

**Project Kangaroo**

**JOINT VENTURE BETWEEN BBC WORLDWIDE LIMITED,  
CHANNEL FOUR TELEVISION CORPORATION AND ITV  
PLC RELATING TO THE VIDEO ON DEMAND SECTOR**

**Joint Position Paper on the Effects of the Transaction on  
Competition**

**2 October 2008**

## Contents

| <b>Clause</b>  | <b>Page</b> |
|--|-------------|
| 1 Context and Summary.....                           | 1           |
| 2 Key Elements of the Joint Venture.....             | 4           |
| 3 Preliminary Observations.....                      | 5           |
| Introduction.....                                    | 5           |
| The relevant markets.....                            | 5           |
| The counterfactual.....                              | 6           |
| Pro-competitive effects/consumer benefits.....       | 7           |
| The Parties as ‘close competitors’.....              | 10          |
| 4 The VOD Rights Acquisition Market.....             | 11          |
| Introduction.....                                    | 11          |
| Overview.....  | 12          |
| Catch-up rights.....                                 | 12          |
| Archive rights.....                                  | 12          |
| No risk of spillover to PACT negotiations.....       | 14          |
| Conclusion on rights acquisition.....                | 15          |
| 5 The Retail VOD Market - Introduction.....          | 16          |
| Introduction.....                                    | 16          |
| The business models.....                             | 16          |
| The competitors.....                                 | 16          |
| The joint venture’s relative market position.....    | 20          |
| Exclusivity over rights.....                         | 21          |
| 6 The Retail VOD Market – Free Content.....          | 22          |
| Introduction.....                                    | 22          |
| Competitive analysis.....                            | 22          |
| 7 The Retail VOD Market - Transactional Content..... | 24          |
| Introduction.....                                    | 24          |
| Overview.....  | 24          |
| DTO.....   | 25          |

|   |    |
|---|----|
| Transactional content - key general features .....      | 26 |
| Consumers reluctant to pay for content .....            | 26 |
| Limited pay transactions on UKVOD .....                 | 27 |
| Limited exclusivity rights.....                         | 27 |
| Pricing constraints .....                               | 29 |
| Market size - UKVOD projections.....                    | 29 |
| Market shares - UKVOD projections .....                 | 31 |
| Market shares - the DVD proxy .....                     | 33 |
| Non-price effects .....                                 | 34 |
| 8 Overall Conclusions on the Retail Market.....         | 34 |
| 9 The VOD Syndication Market.....                       | 34 |
| Introduction .....                                      | 34 |
| Overview.....   | 35 |
| Archive content.....                                    | 35 |
| Catch-up content .....                                  | 37 |
| Preferences for UK content .....                        | 38 |
| VOD services are successful without UKVOD content ..... | 39 |
| Conclusion on syndication.....                          | 41 |
| 10 The Internet Display Advertising Market .....        | 41 |
| Introduction .....                                      | 41 |
| Analysis .....  | 41 |
| Conclusion on advertising .....                         | 42 |
| List of Annexes .....                                   | 43 |

## 1 Context and Summary

- 1.1 This paper sets out the Parties' joint position on the effects of the transaction on competition in each of the four relevant markets identified in the Parties' joint position paper on market definition (the "Market Definition Paper"). It should be read in conjunction with the Parties' statement of case and overview, the joint background paper on the joint venture and the joint position papers on the counterfactual and barriers to entry.<sup>1</sup>

### **Background**

- 1.2 UKVOD will offer consumers an internet site on which they will be able to access a broad range of material that has appeared on UK television including archive material that is likely otherwise to be unavailable. It will support, and develop awareness of, this content with strong editorial material and technology that allows connections to be made between different items of content. Over 90 percent of transactions on UKVOD are expected to be free to the consumer and funded by advertising.
- 1.3 The site will contain material that is exclusive to UKVOD but nearly all of its most popular content, including all free catch up, and nearly all content that can be purchased to be permanently owned (DTO), will be non-exclusive.

### **Competition between the parties**

- 1.4 The Parties are not currently close competitors in VOD markets. BBCW does not have a VOD service and ITV has a limited service. There are also considerable differences between the Parties' syndication activities. The nascent state of the VOD market, the uncertainty as to how the market will develop, and the significant strengths enjoyed by competitors mean that there is no counterfactual scenario that can reasonably be expected under which the quality and range of content that will be available on UKVOD could be provided to consumers.
- 1.5 The Parties' market positions in free-to-air linear television are no guide to their positions on VOD markets. A significant proportion of the Parties' linear broadcast material is unsuitable for archive VOD (e.g. news, sport, talent shows and soap operas) and the Parties do not have VOD rights over much material that is suitable, including most US material. Where material is suitable many of the rights will be non-exclusive (e.g. nearly all rights relating to permanent ownership). UKVOD will face significant competitors, including Apple (the market leader in transactional VOD), Sky, Virgin Media, Microsoft, Amazon/LOVEFiLM and Tesco. UKVOD's projected market share will be in the region of 10 percent of VOD transactional revenues (11.5 of television only) by 2012.

### **Rights acquisition**

- 1.6 The transaction will not change competition for acquisition of VOD rights, as the Parties will continue to acquire these on the same basis as now. There is currently a regulatory obligation to separate the sale of most VOD rights from the sale of free-to-air linear rights when broadcasters are acquiring content from independent producers. There is already evidence of these rights being held separately and this is likely to accelerate, driven as it is by financially strong and well-informed sellers and purchasers. Catch-up rights will continue to be purchased with free-to-air linear rights as they are now. The Parties will be financially incentivised to acquire content for exploitation on UKVOD in competition with each other and third parties.
- 1.7 The proposed joint venture will not result in co-ordination in the renegotiation of the PACT terms of trade. In the first place, BBCW (as opposed to BBC) is not involved in these negotiations and, in any event, the fact that rights acquisition negotiations are

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<sup>1</sup> A glossary of terms used in this paper can be found in Annex 1.

driven by free-to-air rights, the strong competition in relation to acquisition of VOD rights and the oversight exercised by Ofcom mean that there is no prospect of co-ordination.

**Retail competition**

- 1.8 The major retail competitors for VOD include pay TV providers such as Sky and Virgin Media; telecoms businesses such as BT; games consoles manufacturers such as Microsoft and Sony; device manufacturers such as Apple; and online VOD service providers such as Amazon.
- 1.9 Consumers have a strong preference for viewing VOD over their TV sets and this gives a retail market advantage to closed platforms. The two leading closed platforms - Sky and Virgin Media - together have over [x] percent share of UK transactional VOD revenues. Other major competitors include Apple which has great strength through its iTunes download business and links to iPod and iPhone devices and is the leading on-line transactional service in the UK; BBC iPlayer, a free publicly-funded service; Microsoft through its Xbox media download service; Amazon/LOVEFiLM was a pioneer in the UK DTO market and BT which has a very large subscriber base and leading complementary products in broadband and telephony. In many of these examples (Sky, Virgin, Apple, Microsoft and BT), the competitor is able to bundle VOD as a "free" add-on to other higher margin services, placing them at a significant advantage to standalone content services. In addition, a number of these competitors have joint venture or cooperation arrangements, e.g. BT Vision is to sell Xboxes that will enable viewers to access both BT VOD content and Xbox content as well as free-to-air linear television and a joint venture between Sony and Sky enables users to download a wide array of content from a range of distributors and broadcasters on to PSP devices. Potential future major UK competitors include Hulu, the leading US open VOD service, and Amazon.
- 1.10 The UKVOD proposition will be a standalone content proposition, focussed on editorial quality and a comprehensive content library. Compared to competitors it will be disadvantaged in not having: a TV platform consumer proposition; a PVR to allow recording of content; access to a wide range of exclusive premium film or sports material; a strong subscriber base; the ability to bundle other services; links to hardware; a strong internet retail base; or the ability to strike global deals.

**Free content**

- 1.11 Over 90 percent of transactions<sup>2</sup> on UKVOD are forecast to be free to consumers. The Parties will compete with each other and third parties for the sale of advertising around their own content and UKVOD will sell advertising in and around common parts of the site. There will be significant competition from free content available on other sites: free catch up will continue to be available on C4C and ITV and is likely to be available on third party sites and platforms; BBC iPlayer is outside the scope of the joint venture; other internet sites such as Sky Player will offer free content (in the case of Sky to its subscribers); and PVRs are a strong alternative to catch up and, increasingly, archive material. Finally, there is a vast market for unlicensed (illegal) content, including everything that will be offered on UKVOD. Short-form content is also provided free.

**Transactional content**

- 1.12 The Parties are not currently competitors in transactional VOD content and it cannot be assumed that, absent the joint venture, all of the Parties would offer transactional TV content given the low propensity of consumers to pay for content over the internet or TV content other than premium content (i.e. movies, sports and adult).
- 1.13 It is forecast that over 90 percent of DTO content offered by UKVOD will not be exclusive to the site and identical content will be available elsewhere.

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<sup>2</sup> This includes views by streaming, DTR and DTO.

- 1.14 UKVOD will face price (and non-price) competition from other sites. The competitors include suppliers such as Apple, which dominates the US transactional internet market and leads the UK market, and follows a business model which is driven by the desire to maximise hardware sales; and Microsoft, the number two US supplier. DVD is an alternative to transactional VOD [>€].
- 1.15 UKVOD forecasts that it will have about 10 percent of the UK transactional long form VOD sector by 2012.

**Syndication**

- 1.16 In terms of archive content, UKVOD will have strong incentives to syndicate to other platforms to access consumers who would not otherwise visit the UKVOD site and maximise revenues. In any event, it will not be the only or major supplier of content to other sites and platforms: other platforms will be in a position to market PVRs (which Sky regards as equivalent to a VOD service) and US content is mainly non-exclusive. As for UK content, DTO rights and many other VOD rights may not, under the current PACT terms of trade, be bundled with primary broadcast rights. Linear TV rights and (non catch up) VOD rights are increasingly being sold to different parties, and this separation is likely to increase as the market matures and becomes more similar to the market for other secondary rights such as DVD rights. Wholesalers or aggregators can syndicate content in bulk, as Microsoft has with BT Vision, and carve outs in the joint venture arrangements will allow the Parties to syndicate some archive rights separately to the joint venture's syndication activities.
- 1.17 The syndication of free and DTR catch up rights will not be included within the joint venture and the joint venture does not materially affect the incentives of the Parties to syndicate these rights. BBC catch up is in any event included on iPlayer with syndication decisions taken by the BBC in accordance with public service principles (the BBC has already launched a syndicated version of iPlayer on Virgin Media). UKVOD will have the right to syndicate DTO rights in catch-up content but [>€] free or DTR syndication rights in the same catch-up content will continue to be available from the relevant Party.
- 1.18 It is not the case that access to UK content is required to provide a VOD service and the most successful VOD services - Apple, Virgin Media and Sky - are not in any way dependant on material that will be on the UKVOD service.

**Advertising**

- 1.19 The transaction will have no material impact on the internet display advertising markets where the Parties will have an insignificant combined market share.

