the other, the transmission of those programmes to licence payers.

6. In brief, we submit that:

- The BBC Trust needs to update its Policy Statement of August 2007 on the Syndication of BBC on-demand content.
- The 2009 Communication from the European Commission on the application of State aid rules to public service broadcasting requires those public service broadcasters who wish to provide audiovisual services over new digital platforms, to fulfil the same democratic, social and cultural needs of their audiences, as they do with their over-the-air broadcasts. Moreover, these developments must not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.
- It is therefore insufficient for the BBC's syndication policy merely to have passed a public value test (PVT). The BBC Executive must syndicate on-demand content in a manner which enables all licence payers to access it.
- The BBC should seek to persuade both the UK government and broadband network providers, who will spend the money which the government proposes to top-slice from the BBC's licence fee revenues, to do so in a manner which will ensure that every licence payer can access adequate broadband capacity to download all the BBC's current and future on-line services without having to pay a premium charge.
- The BBC Trust should reject the proposal by the BBC Executive to syndicate BBC programmes "in context". This is for two reasons:
 1. It restricts the licence payer's freedom to watch a programme of her/his own choice, by clinging to traditional – and increasingly outdated - assumptions about the public service value of the broadcast channel.

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2. It implies that some BBC programmes do not fulfil the BBC's public purposes unless they are part of a larger package.

- The BBC Trust should require the BBC Executive to ensure value for money when syndicating BBC programmes. VLV submits, however, that it should be possible for the BBC Executive to ensure this simply by making a stream of digital information available to all authorised platform providers, and then regulating its syndicated use, not by technological means, but by a family of parallel copyright contracts.
- The BBC should not develop standard software that can work on many devices such as the iPlayer. This should be the responsibility of the companies which manufacture, or seek to adapt, such devices.
- The BBC should not invest in developing special non-standard technology for other devices. This is the responsibility of those who seek to manufacture and market such devices.
- If the BBC does not develop specialist or non-standard software, it will not need a criterion – such as audience reach - on which to base its priorities. Audience reach for online services is best achieved through the roll-out of a universal broadband network.
- The BBC should not need to publish a criterion for prioritising any non-standard software development. Its only criterion should be to ensure the universal delivery of a service in areas of the UK where its online services are not already available to licence payers without the payment of a premium.
- The BBC should not develop a customised iPlayer for a manufacturer, unless it can demonstrate that to do so would provide outstanding value for the licence payer.
- The BBC should allow manufacturers to develop their own versions of the iPlayer or other electronic technology. VLV considers that the BBC Executive can ensure editorial standards and high quality through the application of copyright law, rather than through technological control.
- VLV submits that the BBC Executive's proposal to change the Trust's 2007 policy do not fully prioritise the needs of the licence payer. We therefore propose that the current syndication policy should be improved as follows:
 1. Licence payers should only be offered a BBC programme in its complete form. Therefore the BBC Trust should only allow BBC programmes to be syndicated in a complete form. They should never allow them to be presented to licence payers as extracts, in an abbreviated form, or even to be interrupted by advertising commercials.
 2. Licence payers should always be aware that they are watching a BBC programme. Therefore, the BBC should always be identified as the producer of the programme, both in the programme credits, and in any publicity promoting the programme, which is directed towards licence payers.
 3. Although the BBC should allow the retransmission of its programmes on any platform to which licence payers have free access, it should categorically

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refuse to allow the secondary retransmission of these programmes to other organisations, such as file-sharing organisations or social networking sites.

The BBC Trust's Policy on the Syndication of on-demand content

7. In August 2007, the BBC Trust's policy statement on the syndication of on-demand content concluded that, following the conclusion of a Public Value Test (PVT), it would agree, through the agency of bbc.co.uk, to adopt and publish on-demand content on a non-discriminatory and non-exclusive basis, subject to certain conditions.

8. The term "content" includes all on-demand programme content, including short edited clips of such content. However, the policy applies only to "syndication arrangements" which are, or will form part of, the BBC's public service activities. It does not extend to provision of content on a commercial basis.

9. The policy was also made "without prejudice to the requirements of the Charter and Framework Agreement and requirements of other policies, protocols, rules or codes of the Trust." (Syndication policy statement, paragraph 8)

10. In addition, the Trust laid down a number of key principles which were "designed to ensure that the syndication of content is conducted in the best interests of licence payers" (paragraph 14). These included:

- The Content to be distributed on a non-discriminatory basis
- Access to content to be provided on a non-exclusive basis
- Content must be provided on a platform neutral basis
- Content only to be distributed within the UK
- Content to be available free of charge at the point of use (or at entry-tier level for subscription services)
- Syndication to have no adverse effects on the BBC's ability to fulfil its public purposes
- Syndication to comply with all relevant legal and regulatory requirements
- But in addition, the BBC Executive could specify additional requirements designed to protect the BBC brand, ensure technical integrity, maximise delivery of the Public Purposes and ensure a quality experience for users.