**Conclusion**

- 1.20 The concerns of some third parties that the transaction would result in UKVOD having strong retail market power and be able to drive up prices is unsustainable given that nearly all transactions will be free and advertising will be sold in a market which is highly competitive and in which the Parties will have a small market share. For transactional material, the Parties will face strong competition from more powerful and better established services. Consumers are generally extremely reluctant to pay for any internet or TV related content and, where they are prepared to pay for such content - usually in respect of DTO - there will be alternative outlets for the same and similar content.
- 1.21 On syndication, there will be no material change in the circumstances in which the most desired content - free and DTR catch up - is syndicated. The Parties will have the right to separately syndicate all of the most valuable DTO content. As for the rest, UKVOD assumes in its business plan that archive material will be syndicated and it will have every incentive to do so given the value of syndication deals. In any event, other sites

have alternative sources of content and when, outside the context of this inquiry, the two leading closed platforms, Virgin Media and Sky, have publicly discussed their VOD businesses both indicated that their success to date has been built on content that will not be syndicated by UKVOD.

- 1.22 There is no market in which the joint venture will materially reduce competition. Rather, the service that will be offered by UKVOD will give consumers a scope of content, quality of editorial and functionality that is unlikely to be available if UKVOD was not to proceed. It will offer a differentiated mainly free proposition in a market led by powerful global players with distinct offerings and under threat from unlicensed sites which attract considerable consumer support.

## **2 Key Elements of the Joint Venture**

- 2.1 The Parties have provided full details of the proposed transaction to the Commission. The key features for the purposes of the competitive assessment may be summarised as follows:

- The Parties will continue to compete with each other, and third parties, for the acquisition of VOD rights in content.
- UKVOD will offer catch-up and archive content to consumers.
- UKVOD intends to make available to consumers content from third parties, in addition to the content contributed by the Parties.
- UKVOD intends to offer consumers a choice between, on the one hand, one-off viewing of a title on a free advertising-funded and/or DTR basis and, on the other hand, permanently owning a title through DTO.
- It is forecast that over 90 percent of transactions on UKVOD will be free and advertising-funded.
- The Parties will sell advertising in respect of their free content in competition with each other.
- ITV and C4C will continue to offer catch up on their own websites. BBC iPlayer will continue to offer BBC catch up as a standalone proposition.
- Consistent with the relationship between free-to-air linear broadcasting rights and catch-up rights (as provided for in the PACT terms of trade), temporary catch-up syndication rights (i.e. free and DTR) will remain with each Party and will not be transferred to UKVOD. UKVOD will have the right to syndicate DTO catch up rights [x].
- The Parties will retain the right to syndicate DTO rights in content that is wholesaled on DVD to DVD retail platforms, meaning that the most popular transactional content will be provided by the Parties to UKVOD on a non-exclusive basis.
- Archive content licensed to UKVOD will be syndicated solely by UKVOD unless it falls within an exception to the exclusivity provisions. The UKVOD business model assumes that it will seek syndication and sub-licensing agreements with third party platforms for archive content.

### 3 Preliminary Observations

#### Introduction

3.1 In this section the Parties:

- briefly describe the relevant markets;
- explain why a counterfactual based on the assumption that the Parties are or will be close competitors in VOD markets is incorrect;
- describe in outline the consumer benefits that will arise from the joint venture;
- set out why the Parties' free-to-air linear television market shares are no guide to their positions on VOD markets.

#### The relevant markets

3.2 The Parties set out their views on relevant markets in the Market Definition Paper. They described four markets in which to consider the competitive effects of the joint venture:

- (a) A UK market for the acquisition of VOD rights;
- (b) A UK retail market for the supply of VOD services (the "retail VOD market");
- (c) A UK wholesale market for the supply of VOD services (the "VOD syndication market"); and
- (d) A UK market for the supply of internet display advertising.

3.3 So far as markets (a) and (b) were concerned the Parties stated that the appropriate approach to market definition in the VOD sector, where markets are nascent, is to consider the cumulative effect of various substitution possibilities in relation to both VOD delivery technologies and VOD content. If faced with a 5-10 percent price increase by a hypothetical monopolist open internet supplier of UK TV VOD content, consumers would have a number of effective switching options. Not all options will be appropriate for all consumers but enough consumers would have sufficient alternatives to make such a price increase unprofitable.

3.4 In terms of VOD delivery, there is substitutability between a variety of technologies and platforms:

- VOD provided over TV platforms is a strong constraint on internet VOD;
- PVRs compete directly with other VOD services because they are seen by consumers as a direct alternative means of accessing recent and, increasingly, older content; and
- DVDs are an alternative to VOD for transactional (i.e. DTO and DTR) content.

3.5 For a significant proportion of consumers there is substitutability between a range of different types of content:

- UK and US originated content;
- Film and made-for-television content;

- Free (including illegal) and pay sources; and
- Long form content and short form content of the type available on websites such as YouTube.

3.6 Further evidence on substitutability will be provided in a supplementary paper on market definition to be submitted by the Parties.

**The counterfactual**

3.7 The Commission is referred to the confidential papers submitted by the Parties on their individual counterfactuals. There are a number of generic points concerning the counterfactuals that are relevant to the competitive assessment.

3.8 The Commission's Merger Guidelines state that, in applying the substantial lessening of competition test, the counterfactual will be the situation which is expected to arise in the absence of the merger under consideration.<sup>3</sup> "In many cases", this will relate to the existing, pre-merger, competitive conditions. However, in "certain circumstances" the Commission will need to consider other factors that "may be expected". It is clear that it would be inappropriate to take account of possible market changes unless, as a minimum, there was a reasonable expectation that they would arise in the near future.

3.9 Some third party comments to the Commission have suggested that the Parties are currently close competitors in VOD and that this will continue for the foreseeable future absent the joint venture. A proper analysis will demonstrate that BBCW is not a current competitor at all in VOD retail markets; that each of the other Parties have different market propositions; and that there are a number of possible models for the development of each Party's VOD proposition.

3.10 The current position varies considerably between each Party. BBCW does not have a VOD service (iPlayer is a BBC service limited to 0-7 day catch up and outside the scope of the proposed joint venture). ITV has a limited free streamed service that focuses on catch up and a limited range of archive material mainly related to current linear programming. C4C has a broader service that includes catch up, film and archive material on a free or pay basis, although this is limited in scope, largely reflecting the range of material available to C4C. The pre-merger situation is therefore that on the retail VOD market BBCW is not a competitor at all and C4C and ITV each offer different types of services.

3.11 In relation to syndication, the current position is that each of the Parties adopt a different approach to syndication with ITV having adopted a more conservative approach to date, C4C syndicating 4OD (as an aggregator service) more widely, and BBCW licensing VOD content to various platforms on a programme licensing basis.

3.12 As for the future, the OFT's conclusion that ITV and C4C would continue to offer independent archive content services in the absence of the transaction was unfounded for two reasons:

- First, it reflected a misunderstanding of the current offerings of C4C and, in particular, ITV as described in the preceding paragraphs.
- Second, it assumed that the two broadcasters will have business cases to expand/maintain the supply of archive content by themselves and ignores the costs of making available [→] classic archive, that is old archive material for which there is relatively limited consumer demand (see paragraphs 3.19 to 3.20 below). There is no basis for an assumption that either Party would develop their retail archive offering to the same extent as would be developed on

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<sup>3</sup> CC2, Merger Reference Guidelines, paragraph 1.22.

UKVOD. In this regard, the Commission is referred to the confidential counterfactual papers submitted by each of C4C and ITV.

- 3.13 The OFT assumption that BBCW would commercialise BBC archive content in the absence of the joint venture and “represent a significant potential competitor” to the other Parties’ wholesale and retail VOD offerings was overly simplistic. Even if BBCW were to enter the retail VOD market (which is by no means certain), the OFT overstated the extent to which a BBCW venture - whether undertaken independently or in partnership with a third party - would constitute the closest potential competitor to ITV and C4C (BBCW could not offer any catch-up content and the nature of archive content on offer would very much depend on factors such as the relationship with other BBCW services and the identity of any partner).<sup>4</sup>
- 3.14 The counterfactual can only assume with any reasonable expectation that ITV and C4C will have some presence in the retail VOD market and possibly ongoing syndication activities. In respect of BBCW, there is significant uncertainty about whether it would enter the market and about the likely scope of its activities, so it would be wrong to assume that it will be a standalone competitor offering a broad and comprehensive range of content. Similarly, it can no more be presumed that ITV would develop a similar service to that currently offered by C4C than it can be expected that C4C would maintain or increase the scope of its current offering.

**Pro-competitive effects/consumer benefits**

- 3.15 The deal rationale for UKVOD is to create a customer proposition that can compete in the VOD market against powerful competitors who are able to leverage significant existing assets that the broadcasters do not possess (e.g. an established closed platform customer base, an installed base of proprietary hardware devices, an established internet retail presence, global reach). To achieve this, the Parties intend to create a ‘one stop shop’ that will provide consumers with the convenience of being able to access both popular content and niche content on a single service. The UKVOD service site will include catch up as well as archive, film as well as TV, and US as well as UK content. This will involve providing UKVOD with the Parties’ catch-up content (excluding BBC catch up) as soon as possible after broadcast transmission and the pooling of content from the Parties’ archives. It will entail investing significantly in technology and in editorial content and packaging, in order to provide a sophisticated and comprehensive user experience.
- 3.16 Customers will have the advantage that they can access a wide range of content, organised within an easy-to-navigate single library. Even if the customer does not know on what channel a specific title was broadcast (or if the VOD rights are currently held by a party other than the original broadcaster) they will have a high chance of finding what they are looking for on the UKVOD site, rather than having to searching multiple sites.
- 3.17 The UKVOD proposition is much more than an aggregation service that simply collates existing levels of demand. Specifically, the investments in user functionality and editorial content are intended to stimulate new levels of demand by ‘taking the consumer on a journey’. This will generate additional interest in, and demand for, programmes with which they may have a nostalgic connection, or for which they may not otherwise have had an immediate interest or where the connection with their first choice programme is not immediately obvious. [~~redacted~~].
- 3.18 It is expected that this will stimulate substantially higher levels of demand for UK archive content, such that it becomes viable to offer a much broader range of content. [~~redacted~~]<sup>5</sup>
- 3.19 This substantial increase in demand will improve the viability of making additional content available. This is because [~~redacted~~] there are substantial incremental costs

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<sup>4</sup> [~~redacted~~]  
<sup>5</sup> [~~redacted~~]

associated with making an additional hour of content available (i.e. irrespective of usage) on a VOD service. This reflects the following costs:

- Digitisation – converting the content from a physical tape to a master digital file. [redacted]. This cost is only incurred the first time a title is selected to be converted to digital. [redacted].
- Transcoding and content preparation – the cost of converting a digital master file into a video stream compatible with the VOD service's online platform and associated content preparation costs, such as quality assurance, meta-data creation and compliance. [redacted]. These activities are expected to take place whenever content is supplied for digital consumption. A cost is therefore incurred whenever a new distributor looks to acquire digital content.
- Rights clearance – clearance costs are highly dependent on the piece of content in question, with revenue shares applying to content covered by terms of trade and flat fees payable on other content. [redacted]. Each circumstance will be different. However, a rights clearance cost may be incurred when the content is used in a different format or provided to a different distributor.
- Content storage and hosting – the costs of storing and hosting content on the VOD service platform. [redacted].

3.20 These incremental costs mean that, in order to justify the costs of putting content onto a VOD service, a reasonable level of demand is required. In a counterfactual where each of the Parties individually sought a return from commercialising its archive (or where the Parties co-operated with a service less focussed on an archive-based proposition), a more limited volume of archive titles would be viable. However, the demand for archive content that the joint venture proposition will support and encourage will mean that a more significant amount of titles becomes viable. This is estimated to be in the region of an additional [redacted] hours of content, which may grow as the UKVOD business model proves successful.<sup>6</sup>

3.21 The viability of these additional titles is driven solely by substantial increases in volume associated with the UKVOD proposition and not any increase in prices.

3.22 These estimates may be conservative as they do not seek to quantify the cost benefit from economies of scale (i.e. genuine reductions in incremental costs) associated with the pooling of archives. [redacted].

3.23 These benefits would not be likely to arise absent the joint venture for the following reasons:

- None of the Parties alone have a sufficient range of material to provide the scope of content that would be available on UKVOD thus making it difficult to credibly market an archive based proposition (as opposed to a service focussed on current and recent material with some supplementary archive). [redacted].
- A joint venture between a Party and a third party would face a similar difficulty. The site would be limited as to the range of material it could draw on and third parties are primarily interested in catch up and recent content. That is not to say that such a site would not be successful – it might be – but its success would not be based on the business proposition driving UKVOD, focussed on providing a 'one stop shop' for a range of material that has appeared on UK television.

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<sup>6</sup> [redacted]

- It is unlikely that, absent a joint venture similar to UKVOD, a third party would be able to replicate the output and effect of UKVOD, through entering into syndication deals with the three Parties:
  - A third party would face substantial execution risk in attempting to secure the cooperation of the three Parties. The UKVOD proposition effectively means that the final product is greater than the sum of the parts. Hence, a third party seeking to negotiate the cooperation of the Parties' will be faced with the prospect of each Party seeking to extract that additional value for themselves. A joint venture between the Parties removes this 'hold-up' problem by allowing the Parties to extract a fair share of the incremental benefit of their collaboration. A third party negotiating separately (and bilaterally) with the Parties would face severe difficulties in achieving such a solution. It might do a deal with one of the Parties (depending on each Party's syndication strategy) but it would be much harder to do a deal with all three. Moreover, a non-broadcasting industry partner (or non-UK partner) is likely to be less sympathetic about the need to offer catch up and DTO content to other sites.
  - In order to justify the investment in fully exploiting archive content a third party is likely to require at least the same level of content exclusivity that will be offered to UKVOD and probably more. It would need to promote the service and devote resources [>&] and to justify this cost it would need to be reasonably confident about likely levels of demand.
  - A key component of the Parties' incentives to invest in the UKVOD venture is the attraction of having a more direct relationship with customers. This generates 'option value' going forward in terms of an improved understanding of customers giving rise to other potential strategic opportunities. An arrangement with a third party owning a platform and the customer relationship and simply sourcing content from the Parties would be strategically far less attractive and this would substantially diminish the business case for investing in making the broad range of archive available.
  - It is unlikely that the BBCW (and possibly the other Parties) would be prepared to enter into an arrangement concerning such a quantity of its content to an entity in which the Party had no equity involvement.
  - A third party solution would face substantial additional transaction costs associated with delivering a similar proposition. [>&]. The joint venture will have access to the Parties' personnel and institutional experience to achieve this and a degree of cooperation between UKVOD and each Party that would be unlikely to emerge out of a purely contractual relationship.
  - More fundamentally, most potential joint venture partners of scale have business models that extend beyond pure content exploitation. This would inevitably create tensions in seeking to align the Parties' content objectives with those of a more broadly based business. A large multi-product online distributor would be likely to wish to cherry pick content and disregard even commercially viable titles that produced a lower return than other products. As standalone content businesses and as public service broadcasters (or, in the case of BBCW, a body acquiring content from a public service broadcaster) the Parties have a strong common interest in making archive material available even if the return is lower than for other products.

3.24 In summary, UKVOD's vision is to become a 'one stop shop' for UK television VOD content. Since catch-up content will always be available on ITV and C4C's own websites and on BBC iPlayer, the key element of UKVOD's proposition is its strategy to

promote a wide range of UK archive content. No third party can be reasonably expected to attract more users with a propensity to view archive content and therefore be in a position to make available as much archive content as UKVOD.

3.25 This focus will enable UKVOD to improve the economics of archive content relative to other VOD services and to bring a substantially greater amount of content to the market. This will generate competition in the VOD markets and lead to substantial benefits to:

- consumers - in terms of the range of content available, the quality of the service in terms of user-friendliness, interactivity and editorial links, and trust they will be able to place a service (including in relation to legitimacy of the content and the robustness of the technology) than comes from the endorsement of three broadcasters;
- content rights holders - who will receive royalties from content that would otherwise not be exploited to the same extent on other VOD services (in particular, in the absence of a compelling licensed proposition, large numbers of consumers will continue to access unlicensed material);
- advertisers - who can reach a new audience online with the same quality attributes as traditional television audiences; and
- technology providers - who will benefit from the technology investment of around [redacted] that will be made by UKVOD by the end of 2012 to innovate and promote the range of content in its library.

3.26 It is emphasised that these benefits are not generated by content exclusivity. Other sites and platforms will offer similar or identical content. The attraction of the UKVOD site derives from the business focus that the Parties have chosen to adopt and the fact that none of the Parties on their own or in cooperation with others are likely to commercially succeed in offering a similar proposition.

**The Parties as 'close competitors'**

3.27 The third party suggestion that the Parties are "close competitors" appears to stem from the fact that the Parties have large shares of the free-to-air linear television market and that they are important commissioners of UK independent productions. However, these factors are of limited significance in the VOD market:

- The Parties account for about 73 percent of total linear viewing. However, a significant proportion of linear television is unsuitable for archive VOD and may only have value for catch up. This includes news, sports, soaps, current affairs, religious and arts programming. Content only suitable for catch up represents about [redacted] percent of hours broadcast by the Parties,<sup>7</sup> which the Parties believe is a larger proportion than for other broadcasters. Of the content that has archive VOD value, the Parties control the exclusive rights to only around [redacted] percent. Therefore, it follows that the Parties can only control a maximum of [redacted] percent of content that has archive VOD value, and most likely quite a bit less given the Parties' content genre mix. Separately, the Parties also believe that this figure overstates their overall share of control of rights for content suitable for VOD, because a significant amount of popular VOD content is not accounted for in simple linear viewing shares, for example movies, sports and adult content that is only available on pay-per-view and not controlled by the Parties. If this content were taken into account the Parties' collective share of material suitable for archive VOD would be significantly lower again.

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<sup>7</sup> [redacted]

- The Parties will not have the VOD rights over much of the material that is suitable for VOD exploitation, for example movies, sports and adult and most US content, which has particular strengths in popular VOD genres such as comedy and drama. [redacted].
- Where the Parties do have VOD rights for suitable material many of the rights will be non-exclusive and therefore the content will be available on other sites and platforms (thereby reducing UKVOD's and the Parties' likely market shares as compared to linear television). The acquisition of VOD rights by the Parties and the supply of those rights to UKVOD is discussed in detail below in section 4. It is clear that terms of trade regulation (i.e. the distinction between primary and secondary rights) and the specifics of UKVOD's Content Supply Agreements (i.e. the nature of the carve outs and other special provisions) limit the amount of archive VOD content that will be exclusively available on UKVOD and much of the most popular content, including catch up and DTO versions of popular programmes, will be non-exclusive.
- There is strong alternative content to that which will be available on UKVOD. This includes film and short form content, other UK content and US content. As regards the latter and as explained in the Market Definition Paper, the nationality of content is much less important in determining competition than other factors such as age of content and genre. The 'next best alternative' for many consumers is driven by genre, classification or association with a particular creative individual, rather than origin of content. Thus, for example, *Dr Who* (UK) and *Torchwood* (UK) are closer content competitors to *Heroes* (USA) than to *The Tudors* (UK).
- As an internet retail service, UKVOD will enter the market in competition with a number of established internet and video service providers who have significant experience and market presence in VOD, including Apple, Sky, Virgin Media, Microsoft, retailers such as Amazon/LOVEFiLM and Tesco. At UKVOD's entry into the market in 2009, the first three of these competitors are expected to have a collective market share of [redacted] percent of UK revenues from long form transactional VOD content and their combined share is expected to be [redacted] percent in 2012 [redacted].

3.28 These factors mean that UKVOD's projected market share will be considerably smaller than the Parties' linear television shares. It is estimated that UKVOD will have only 10 percent of UK VOD transactional revenues by 2012 [redacted].

3.29 If account is taken of short form VOD, which as explained in the Market Definition Paper is substitutable for long form VOD content for a significant number of consumers, UKVOD's share of VOD market is very small. Sites such as YouTube currently account for the majority of users of online video (including short form and user generated content which are an alternative to UKVOD's offering), e.g. YouTube currently accounts for 55 percent of the total UK online video views and 41 percent of total minutes of online video viewing.<sup>8</sup>

## 4 The VOD Rights Acquisition Market

### Introduction

4.1 In this section the Parties explain that:

- the joint venture will have no impact on the acquisition of catch-up rights which are sold with linear television rights;

<sup>8</sup> Source: Comscore VideoMetrix, July 2008.

- there are strong financial and other incentives for the Parties to compete for the acquisition of archive rights;
- there is no prospect of any spillover to impact future PACT negotiations.

**Overview**

- 4.2 In the post-merger situation, the Parties will continue to compete for the acquisition of rights over content in the same manner as currently and will supply that content to UKVOD pursuant to the terms of the joint venture arrangements.<sup>9</sup> The transaction will therefore not have any effect on competition in the VOD rights acquisition market and the Parties note that the OFT was not persuaded by concerns from third parties that the transaction could give rise to buyer power issues in this market.
- 4.3 Some third party comments to the Commission raised concerns about aspects of the PACT terms of trade which relate to matters such as holdback requirements and the rights granted to the free-to-air linear rights holder, e.g. in respect of returning series. These concerns are not consequences of the joint venture. The same terms would apply under the counterfactual. In any event, the terms of trade are agreed in separate negotiations between the PACT and ITV, C4C and BBC respectively and subject to Ofcom’s regulatory oversight.
- 4.4 The Parties explain in further detail below why the transaction does not give rise to competition concerns in relation to VOD acquisition, considering catch up and archive content separately.<sup>10</sup>

**Catch-up rights**

- 4.5 Catch-up rights are tied to and acquired with free-to-air linear rights (although they are currently of much less value than free-to-air linear rights because linear viewing of a new TV programme significantly exceeds viewing on VOD services). The PACT terms of trade grant exclusivity over 0-30 day catch up to the holder of the primary rights, and this is not affected by the joint venture.<sup>11</sup> The existing strong competition between broadcasters (including the Parties, BBC, Five, Sky and Virgin Media) for free-to-air linear rights (which are their core business, and will be unaffected by the joint venture) entails equally strong competition for catch-up rights. In this regard, it should be remembered that the BBC’s rights acquisition activities are conducted entirely separately from those of BBCW.