11. In general, the Trust's guidelines have worked well, and have improved the opportunities for many licence payers to access a large number of BBC programmes on-line, as well as over the air. There have, however, been two disadvantages for licence payers in these new arrangements. They are:

- The licence payer now has to pay a broadband network to deliver the BBC's on-line services to the domestic computer or TV set, whereas over-the-air broadcasts are delivered to the home free of charge.

- As yet, there is no universal broadband network throughout the UK, which has sufficient capacity to deliver radio and television programmes into the home. This means that a significant minority of licence payers are perforce paying for the BBC's on-line services, which, in fact, they themselves are unable to access.

12. Thus although the Trust's 2007 policy statement on syndication of on-demand content may have passed a PVT test, and although the BBC Executive was required to "maximise delivery of the Public Purposes and ensure a quality experience for users" all licence payers do not yet have adequate access to the BBC's online services. The more 'digital information' there is within a programme, the worse this problem becomes.

13. There is a danger, therefore, that unless the Trust's syndication policy is adapted to ensure universal access to its online services for all UK licence payers, it may fall foul of European and national regulatory frameworks.

The BBC within a European Regulatory Framework

14. The allocation of television licence payers' money to the BBC is ultimately governed by the European Union's rules on the allocation of State aid. The protocol to the Amsterdam Treaty justifies the allocation of state aid to public service broadcasters on the grounds that it "is directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism". In its 2001 Communication on the allocation of State aid to public service broadcasting, the European Commission stated that public service broadcasting could not be compared with any other economic service in the public sector on the grounds that:

"There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion." (2001/C 320/04, paragraph 6.)

15. But in its 2009 Communication, the European Commission recognised that:

"In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, *provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.*" (2009 C 257/01, paragraph 81) [VLV's emphasis]

16. Thus although public service broadcasters are permitted to deliver their audiovisual services over new distribution platforms, this does not absolve them from addressing the same democratic, social and cultural needs of licence payers that they do with their over-the-air broadcasts. VLV considers that this requires the BBC to ensure that its on-line services are universally available to all licence payers.

17. The EU and the European Commission have established different arrangements for allocating State aid, - such as TV licence revenues - to broadband networks, however. These are largely covered by two documents. The first is the Commission's 2005 Decision on the Application of State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (*Official*

Journal, L 312, 29.11.2005, p. 67). The second is the 2009 Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks. (2009/C 235/04) The latter divide Europe into what the Commission describes as 'white', 'black', and 'grey' areas. These are not geographical areas, but are largely determined by the competitive network environment which is available to consumers, and thus the licence payers, living in those areas.

The Delivery of a Universal Online Service

18. Within the UK, the BBC's public service remit – that is its six Public Purposes – presupposes the delivery of a universal service to all licence payers. Indeed, its sixth Public Purpose specifically requires the BBC to take a leading role in the switchover to digital television. VLV therefore submits that the principle of providing a universal service must also extend to the BBC's online services.

19. Although the BBC Trust's 2007 Statement of Policy on the Syndication of BBC on-demand content arose from the conclusion of a PVT, it did not specifically require the BBC Executive to provide a universally available online service, which was free at the point of use. It merely required the Executive to "maximise delivery of the Public Purposes, and ensure a quality service for users."

20. Moreover, paragraph 15(e) of the Trust's policy statement specifically authorised the BBC Executive to syndicate BBC content to providers of online services which charged viewers a subscription to access their basic tier service.

21. How might the BBC achieve the delivery of a universal online service, which was free at the point of use? As VLV notes above, the Commission's guidelines for the application of State aid to broadband networks are different from those for public service broadcasting. VLV also notes that in his budget speech the Chancellor of the Exchequer informed Parliament that he intended to take £250 million from the BBC's digital switchover funds in order to foster rural investment, although the details of this proposal remain unclear.

22. *VLV considers that it will now be essential for the BBC to seek to ensure that the outcome of any such investment by the Government of licence payers' money in rural networks must guarantee sufficient broadband speed to all licence payers for them to be able to access the BBC's online service free at the point of use. To this end, VLV encourages the BBC Trust to take active steps to liaise with the government and all providers of electronic communications service in order to achieve this.*

23. In parenthesis, VLV calls the attention of the BBC Trust to the fact that Finland has recently introduced a right for all its citizens to have access to a broadband network, and that the Finnish government hopes to upgrade its services to a 100 MBps service within five years. In contrast, the UK is only ranked at 33 in the world, with an average broadband speed which is five times lower than that which is available in South Korea.