**Archive rights**

- 4.6 The incentives for the Parties to compete aggressively against each other for rights over archive content are not changed by the proposed joint venture for the following reasons:
- [redacted].
  - [redacted].
  - [redacted].
  - In competing to acquire content, the Parties will retain the incentive to secure broader secondary rights (e.g. for distribution outside the UK) and reap rewards outside of UKVOD, e.g. under the DVD/DTO carve out.
  - [redacted].

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<sup>9</sup> [redacted]

<sup>10</sup> [redacted]

<sup>11</sup> See the Parties’ joint background paper on rights acquisition for further details.

4.7 As the VOD market becomes better established, there will be significant incentives for third parties to bid for VOD rights. There is already separation of free-to-air linear and VOD rights in the case of most US content with US studios selling VOD rights (including sometimes catch-up rights) separately to free-to-air linear rights. For UK content this has been less common although there are recent examples. For example BBCW acquired the VOD rights to *Primeval* where the free-to-air linear rights were held by ITV). Similarly, the production company Shine sold the free-to-air linear rights in *Merlin*, which is currently being broadcast, to BBC while the DTO and DTR rights were sold separately to Fremantle; and *Bonekickers* was broadcast by the BBC while the DTO/DTR rights were acquired by Granada International.

4.8 It has been suggested by some third parties that such a separation would be difficult in the case of UK content because of the power of the free-to-air linear broadcasters. The Parties refute that suggestion for the following reasons:

- For the reasons described in paragraphs 3.27 to 3.29 above the free-to-air linear broadcasters have a much weaker position in respect of VOD than they do in relation to free-to-air linear TV.
- The current terms of trade provide a ceiling as to what broadcasters may negotiate and require the separation of VOD and free-to-air linear rights in archive material. All DTO rights may be contractually sold separately to other rights. All other VOD rights may also be sold separately subject to certain exceptions of which the most significant relates to rights in returning series where there is a two year holdback to protect the value of the free-to-air linear rights. This restriction in respect of returning series does not apply to DTO rights, that is the producer can sell DTO rights to any party for exploitation at an earlier time.<sup>12</sup>
- Until very recently there has been no retail market of any substance for the exploitation of archive TV VOD rights. The development of such a market will increase the relative value of VOD rights, incentivising both producers and purchasers to separately sell and bid for such rights.
- Independent producers understand the scope for the separate sale of VOD rights and are perfectly capable of exercising their contractual rights in respect of such sales. They are supported by a well-informed and influential trade association (PACT). The Parties do not agree with the suggestion that the independent producers are too small or fragmented to be capable of taking advantage of the powers that they have. The top 10 independent TV production companies account for 66 percent of the total sector's revenue, and the top 5 for 41 percent of the same figure.<sup>13</sup> A number of large independent production companies with distribution arms have emerged as strong competitors following consolidation in the production industry in recent years (e.g. RDF Media, ALL3MEDIA, Ten Alps, IMG, Shine). These and other major production companies such as Endemol and FremantleMedia have significant scale and expertise, and are capable of taking advantage of commercial rights given to them under the PACT terms of trade, including aggregating rights and selling them in bundles when that is in their interests. There are recent examples of producers exploiting these rights:

<sup>12</sup> For BBC commissioned content, independent producers have the right to make a programme or episode available after the initial 7 day catch-up window. Under the ITV terms of trade, there is a general right for producers to exercise 'boxed set' DTO rights immediately after broadcast of the last episode, or individual episodes after expiry of the 6 month holdback period (unless negotiated for earlier release). For C4C, DTO rights can be exploited by the producer 30 days after broadcast in the case of a standalone programme, immediately after the last episode in a series as a 'boxed' set or 6 months after the broadcast of the last episode in a series for a single episode offered on a DTO basis.

<sup>13</sup> Source: PACT Census 2007/2008.

- In its 2007 annual report RDF Media, one of Britain's leading independent television production companies, states “[w]e are now exploiting not only content created by RDF Media Group companies but content created by more than 80 other independent UK producers and a further 40 other content creators from around the world. RDF rights’ active catalogue now exceeds 4,000 hours of programming (2006 3,000) about 70 percent of which is non-RDF content.” RDF also states that it is extending into the broadband market to extract full value from the television rights it controls.
- In September 2008 the blinkBox internet site announced a deal with All3MEDIA to acquire VOD content in more than 75 TV shows,<sup>14</sup> including *Peep Show* and *Shameless*. Fifteen of these titles were originally broadcast on C4C and two were broadcast on ITV. On 28 September 2008, Joost announced it had expanded its deal with ALL3MEDIA to add “hundreds of hours of shows to viewers in the UK”, including UK TV content such as *Peep Show*, *Shameless*, *Ultimate Force*, *North Square* and *Derren Brown*.<sup>15</sup> All sixteen named titles were originally broadcast on C4C or ITV.
- On the purchaser side, in addition to the Parties, VOD providers such as iTunes, BT, Virgin Media, Microsoft, Sky, Joost and Babelgum have the market know-how and financial means to bid for content from independents and do so currently.
- The combination of strong well-informed sellers and strong potential purchasers should provide sellers with significant scope to exploit their contractual rights to sell VOD on a standalone basis. As PACT points out in its submission of July 2008 to the Commission:

*“The Codes of Practice in the Communications Act and the ensuing terms of trade negotiated between PACT and the broadcasters, have disaggregated the rights to content. As a result, new platforms and services have greater access to UK-made content, alongside the traditional broadcasters. These new entrants offer the potential [to] provide greater competition, encourage value for money, provide more investment and offer more choice to UK citizens and consumers.”*

- 4.9 UKVOD will acquire content from a range of suppliers, including from third party content owners and content aggregators, that is companies who provide packages of content that is rights cleared and regulatory and technically compliant. This is likely to include the purchase of premium content, primarily film, from producers and distributors. UKVOD will therefore provide an additional purchasing point for aggregated content.

**No risk of spillover to PACT negotiations**

- 4.10 For the sake of completeness, the Parties comment here on the concern raised by certain third parties, although dismissed by the OFT, that the Parties have incentives to align the terms of trade with regard to VOD rights when these are renegotiated. There is no possibility of coordinated effects between the broadcasters in conducting renegotiations of the Parties’ separate terms of trade with PACT for the following reasons:
- The features described in the previous paragraphs of this section incentivising competition between the Parties for the acquisition of VOD rights will equally dis-incentivise any coordination between the Parties.
  - The PACT terms of trade negotiations are driven by a broad range of commercial factors of which free-to-air linear rights are by far the most

<sup>14</sup> See <http://www.c21media.net/news/detail.asp?area=89&article=44424>

<sup>15</sup> See <http://press.joost.com/>

important. Even in the context of a growing VOD sector, VOD rights will not drive these negotiations. VOD rights are one of a number of secondary rights (including, for example, repeat rights, DVD rights and overseas rights) which will have to be discussed - there is no practical scope for isolating the negotiation of VOD rights.

- BBC rights negotiations are conducted by the BBC public services arm which is separate from BBCW, which operates at arms length in accordance with the BBC's Charter and Agreement (BBCW plays no part in these negotiations and does not have terms of trade). It is BBCW that has the commercial relationship with ITV and C4C in respect of UKVOD. This of itself means that there is no scope for coordination between the Parties.
- Each broadcaster has its own separate and individual negotiation with PACT. These negotiations reflect different business priorities, e.g. BBC rights negotiations are driven by the public service objectives of its licence fee funded activities; ITV is driven by broader commercial considerations appropriate for a listed company; and C4C is government owned, has a public service remit and is commercially funded. Each broadcaster has its own budgetary requirements and programming objectives.
- The broadcasters are under statutory obligations to acquire UK content (at least 25 percent of which must be independent productions<sup>16</sup>) and to conclude terms of trade with independent producers, and thus PACT's bargaining position will remain strong. Indeed, PACT as party to all three sets of negotiations has considerable knowledge of each of BBC, ITV and C4C's negotiating positions, which is not available to the Parties individually. Further, the broadcasters' negotiations with PACT are subject to regulatory oversight by Ofcom, which must also approve any amendments to any of the Parties' codes of practice.

**Conclusion on rights acquisition**

- 4.11 For the reasons set out above it is clear that the joint venture will not substantially lessen competition on the market for the acquisition of rights in VOD content.

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<sup>16</sup> See section 277 of the Communications Act 2003.

## 5 The Retail VOD Market - Introduction

### Introduction

5.1 In this section the Parties describe:

- the various business models for the provision of VOD and explain that it is forecast that over 90 percent of transactions on UKVOD will be free;
- the strong market advantage enjoyed by closed platforms;
- the large number of retail competitors to UKVOD including the three most powerful: Sky, Virgin Media and Apple;
- the proposed joint venture's relative market position and its strengths and weaknesses compared to competitors;
- why much content on UKVOD will not be exclusive to the site.

### The business models

5.2 Retail VOD services may be:

- supplied free of charge to consumers and advertising funded;
- supplied by the BBC free of charge and paid for by the licence fee;
- bundled "free" as part of a wider product range;
- made available on a temporary transactional basis under which the consumer pays to download and view the content for a limited period (DTR);
- made available on a permanent transactional basis under which the consumer pays to download and own the content (DTO); or
- supplied on a subscription basis under which the consumer pays to access all content on a site (or content of a particular type) for a specified time.

5.3 The current UKVOD business plan forecasts that over 90 percent of the anticipated transactions on the site will be free and advertising funded. The remainder will be transactional provided on a DTR and/or DTO basis. Over 90 percent of DTO content on UKVOD will be non-exclusive; that is consumers will potentially be able to acquire identical content on other sites and platforms.

5.4 The competitive issues in respect of free content are considered in section 6 below and those relating to transactional, that is paid for, content are considered in section 7. First, the competitors to UKVOD are reviewed and UKVOD's market position in relation to those competitors is assessed.

### The competitors

5.5 As a new entrant, UKVOD will face a range of retail competitors, some well established in the VOD market and others that are developing new propositions to leverage off strengths in other areas. The major competitors are:

- Pay TV providers such as Sky, Virgin Media and Top Up TV;
- Telecoms providers such as BT, Tiscali, O2 and Orange;

- Games console manufacturers such as Microsoft, Sony and Nintendo; and
- Online VOD service providers, such as Apple (iTunes), Amazon/LOVEFiLM,<sup>17</sup> Sky (Sky Player), Demand Five and retailers, including online DVD providers that plan to offer DTO and DTR in the near future such as Tesco.

5.6 From within these groupings, Sky, Virgin Media and iTunes have already established very strong market positions. [ >€].

#### **The significance of closed platforms**

5.7 Surveys indicate that consumers have a strong preference for VOD on TV rather than over a computer screen. When questioned by Wiggin Entertainment Media Research on their preference for watching downloaded content on a computer screen or main television screen, 41 percent of consumers questioned said their preference would always be the main television screen in their household. A further 35 percent indicated that their main preference would be to watch downloaded content mostly on TV. Hence, over 75 percent of consumers show a preference for watching VOD content on TV. A press statement issued by Virgin Media on 26 September 2008 stated:

*“The take-up of BBC iPlayer on Virgin Media's TV platform has continued to grow with an average of 11.5 million views per month. BBC iPlayer on Virgin Media's TV platform now accounts for around a third of all BBC iPlayer\*\* views, demonstrating the huge popularity of Virgin Media's on-demand service with viewers.*

*\*\*According to BBC figures for May 2008, total views of BBC iPlayer online were 21.8 million (across all ISPs)”*

Virgin Media is currently the only closed platform on which BBC iPlayer is available and although Virgin's broadband and TV service is used by only 15 per cent of UK households it accounts for about one third of total viewing of iPlayer demonstrating the significant preference of viewers to utilise closed platforms.

5.8 This clearly gives a strong retail market advantage to closed VOD platforms and games consoles which allow consumers to view content on a TV - the attraction of so-called 'lean back' TV viewing over 'sit forward' viewing on a PC. There are 'digital media adaptor' devices that allow consumers to shift content from PC to TV but these are cumbersome and require the computer to be linked to the TV and then disconnected rather than providing the immediate connectivity of closed platforms and games consoles. Thus, while closed VOD platforms constrain pricing and non-price elements on an open VOD service, the latter will not necessarily provide an equivalent constraint over closed platform offerings. It should also be noted that the availability of non-subscription platforms such as Freeview and freesat carrying free-to-air services mean that a subscription is not necessarily required to access VOD directly from a TV platform. Imposing a subscription fee, however, offers closed VOD platforms the ability to bundle pay and free content, thus allowing operators to offer otherwise 'transactional' content to a significant subscriber base of consumers without an additional charge.

5.9 In addition, closed VOD platforms generally offer PVRs, which act as a variant of platform-controlled VOD services, enabling viewers to control their VOD experience by recording and storing, directly and without physical intervention, content from the wide range of linear channels (new and repeated) carried by the platforms. PVRs also allow closed platforms to push VOD content to subscribers so it is readily accessible.

5.10 Closed VOD platforms have scope to bundle a variety of different products across linear television, broadband and telephony. This means that they are able to provide VOD at no incremental cost for the customer, with VOD acting as a retention tool for customers

<sup>17</sup> Earlier this year Amazon sold its online DVD rental business to LOVEFiLM in return for a 30% equity stake in LOVEFiLM - see paragraph 5.11 below and Annex 2.

whose overall expenditure across a whole suite of products is far larger than it would be on VOD on a standalone basis. As a result, UKVOD will be competing in a retail market against closed VOD platforms which have the scale and business model to use VOD content as a promotional tool to attract and retain customers across their suite of services.

### The major competitors

5.11 The likely major competitors and market positions are described in detail in Annex 2.<sup>18</sup> In summary:

- (a) Sky and Virgin Media together are forecast to have a [ $\approx$ ] percent share of UK transactional VOD revenues in 2009.<sup>19</sup> These providers, and telecoms providers such as BT Vision, have strong customer bases to which they can offer VOD material (in both closed and open VOD forms), plus the industry knowledge and contacts to acquire content licences from independent producers, US and UK movie and TV studios, and broadcasters. Some of these operators have extended their reach to non-subscribers through open VOD services over the internet (e.g. Sky, BT Vision).
- (b) Sky has the advantages of a very strong content proposition, agreements (often exclusive) with the major studios and direct customer relationships. Sky+, the Sky PVR service, is the market leading PVR and is considered by Sky to be a form of VOD. It enables viewers to select and store programmes from linear channels' schedules (including archive linear channels). At the same time, Sky also offers a push VOD closed service - Sky Anytime - to certain subscribers, pre-selecting for viewers a selection of content from its channel line-up for storage on their Sky+ box. Sky this year re-launched Sky Player (re-branding Sky Anytime on PC), a PC VOD service offering Sky TV content to subscribers at no additional charge and to non-subscribers on a DTR basis. Sky Player contains content from Sky-branded channels and a number of third party channels carried on the Sky platform. Content includes movies. Sky subscribers can access Sky Box Office movie content through Sky Player for an additional fee. Sky has become a formidable competitor in the open VOD environment based on its premium content proposition and its ability to leverage off an existing subscriber base.
- (c) Like Sky, Virgin Media occupies a position of considerable strength in VOD through leveraging off its existing pay TV and related business (e.g. telephony and broadband). Virgin Media is the UK's leading digital cable TV business. It was the first company to launch VOD on a wide scale and has the largest closed VOD (or indeed any VOD) customer base. Virgin Media also offers its customers a PVR. Subscribers have access to a range of VOD content (including a catch up) as part of the basic subscription package. The BBC iPlayer was added to the service in the first half of 2008 and is provided to users free of charge. A subscription package, costing £7 per month, gives users access to an additional range of archive on-demand content and Virgin Media also offers a large library of film titles on a pay-per-view basis. A press release issued by Virgin Media on 28 September 2008 stated:

*"For the first time ever, 50 percent of Virgin Media's 3.5 million TV customers are watching on-demand regularly. The latest viewing figures reflect a recent survey which found that Virgin Media was second only to YouTube\* for on-demand viewing of any kind, putting the company ahead of popular online services such as BBC iPlayer and Google.*

<sup>18</sup> An indication of the speed of development in the VOD market is that there have been a number of significant changes and additions to the description in the Parties' merger notification to the OFT in April 2008.

<sup>19</sup> [ $\approx$ ].

*The significant take-up in on-demand viewing has been driven by a raft of new content partners and deals in TV, music, movies and kids programming as well as the launch of the popular BBC iPlayer on Virgin Media's TV service."*

- (d) Apple has considerable strength through its iTunes download business and its link to the iPod and iPhone devices. At present, iTunes is the leading online transactional service in the UK, reflecting the market-leading position Apple established and has since maintained in the US.
- (e) BBC's iPlayer service operates as a comprehensive, heavily marketed free service, carrying no advertising, and no requirement to make a return. It is available both as a destination site direct to the consumer and on a syndication basis by closed and open VOD platforms. Thus, versions of BBC iPlayer are available on Virgin Media and the Nintendo Wii.
- (f) Microsoft launched its Xbox media download service in the UK in December 2007 in order to replicate its highly successful US business. In July 2008, Microsoft announced a deal with Netflix, an online movie rental service, that will allow Xbox users to access the Netflix catalogue of online content, which includes more than 10,000 movies and TV programmes. In January 2008, it was announced that BT Vision will start to sell Mediaroom IPTV enabled Xbox 360s by mid-2008. This will enable BT Vision customers to access games, DTT channels, BT VOD content and content via the Xbox Live Marketplace.
- (g) In July 2008, GoView!, a joint venture between Sony and Sky was launched, offering sports, entertainment, movie, music and animation content, which subscribers will be able to download onto PSPs on a subscription or DTR basis. Agreements with distributors and broadcasters include Disney-ABC-ESPN TV, BBCW, Sony Pictures TV, NBC Universal, National Geographic and Sky Sports. Comedy, Sports and Entertainment Packs are available by monthly subscription, whilst selected movies and TV series can be transferred via the rental service on Go!View. Go!View content is initially downloaded to a PC. Consumers are only charged for content when it is transferred to a PSP.
- (h) LOVEFiLM, 30 percent owned by Amazon, was a pioneer in the UK VOD market and enjoyed first mover advantage in this area. Bringing to bear the value of Amazon's expertise as an online retailer, Amazon will promote LOVEFiLM services on its sites to UK customers.
- (i) There are third party content aggregators such as Babelgum (launched in 2007 and focusing on independently produced content, particularly movies) and Joost (also launched in 2007, claiming to offer access to over 28,000 TV shows on over 480 channels and having recently announced the expansion of its relationship with All3MEDIA to provide addition UK content<sup>20</sup>).
- (j) Tesco announced the launch of Tesco Digital in April 2008, which will initially provide a comprehensive music offering. TV programmes, movies and games will also be available in the near future.
- (k) Orange (owned by France Telecom) and O2 have announced plans to establish VOD services in the UK, with Orange, who already offers VOD services in France, announcing content deals with Disney and MGM.<sup>21</sup>
- (l) Etailers and physical retailers which also sell over the web, such as HMV and Zavvi, can be expected to offer DTO as a logical expansion of their DVD businesses. Similarly DVD rental businesses such as Blockbuster can be

<sup>20</sup>

See <http://press/joost.com/>

<sup>21</sup>

See "Orange is silent on launch date for its IPTV service," 22 April 2008, <http://www.brandrepublic.com/MediaWeek/News/803875/Orange-silent-launch-date-its-IPTV-service/>

expected to move into the DTR sector on the internet. Once a business is offering one of a DTO or DTR service it is likely that it will also offer the other. This trend is evident from the US where, for example, Blockbuster purchased Movielink (a download service previously owned by Paramount, MGM, Sony, Universal, and Warner Bros) with a view to entering the VOD market. It can be expected that this service will be offered in the UK.

- 5.12 Potential future major competitors in open VOD in the UK include Hulu and Amazon. Hulu, founded by NBC Universal and News Corp, is an online service that offers users a combination of free professionally produced long-form video content (TV shows and movies) and user-generated content. Amazon has recently launched the "Amazon Video on Demand" service, which allows users to stream and download content to their PCs from a library of over 40,000 movie and TV titles. While this service is currently only available in the US, it is anticipated that this service will be rolled out internationally (see Annex 2 for further details).
- 5.13 Online video viewing is dominated by YouTube and Google and it can be anticipated that, despite the growth of long form, they will continue to lead the market (YouTube currently accounts for 55 percent of all online video views and 41 percent total minutes of online video viewing in the UK).<sup>22</sup>
- 5.14 In addition, there are a huge variety of unlicensed internet sites offering unauthorised content. The existence of these illegal sites and the availability of 'peer-to-peer' (P2P) software means that a significant range of the Parties' content is already available on the internet. Finally, C4C and ITV will continue to make VOD content available on their home sites, which will exist alongside the UKVOD service, albeit with more limited content than is currently available.

**The joint venture's relative market position**

- 5.15 UKVOD will be a standalone content business with a wide range of material available in one place including classic archive material. It will not bundle content with technology or other retail offerings nor provide an exclusive link to a device. Neither will it have access to a subscriber or retail base. The vast majority of the content to which UKVOD will have access will not be premium content (of the type that is available to Sky, such as premium (first-run) film) and will have originally been broadcast on free-to-air channels, which are carried on the basic tiers of closed platforms - and much of it will be available from other VOD sources.
- 5.16 [redacted]. The proposition is not dependent on content exclusivity and, given that UKVOD will not have exclusive access to much of the most popular VOD content - including catch up, major US series, DTO content and independently produced archive rights since 2004 - a business model that sought to rely on exclusivity would be doomed to fail (see paragraph 5.19 below).
- 5.17 Other VOD platforms and sites will have qualities which UKVOD will not share (or will not share to the same extent). These qualities will make those sites distinct and attractive to significant groups of consumers. In particular, relative to competitors, UKVOD will not have:
- a TV platform consumer proposition;<sup>23</sup>
  - a PVR to allow recording of content;
  - access to a wide range of exclusive premium film or sports material, which along with adult content are an important driver of consumers' willingness to pay for content [redacted];

<sup>22</sup> . Source: Comscore VideoMetrix, July 2008.