24. VLV further submits that, only by ensuring a universally accessible online service which is available to all licence payers free at the point of use, will the BBC will be able to fulfil Sir Michael Lyons' ambition of being much more open and responsive to the public.

Public Service or Public Value?

25. The August 2007 Statement of Policy by the BBC Trust on the syndication of on-demand content was based on a PVT conducted by the Trust. This concept is not recognised in European law, which only permits State aid for public service broadcasting services. The BBC Charter and Agreement, however, which is the expression of the UK Government's public service mission for the BBC, uses the ambiguous term "public purposes".

26. These are not pedantic quibbles, for the rationale in the Amsterdam Treaty for allowing State aid for public service broadcasters is that, in addition to preserving media pluralism, it "is directly related to the democratic, social and cultural needs of each society". It is clear from the European Commission's 2009 Communication on the application of State aid to public service broadcasting, that this requirement applies to the online services which are provided by public service broadcasters, as well as to those which are broadcast.

27. VLV recognises that the Trust's August 2007 policy statement on syndication of on-demand content may well have added public value to the services provided to licence payers by the BBC, but it did not instruct the BBC Executive to provide a universal on-line service. Paragraph 16 of the policy statement merely allowed the Executive "to specify additional requirements designed to ... ensure a quality experience for users."

Public Service and 'Public Service Programmes'

28. The ultimate task of a public service broadcaster is to translate its public service remit into radio and television programmes, as well as into online services which can be accessed by all licence payers. Of course, there will always be an ongoing debate about whether this task has been well done or not.

29. The manner in which the BBC has interpreted this responsibility has changed over the years. The traditional Reithian imperatives of 'to inform, to educate, and to entertain' have gradually been modified to permit more popular programming. Sir Huw Weldon wanted a win-win philosophy, in which the BBC would make 'the good popular, and the popular good'. Later on, in an increasingly competitive media environment, the BBC justified popular programmes in order to improve the Corporation's audience reach. On other occasions, licence payers and regulators have been told that it is the whole range of the BBC's programmes which constitute its public service provision. Programmes, we are advised, can "entertain in order to inform", and "inform in order to educate". This preserves the BBC's editorial freedom and independence.

30. But in future, as Sir Michael Lyons informed VLV on 30 June, the Trust wants the BBC Executive to provide programmes of quality and distinctiveness. Thus, by implication, if not by result, every BBC programme has to aspire to be distinctive, and of high quality. This requirement must necessarily lead to changes in the syndication policy of the BBC Trust.

31. VLV submits that in future it will be necessary for the BBC Executive to recognise that:

(a) All programme content, whether broadcast or provided online, will have to be distinctive and of a high quality; and

(b) The previous policy of allowing the syndication of 'short edited clips of such content' would contradict such an aspiration.

Specific Questions Asked by the BBC Trust

32. VLV will now deal with the BBC Trust's specific consultation questions:

(a) Should the BBC's Programmes Always Be Presented in Context?

33. VLV has reservations about the BBC Executive's proposal that BBC programmes should only be available in the context of a BBC package, such as a specific BBC TV channel. This is for two reasons:

The first is that one of the major advantages of online delivery systems for viewers is that they can choose the time when they watch an individual programme. The concept of the TV channel as a "package" seems old-fashioned and backward looking. This is not to deny the value to viewers of the traditional TV channel, or even of the BBC syndicating a whole channel to be made available online. But it will also be valuable for licence payers to access, at a time of their own choosing, an individual programme, such as, for example, new and current affairs programmes, consumer advice programmes, or individual sporting events. There could, however, be an argument for ensuring that individual episodes of TV serials had to be packaged in the order in which they were first transmitted.

34. The second reason, which the BBC Executive advances for only allowing its online programme to be delivered in a package, is that it would allow the Executive "to deliver the public purposes more effectively". But as VLV notes above, the decision by the Trust for one of the future goals for the BBC to be "quality and distinctiveness", undermines the Executive's traditional rationale of delivering its public purposes by means of a mixed schedule. If the Executive is to fulfil the Trust's ambition, every BBC programme will need both to contribute to the fulfilment of one of the BBC's public purposes, and to demonstrate quality and distinctiveness. This means that it should not have to be packaged in order to fulfil the BBC's public purpose.

(b) Should the Trust Consider Value for Money in its Syndication Policy?