<sup>23</sup> [redacted].

- a strong subscriber base and a bundle of other services to which VOD can be provided as an add-on (unlike Sky and Virgin Media and telecoms businesses such as BT and Tiscali);
- a link to hardware (unlike Apple, Microsoft and Sony) which experience both in the US and the UK indicates is a major competitive advantage;
- a strong internet retail base (unlike Amazon and iTunes); or
- the ability to strike global content deals (unlike Apple, Microsoft and Sony).

5.18 The comparative advantages enjoyed by UKVOD’s competitors mean that UKVOD will face extremely strong competition. Indeed, in attempting to launch a UK-focused, open VOD service, UKVOD might be viewed as being disadvantaged. The strongest VOD competitors in the UK market are:

- (a) Closed platforms that are able to leverage VOD offerings off strong existing subscription or membership bases (e.g. Sky, Virgin Media) and bundle pay and free content.
- (b) Global companies that can support the integration of a content service with consumer loyalty from a popular hardware device (e.g. the iTunes/iPod synergy and console makers).
- (c) Services with a focus considerably wider than the UK, global brands, and significant economies of scale and scope (e.g. iTunes). This includes LOVEFiLM, an existing internet VOD service that was launched with a UK focus (now is active in Germany and Scandinavia), which has strong advantages arising from its partnership with Amazon, the global internet retail giant, and its early mover advantage.

**Exclusivity over rights**

5.19 A significant proportion of the content available on UKVOD will not be exclusive to UKVOD to retail or syndicate:

- All free catch up - ITV and C4C will continue to offer free catch up on their own sites and syndicate (including on a DTR basis) to other sites, and the BBC will continue to offer iPlayer and control its syndication;
- Film, which will be mainly licensed from US studios and can be expected to be provided on a non-exclusive basis to UKVOD; and
- Archive, which will be retailed on a free, DTR and/or DTO basis:
- [redacted],<sup>24</sup>[redacted]<sup>25</sup>[redacted];<sup>26</sup>
- [redacted] DTO; of these hours, over 90 percent of hours will be non-exclusively available to UKVOD [redacted]

[redacted]<sup>27</sup>

|            |            |            |            |            |            |
|------------|------------|------------|------------|------------|------------|
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |

24 [redacted].  
 25 [redacted].  
 26 [redacted].  
 27 [redacted].

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| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |

[redacted]

5.20 UKVOD will therefore face competition from a range of other VOD providers able to retail identical content to UKVOD.<sup>28</sup>

5.21 [redacted].

[redacted]<sup>29</sup>

|            |            |            |            |            |
|------------|------------|------------|------------|------------|
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
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[redacted].

## 6 The Retail VOD Market – Free Content

### Introduction

6.1 In this section the Parties:

- explain that they will continue to compete with each for the sale of advertising;
- describe the extent of competition from other sites and platforms in respect of free content.

### Competitive analysis

6.2 It is projected that over 90 percent of transactions on UKVOD will be free to consumers. The joint venture will not have any competitive effects on the retail market for content provided free to the consumer:

- (a) The Parties will continue to compete with each other for the sale of advertising in and around their content and third parties will be free to sell advertising in and around their content if they so choose. As explained in section 4 above there are significant incentives for the Parties to compete with each other to provide strong content. UKVOD will sell advertising in and around common parts of the site.<sup>30</sup>
- (b) Furthermore, as explained below in section 10 the breadth of the separate market for internet display advertising in which UKVOD will operate means that price effects could not arise in relation to free content in the advertising market.
- (c) UKVOD will be subject to competition from free content available on other sites and platforms:

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28 [redacted].  
 29 [redacted].  
 30 [redacted].

- (i) Free catch up will continue to be available on the C4C and ITV websites. This is an important means of enabling C4C and ITV to support their free-to-air linear programming through a combination of catch up and editorial related to current broadcasts. UKVOD will provide an alternative outlet for C4C and ITV catch up as compared to the counterfactual.
- (ii) Syndication of free catch up (including on a DTR basis) to third party sites and platforms will be for the decision of C4C and ITV and outside the scope of the joint venture. For reasons described in paragraphs 9.6 to 9.9 below, the ability and the incentive to syndicate catch up will not be changed by the joint venture. [>€].
- (iii) iPlayer will be outside the scope of the joint venture and available free over the internet and on closed platforms such as Virgin Media.
- (iv) Closed platforms include a wide range of VOD, including catch up and a range of archive material, the cost of which is bundled into the subscription.
- (v) Internet sites such as Sky Player (for Sky subscribers), Demand Five and Joost include much or all of their content for free.
- (vi) There is a vast market for material from unlicensed content providers. For example, a Google search using the term "French and Saunders download" returns 128,000 hits in 0.21 seconds.<sup>31</sup> The sixth hit links to a torrent<sup>32</sup> site offering a download of Series 2 of *French and Saunders* illegally. [>€]. The global nature of these networks means that despite strong efforts by the industry it is impossible to exercise effective control over illegal content that is shared on them. These include torrent listing sites (such as PirateBay, Torrent Reactor, Torrentz,) and P2P file sharing software (such as Limewire, WinMX and eMule). These technologies are themselves not illegal, making the consumer activity they enable (i.e. unlicensed file sharing) notoriously difficult to prevent. Consumers can also watch illegally posted short-form clips on video-sharing websites, such as YouTube and DailyMotion, which are available for a period of time before being taken down. In many cases consumers may be unaware that they are infringing copyright law. The Parties do not see the government's measures to seek a co-regulatory initiative to facilitate co-operation between Internet Service Providers (ISPs) and rights holders as an adequate solution to address the illegal file sharing problem. Bit Torrent did not have any problem raising further capital recently.<sup>33</sup>
- (vii) PVRs are a strong alternative to catch up and an increasingly good alternative for archive (particularly where the archive content has been broadcast on one of the many free-to-air linear archive channels such as UKTV and Living). PVRs are available from all the closed platform providers and may be purchased on a standalone basis for use with Freeview channels. Sky has stated that: "*[w]ith a weekly selection of over twelve thousand shows, we believe our Sky+ customers enjoy the UK's biggest On Demand service*".<sup>34</sup> While viewers may need to

<sup>31</sup> Search executed on 10 September 2008.

<sup>32</sup> Torrents are files which can be shared using a BitTorrent programme - a form of peer-to-peer software which operates on the BitTorrent protocol.

<sup>33</sup> It is reported (17 September 2008) that BitTorrent, Inc secured \$17 million in third round of funding from DAG Ventures, LLC, DCM-Doll Capital Management, and Accel Partners.

<sup>34</sup> Griff Parry, Sky Director of Broadband and Mobile for Sky, speaking at the IEA & Marketforce's 6th Annual Conference "*The Future of Broadcasting - Maintaining profitability under mounting pressure*" on 26 June 2008.

programme PVRs in advance in order to record a particular show, this requires minimal forward planning, particularly in the case of series where viewers can select to record an entire series up front ('series linking') rather than individual episodes and some PVRs (including Sky+) can be programmed remotely from a mobile phone. Some current PVRs can hold over 200 hours or more of content and new generation PVRs will have significantly greater capacity. PVRs currently marketed in the USA have the ability to intelligently predict users' preferences based on past viewing patterns and record content that may be of interest to the user thus further eroding any difference between PVRs and VOD.

(viii) Short form content over sites such as YouTube (much of which is of professional standard) is not charged for.

6.3 Given the absence of possible price effects for free content in the retail market, it is not necessary to estimate UKVOD's likely market share in this context and the Parties have not attempted to do so.

6.4 Similarly, there is no potential for the merger to give rise to non-price effects in the retail market (i.e. for UKVOD to reduce the quantity or the quality of the free content that is made available to consumers). To attract advertisers (in relation to which the Parties will continue to compete strongly) and to compete with other platforms, the Parties will be incentivised to provide their best quality VOD content and to ensure that content is not withheld from the joint venture.

## 7 The Retail VOD Market - Transactional Content

### Introduction

7.1 In this section the Parties explain:

- that they are not currently competitors in the sale of transactional content;
- why the proposed merger will not impact competition for DTO content;
- that consumers are very unwilling to pay for most of the content that UKVOD will offer and the vast majority of transactions on UKVOD will be for content provided on a free basis;
- why much of the TV content on UKVOD will not be exclusive;
- the significant pricing constraints that UKVOD will face;
- UKVOD's likely market shares which, even if long form TV is considered separately to film and short form, will be no higher than 20 percent;
- that quality and innovation are core to UKVOD's proposition so the merger will not give rise to non-price effects.

### Overview

7.2 The Parties are not currently competitors in transactional VOD content. ITV does not have a transactional offering and BBCW is not active in the VOD retail market in any capacity. It is therefore only C4C which offers a transactional service, the bulk of its DTR being in film or US content with a DTO option offered wherever the rights are available to C4C. It cannot be assumed that the Parties will each, absent the joint

venture, offer content on a transactional basis.<sup>35</sup> Any reduction in horizontal rivalry between the Parties in relation to transactional content, on any market definition, would therefore only be very modest and, in any event, would be outweighed by the benefits to consumers from UKVOD as a stronger competitor in transactional content than any of the Parties could be individually.

7.3 All content on UKVOD will be offered for temporary consumption, either free or pay (DTR). UKVOD intends that about [redacted] percent will be offered for free and about [redacted] percent pay (DTR). In addition about [redacted] percent of all content will have an option of permanent ownership (DTO).

7.4 [redacted]. It will be seen that over 90 percent of transactions [redacted] is accounted for by free content.

[redacted]<sup>36</sup>

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|------------|------------|------------|------------|------------|
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |

[redacted]

**DTO**

7.5 There are a number of market features common to all forms of transactional content (DTO and DTR). However, there are certain characteristics specific to DTO.

7.6 [redacted].

7.7 Nearly all DTO content (over 90 percent) will be non-exclusive to UKVOD, that is, identical content will be available elsewhere for the following reasons:

- Since 2004, DTO rights in free-to-air linear content produced by UK independent production companies can be sold separately to the free-to-air linear rights and on a non-exclusive basis. This means that there are a number of independent sources of much of the DTO content that will be carried on UKVOD.
- The acquisition of content in DTO format is comparable to the acquisition of the same content in DVD format. In each case the consumer is able to keep the content in a permanent form (prices for DTO content are therefore comparable with prices for equivalent DVD content). Retailers of the Parties' content in DVD format increasingly expect to be able to supply the same content to consumers from a website in a DTO format. This commercial expectation is reflected in the joint venture arrangements, which incorporate an important carve out allowing the Parties to licence DTO rights in respect of titles supplied to UKVOD to retailers and competing online providers competing online providers who also sell DVDs of the same titles. This recognises that DTO and DVD rights are generally licensed together [redacted].

7.8 The DVD market is highly competitive with etailers such as Amazon, LOVEFiLM, HMV and Tesco competing with each other and high street DVD retailers. While the market is presently dominated by DVD sales (and this is likely to be the case for the foreseeable

<sup>35</sup> [redacted].

<sup>36</sup> [redacted].

future) DTO is considered to be an alternative to the purchase of a DVD. DTO pricing will therefore be constrained by the DVD price of the same or similar material. [redacted]<sup>37</sup> [redacted].

7.9 Although the relative convenience of a DTO download has some advantages to consumers over a physical purchase, this benefit should not be exaggerated. Download speeds remain relatively slow for full length content. Until they fall significantly below minute-for-minute download speeds,<sup>38</sup> the availability and convenience of purchasing physical DVD copies of content from local DVD retailers or rental shops will provide real alternatives to downloads. A 60 minute download time for a 60 minute piece of content may well delay consumption longer than going to the local retailer to purchase or rent a DVD.

7.10 DTO content will also be sold by other internet VOD sites, of which iTunes is the most prominent.

7.11 In summary, the availability of free or DTR alternatives, non-exclusivity, the range of sites on which to acquire identical or similar content and the DVD alternative are significant competitive constraints on DTO sales.

**Transactional content - key general features**

7.12 The following features need to be taken into account when considering the transactional part of the market as a whole:

- Consumers are very reluctant to pay for material over the internet and the UKVOD business plan anticipates that over 90 percent of usage of UKVOD will be in respect of free material. There will be limited transactional content on UKVOD and much of this will be non-exclusive.
- Pricing will be constrained by the availability of the same or similar material elsewhere for free; pricing of the same or similar material on other sites; and, in the case of DTR, the price of the same or similar DTO content.
- UKVOD's market share will not be high and any attempt by UKVOD to raise prices would result in consumers switching away from UKVOD to substitutable content - including US content, other UK content and film - which is offered by a range of strong competing VOD suppliers many carrying the same content as UKVOD.

These points are considered in more detail below:

**Consumers reluctant to pay for content**

7.13 Users are very reluctant to pay for content over the internet and for TV content generally. [redacted]. In the US, Hulu, a major internet VOD site, has followed a strategy of making all content, including films, available free of charge. The fact that this has extended to film highlights the unwillingness of consumers to pay for content. [redacted].

[redacted]

|            |            |            |            |            |
|------------|------------|------------|------------|------------|
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |
| [redacted] | [redacted] | [redacted] | [redacted] | [redacted] |

<sup>37</sup> [redacted].

<sup>38</sup> That is, one minute to download one minute of content.

|      |      |      |      |      |
|------|------|------|------|------|
| [>€] | [>€] | [>€] | [>€] | [>€] |
| [>€] | [>€] | [>€] | [>€] | [>€] |

[>€]<sup>39</sup>

7.14 The widespread availability of illegal content has already had a tangible impact on the way in which some content producers/distributors attempt to monetise their content in an online environment. Consumers will prefer to view material on good quality licensed sites but are often not aware that, in file sharing copyright material, they are doing anything illegal and, in any event, given a choice between a pay for proposition on a licensed site and identical or similar free content on illegal sites, a significant proportion of them will choose the latter. Comedy Central started offering short-form clips of its most popular content (*The Daily Show*, *The Colbert Report* and *South Park*) on its own website in response to a proliferation of clips being posted on video-sharing websites.<sup>40</sup> It now offers full episodes on its own site, free to the consumer.<sup>41</sup>

7.15 This reluctance to pay means UKVOD could not profitably raise the price on transactional content above the competitive level, including profitably charging consumers for content where the competitive price is zero (i.e. free to the consumer and funded by advertising).

**Limited pay transactions on UKVOD**

7.16 It was explained in paragraph 3.27 above why much of the Parties' linear content would be unsuitable for VOD exploitation other than perhaps in the catch-up window. [>€].

7.17 The types of content most capable of attracting transactional revenue are premium films, sport and adult. [>€]. To the extent that UKVOD does acquire movie rights its range will be limited compared to its competitors: LOVEFiLM, for instance, already stocks over 65,000 titles on DVD (with rapid expansion currently taking place into the DTO space), of which the large majority are film titles.

7.18 Of the TV content that will be provided on a transactional basis, most DTO content (including all of the limited amount of catch up DTO) will also be available for temporary usage either free or on a DTR basis [>€].

**Limited exclusivity rights**

7.19 Much of the TV content most capable of generating transactional revenue is content over which UKVOD will not have any rights or will only have rights that are non exclusive:

- [>€]. US content is particularly popular in the genres most appropriate for TV transactional business - drama and comedy. Much of the most popular DVD and VOD content is for US material. As can be seen from the tables in Annex 3, a significant majority of DVD sales of TV material is accounted for by US programmes over which the Parties will not have VOD rights. Thus, for example, the DTO/DTR rights to shows like *The Simpsons* and *Lost* are held by 20th Century Fox rather than any of the UK broadcasters (in the same way that DVD rights are retained).
- Since 2004 independent producers have had the right to sell DTO rights and a number of other VOD rights separately from the free-to-air linear rights. While the Parties (and therefore UKVOD) may have exclusive rights to older material

<sup>39</sup> [>€].

<sup>40</sup> See [http://news.cnet.com/YouTube-takes-down-Comedy-Central-clips/2100-1030\\_3-6130868.html](http://news.cnet.com/YouTube-takes-down-Comedy-Central-clips/2100-1030_3-6130868.html)

<sup>41</sup> See [http://www.comedycentral.com/funny\\_videos/index.jhtml](http://www.comedycentral.com/funny_videos/index.jhtml)

(although this will not necessarily be the case) this is clearly a diminishing asset given that the bulk of value lies in more recent material. [x].

- While content produced in-house is not subject to the terms of trade rules, a high proportion of this is material such as soap operas and talent shows that are not suitable for VOD exploitation while a greater proportion of externally produced material has transactional value.
- Nearly all DTO content (over 90 percent) will be non-exclusive to UKVOD for the reason explained above at paragraph 7.7.

**Pricing constraints**

7.20 UKVOD will face the following pricing constraints:

- As explained above, the vast majority of DTO (over 90 percent) will be provided on a non-exclusive basis and UKVOD will therefore be subject to price competition from other sites and platforms such as Amazon, LOVEFiLM and Tesco offering the same material.
- DTR pricing will be constrained by the price of identical DTO material. DTO allows consumers to download and have indefinite use of content. DTR, which only enables temporary use, will therefore always be at a discount to DTO. [ $\leq$ ].
- The availability of free content and consumer preference for such content means that, if it is possible to price at all, that price will be constrained by the availability of a significant range of material of the same titles or the same or similar genres available on a free basis. This is particularly the case given the limited time that consumers have for viewing. The combination of free (or subscription based) free-to-air linear television, free catch up, free archive, free short form clips, unlicensed sites and material stored on PVRs means that consumers will scrutinise any pricing proposition very carefully. Indeed, the long term sustainability of the transactional model for TV content is far from proven, as demonstrated by the trend towards free by operators such as C4C and Hulu.
- The availability of DTO and DTR on a range of different sites will constrain UKVOD. The price pressure on content supply arising from Apple's business model driven by hardware sales presents a significant competitive constraint on existing competitors and new entrants such as UKVOD. In commenting on likely developments in the UK market in a report prepared for Ofcom by (the SD Report), Screen Digest concluded in 2007:<sup>42</sup>

*"If the UK online movie market goes the same way as the UK online music market, the launch of iTunes will result in a significant reduction in price as third party services try to compete with Apple".*

Amazon/LOVEFiLM established an early leader position in the UK internet VOD market<sup>43</sup> and is likely to remain a key competitor, as detailed above in paragraph 5.11. Sky, through Sky Player, is now offering DTR film content and the SD Report states that *"it is this element of Sky Anytime on PC which could rival LOVEFiLM going forward"*,<sup>44</sup> particularly in light of Sky's strong relationship with content providers, including the US studios.<sup>45</sup>

- As explained in paragraph 7.8 above, DVD sales will be constraints on DTO and DVD rentals will provide an alternative to DTR.

**Market size - UKVOD projections**

7.21 The relatively nascent state of the VOD markets mean that relevant historic market share data is not readily available. In addition, calculating the potential market impact

<sup>42</sup> See Annex 11 to Ofcom's Pay TV Market Investigation, published 18 December 2007 and the independent report produced by Screen Digest (the "SD Report"), paragraph 345.

<sup>43</sup> SD Report, paragraph 334.

<sup>44</sup> SD Report, paragraph 335.

<sup>45</sup> While the SD Report focussed on films, for reasons discussed in all digital providers of film content are expected to also provide TV material and there are no grounds for drawing a distinction between the two and so it is relevant that a large number of sites and platforms offer both film and TV content (on a DTO or DTR basis).

of players currently in the development phase is complicated by the need to take into account alternative business models, e.g. the likely proportion of type of material that will be available on a free as opposed to transactional basis and, within transactional material, what proportion will be provided on a DTO and DTR basis.

7.22 UKVOD has forecast market growth and market shares to 2012 [redacted]. These projections are based on UKVOD's best estimates of the growth of the market and the likelihood of new players entering the market, but they are subject to uncertainties - as described above at paragraph 5.2 there are a number of different business models being used in order to build VOD businesses and the sustainability of consumer willingness to pay for content remains unproven. The success (or failure) of particular models could seriously undermine any estimates.

7.23 [redacted], UKVOD has categorised the retail transactional VOD market as follows:<sup>46</sup>

- **TV content rental (DTR/subscription):** includes pay-per-view and standalone subscription VOD rental services both online and on closed TV platforms across all content genres excluding movies (i.e. TV programmes, sport, adult and other niche content), and retail rental fees for PVR usage. Services in this category include games console VOD rental services, and standalone VOD packages on TV platforms such as BT Vision).
- **TV content DTO:** includes retail DTO services accessible both online and via equipment connected to a TV set across all content genres excluding movies. Services in this category include Apple iTunes/Apple TV and games console DTO services.
- **Movie rental (DTR/subscription):** includes pay-per-view and standalone subscription movie services both online and on TV platforms (e.g. Virgin Media's pay-per-view VOD movie service and Sky Box Office movie rentals).
- **Movie DTO:** includes retail DTO movie services accessible both online and via equipment connected to a TV set (e.g. Apple iTunes/Apple TV and games console movie DTO services).

7.24 [redacted].

7.25 [redacted].

---

<sup>46</sup>

[redacted].

[X]

|     |     |     |     |     |
|-----|-----|-----|-----|-----|
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |

[X]

[X]  
[X]

[X]

7.26 [X].

7.27 [X].

**Market shares - UKVOD projections**

7.28 [X].