35. VLV welcomes the BBC Trust's proposal, as articulated by Sir Michael Lyons in his speech on 30 June, that the BBC should offer licence payers outstanding value for money. VLV therefore welcomes the Executive's proposal for the Trust to consider the cost imposed on the BBC by its syndication policy. On the other hand, VLV is not clear why the Executive cannot simply make arrangements for any organisation which aspires to the right to syndicate BBC programmes to sign a contract which regulates the secondary use of these programmes, which would then allow it to download, or to receive over the air free of charge, a digital feed of BBC programmes, which it can then convert for its own platform at its own expense, subject of course, to the service being made available free of charge to licence payers.

36. A situation might arise, however, where some licence payers choose not to pay their television licence fee, and only to access BBC programmes online. If this were to be so, it seems to be covered by the powers granted to the Secretary of State to define a television receiving set, under s. 368 of the 2003 Communications Act. Alternatively, it might, for example, be necessary, for the BBC to require all online platforms which syndicate BBC programmes to require all their customers to certify that they have also paid their television licence.

(c) Should the BBC Develop Standard Software that Can Work on Many Devices such as the iPlayer?

37 The BBC cannot hope to provide software for every new electronic product that comes along. It should not, therefore, seek to choose between different platform technologies. If the Trust's goal for the BBC is for it to provide programmes that demonstrate quality and distinctiveness, VLV considers that, as the switch from analogue to digital TV demonstrated, either the platform providers, or small and medium British companies, will want to develop software which makes it possible for licence payers to access BBC programmes on these new online platforms.

(d) Should the BBC be prepared, in principle, to invest in developing special non-standard technology for other devices?

38. No – see VLV's answer above.

(e) Is Audience Reach the Best Criterion for Setting Priorities? If so, what should be the threshold?

39. No comment. See VLV's answers to the two previous questions.

(f) Should the BBC also publish its criteria for prioritising any Non-standard Software Development?

40. There should only be one criterion. That is to enable and ensure the delivery of a universal online service in areas of the UK where it is not already available, or will not be available for a very long time.

(g) Should the BBC Develop a Customised iPlayer for a Manufacturer?

41. Any such activity would fall under the provisions of article 71 of the 2009 Communication of the European Commission on State aid for public service broadcasting. This would mean that the BBC would have to compete with the private sector and that any profits would have to be returned to the licence payer. In VLV's view, any such activity would have to contribute to the Trust's goal of providing outstanding value for money to the licence payer.

(h) Should the BBC allow Manufacturers to develop their own versions of the iPlayer or other Electronic technology?

42 VLV notes that the BBC Executive opposes this proposal as it would impede the BBC from ensuring editorial standards, or the high quality that viewers expect from the Corporation. VLV takes a different view. We consider that the BBC can ensure that editorial standards are met through the application of copyright law, rather than technology. Moreover, as we have argued above, the BBC has an inescapable duty to establish a suitably high standard for the delivery of online services to every licence payer.

VLV's Further Comments about the Executive's Proposals for On-Demand Changes

43. The BBC Executive's proposals look outwards from the Corporation to the licence payer, rather than seeing the issues from the point of view of the licence payer. The move from broadcasting signals over the air, to transmitting them online, requires the BBC Executive to accept a change of perspective for transmission policy issues (although not necessarily for programme production issues). The BBC has traditionally both exercised and enjoyed

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powers over how and when the broadcast signal reached the licence payer's radio or television set. In the online [and on-demand] world, signal delivery is necessarily subject to the forces of market competition. The way for the BBC to bridge this gap is through a stricter application of the copyright powers which it exercises over its programmes, regardless of whether or not it charges for them.

44. VLV submits that the BBC Executive should use its powers of copyright to ensure that :

- Syndicated BBC programmes are only transmitted in a complete form. They are never shown in extracts, in shortened versions, or interrupted by advertising commercials.
- The BBC is always identified as the producer of the programme, both within the programme itself and in any secondary publicity directed at licence payers.
- While it allows the retransmission of its programmes on any platform, which is free to licence payers at the point of use, it categorically refuses to allow the secondary retransmission of these programmes to other organisations, such as file-sharing organisations or social networking sites.

Conclusion

45. If the BBC Trust were to amend its 2007 syndication policy in the manner proposed by VLV, we consider that the Trust would be able to achieve the goals which the Chairman of the Trust outlined in his speech to VLV, and to ensure that the BBC's syndication policy will offer to licence payers and to the media industry:

- Quality and distinctiveness.
- Outstanding value for money.
- A much more open and responsive approach, both to the public and to the wider media sector.

End.

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