[X]

|     |     |     |     |     |
|-----|-----|-----|-----|-----|
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |

[X]

[X]

[X]

[X]

7.29 [X]:

[X]

|     |     |     |     |     |
|-----|-----|-----|-----|-----|
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] |

[X]

7.30 [X] UKVOD estimates that by 2012 it will have a share of 10 percent of transactional VOD.

7.31 [X]:

|     |     |     |     |     |
|-----|-----|-----|-----|-----|
| [X] | [X] | [X] | [X] | [X] |
|-----|-----|-----|-----|-----|





would be less than 36 percent (again, not excluding the non-BBCW titles from the 2entertain figures) [ $>\epsilon$ ].<sup>47</sup>

7.41 In reviewing market share proxies based on DVD sales it is important to note that the Parties' shares of DVD sales represent their share of the DVD wholesale market, albeit as measured by reference to retail sales. UKVOD's share of the DTO segment at retail level will therefore be less than the Parties' combined share of DVDs at the wholesale since much of the transactional content that the Parties will provide to UKVOD's website will be provided on a non-exclusive basis and thus available for users to purchase from other sites. Further, producers can sell DTO rights to other platforms or aggregators on a non-exclusive basis. Most of the Parties' most popular content, namely the content they already make available on DVD, will be sold by the Parties in DTO format to retailers who also sell it in DVD format (such as Amazon and HMV), as provided for under the joint venture arrangements (under the DVD/DTO carve out). Furthermore, UKVOD will be entitled to syndicate archive content to other platforms which will retail such content to consumers. In reality, UKVOD's share of the retail sales of the Parties' DTO content is therefore likely to be a limited proportion of the Parties' combined wholesale DVD shares.<sup>48</sup>

7.42 Notwithstanding these caveats, in the Parties' view DVD wholesale sales provide a helpful comparator for UKVOD's likely market share in that, even if one made the artificial assumption that UKVOD will be the exclusive supplier of all the Parties' transactional content, the combined market share would not be significant.

#### **Non-price effects**

7.43 The objective of the proposed joint venture is to provide a unique and innovative platform for consumers to access VOD content. The joint venture's distinct proposition will be based on strong functionality, editorial expertise, broad range of content and other features that will enhance the consumer experience (as further described in paragraphs 3.15 to 3.26 above). It would be entirely counter productive for UKVOD to reduce the quality of the service, including innovation in functionality and consumer appeal, or the quantity of content that will be available. This would risk undermining the joint venture's prospects for success. Any attempt to reduce output would be unsuccessful due to the competitive restraints discussed above. To the contrary, the Parties' investment in the joint venture is made on the expectation that the combination of their VOD activities will result in output above what they may otherwise be able to achieve individually.

## **8 Overall Conclusions on the Retail Market**

8.1 The proposed joint venture will not therefore give rise to either unilateral or coordinated effects on the retail market. For ease of reference, a summary of the reasons why such concerns will not arise following the framework for analysis set out in the Commission's guidelines on merger references is set out in Annex 4 to this paper.

## **9 The VOD Syndication Market**

### **Introduction**

9.1 In this section the Parties explain that:

- there is no prospect of foreclosure because of the existence of upstream and downstream competition to UKVOD;

<sup>47</sup> As detailed in Annex 4, the DVD sales figures over-estimate the Parties' combined market shares as BVA data does not disaggregate the non-BBCW titles from the 2entertain figures. It is not possible to split the 2entertain figures as the BVA does not separately report for BBCW.

<sup>48</sup> [ $>\epsilon$ ].

- UKVOD will have strong incentives to supply material to a range of other sites and platforms and in certain circumstances the Parties each have the right to require UKVOD to seek a syndication deal for content that they have supplied;
- there are a number of alternative content suppliers to UKVOD, that many deals have been entered into with these suppliers, and that there are likely to be an increasing number of such deals in the future;
- syndication of catch-up content (with the exception of DTO rights, which largely do not exist) is outside the scope of the joint venture and the joint venture does not materially change the incentives to syndicate such content;
- UK content is not essential for other VOD platforms, still less the UK archive content that UKVOD controls.

### **Overview**

9.2 The OFT accepted that foreclosure concerns were very unlikely but suggested that horizontal price effects could occur such that it could not rule out there being a prospect of a substantial lessening of competition in VOD syndication. In fact, the joint venture will not give rise to either price or foreclosure concerns because UKVOD will face strong competition in both the upstream and the downstream markets, the Parties will individually remain under the same incentives as currently apply to syndicate catch-up and some archive content (under the carve outs) and UKVOD will have significant commercial incentives to syndicate content.

### **Archive content**

9.3 Subject to the various carve outs, UKVOD will syndicate archive content contributed by the Parties to other sites and platforms.<sup>49</sup> Such deals may provide for distribution of the entire UKVOD service or sub-licensing of substantial representative samples of its content.

9.4 UKVOD will have strong incentives to syndicate to other platforms and services:

- As explained in paragraphs 5.7 to 5.8 above, consumers have a strong preference for viewing VOD over TV sets and the bundling of VOD into wider service offerings by closed platforms means that marketing costs to reach additional closed platform audiences are very low. [redacted] supporting closed platforms would increase the potential audience size by at least eight million households (households without a broadband connection but with a TV subscription or access to free digital TV that could provide them with VOD - see the areas indicated by the red outline box). In fact the potential increase is likely to be greater than this because many users that have broadband will strongly prefer to watch VOD over a TV set. The additional cost of syndication is low and the major costs (digitisation and rights acquisition) will in any event have been incurred. Thus the reach of the service can be extended at low additional cost and in return for revenues which reflect the fact that many closed platform subscribers will regard the service as a valued add-on to their existing subscription.

[redacted]

[redacted]

[redacted]

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<sup>49</sup> The joint venture arrangements provide that there will be a period of 12 months before UKVOD is able to consider syndication to open VOD services, which is in order to build a sufficient degree of profile for the UKVOD service. This does not apply to the syndication of DTO rights.

- There are similar incentives to syndicate to iTunes and games consoles, that is, to access consumers that might not otherwise be accessible (e.g. consumers that might prefer to view content on their iPod or console and who regularly use the service to purchase music and/or video).<sup>50</sup> [redacted]<sup>51</sup>[redacted].

[redacted]<sup>52</sup>

[redacted]

[redacted]

Not concluding a deal with iTunes or consoles would therefore deny UKVOD access to consumers who have demonstrated a willingness to pay for transactional VOD content and who use the site to discover content that they otherwise would not have accessed.

- These platforms and services are large and powerful enterprises in their own right and have access to content from other producers (see paragraphs 9.5 below) with which the UKVOD content would have to compete. There would therefore be no scope to increase prices beyond a competitive level.
- [redacted].

9.5 UKVOD will not be the only, or major, supplier of content to other sites and platforms:

- As explained below C4C and ITV will supply free (and/or DTR) catch-up content directly. This is the most attractive VOD content.
- The BBC public service arm will syndicate iPlayer. BBCW will have no role in this.
- PVRs are an alternative to VOD for other platforms. Sky markets its PVR as equivalent to a VOD service. PVRs are a particularly strong alternative to catch up but with features such a series links, high storage capacity and intelligent recording they are also an alternative to archive, particularly when used to record content from linear channels broadcasting classic content - such as the UKTV channels (see paragraphs 5.9 and 6.2 above).
- Rights in US content are mainly non-exclusive and in most part can be acquired directly from US studios or their distributors.
- Under the terms of trade, DTO rights, and many other rights, in UK independently - produce content can be sold directly by the producer. Producers take advantage of this right (see paragraphs 4.7 to 4.8 above).
- Linear TV rights may be sold by a producer to one distributor and VOD rights to another distributor which will be free to distribute the content to other sites (see paragraphs 4.7 to 4.8 above).
- The competition that applies to the more mature market for other secondary rights - where there has historically been a split in ownership between primary and secondary rights (e.g. DVD distribution rights) - provides a good proxy for how competition will develop in relation to VOD rights. [redacted].

<sup>50</sup> iTunes employs digital rights management technology which prevents VOD downloaded from its site from being viewed on anything other than Mac or PC or an Apple device.

<sup>51</sup> September 2008.

<sup>52</sup> [redacted].

- VOD sites and platforms will have the opportunity to acquire content from wholesalers or aggregators who syndicate content in bulk that they have acquired. For example, FilmFlex acquires film content from film studios and wholesales such content to Virgin Media. As described in paragraph 5.11 above, above, in a recently announced deal, Microsoft has entered into a deal with BT Vision in respect of access to VOD via Xbox; BT Vision will therefore have the benefit of studio deals negotiated by Microsoft as well as having its own direct deals with studios.
- As described at paragraphs 7.7 and 9.4 above, carve outs in the joint venture arrangements will mean that archive material offered on the UKVOD service will be available to other sites and platforms directly from one of the Parties. It is anticipated that this will cover much of the most popular material. Given the combined relative value of the DVD businesses of the Parties (for which revenues totalled more than £[>€] in 2007<sup>53</sup> in comparison to a figure of £[>€] as UKVOD's projected total revenue for DTO sales in 2012 (film and TV)) and the competition in the DVD sector, the Parties will have every incentive to take advantage of these carve out rights. The fact that nearly all of the DTO content on UKVOD is expected to be available from other sources in the market also means that UKVOD would not be able to foreclose the market by refusing to licence DTO content to other services (e.g. iTunes), as nearly all of that content will already be offered to consumers by other services.

#### **Catch-up content**

- 9.6 The syndication of free and DTR rights in catch-up content - the most desired VOD content - will not be included within the joint venture. BBC catch up is in any event included in iPlayer and decisions on syndication of iPlayer are taken by the BBC (not BBCW) in accordance with public service principles. The joint venture does not therefore materially affect the incentives of the Parties to syndicate free and DTR catch up.
- 9.7 For ITV and C4C, catch up is closely linked to free-to-air linear rights (hence under the PACT terms of trade the acquirer of free-to-air linear broadcast rights is entitled to also acquire exclusive catch-up rights in the same content). In considering whether to enter into deals concerning catch up the most important consideration is the impact of the transaction on the relevant broadcaster's free-to-air linear business. The broadcaster will assess the revenue gained from entering into such a deal and the impact that syndication may have on the broadcaster's linear service. In the counterfactual both Parties would continue to offer their own catch-up services and, compared to the counterfactual, ITV and C4C's participation in UKVOD will not materially change the incentive to syndicate free and DTR catch up.
- 9.8 [>€].
- 9.9 UKVOD will have the right to syndicate DTO rights in catch-up content [>€]. However, the general rule is that DTO rights will be subject to holdback so UKVOD will have few titles to which DTO rights will apply in the catch-up window. In the 'box set' situation, the ITV and C4C terms of trade also allow the producer to exploit the DTO rights at the same time, so the DTO rights would be available from another source at the same point in time.<sup>54</sup> [>€], free and DTR rights in the same catch-up content will continue to be available from the relevant Party and UKVOD will not be able to acquire DTO rights in catch-up content of US content (see above paragraph 4.7 above). DTO catch up therefore will not be an applicable category of exploitation for UKVOD in the intermediate future and is unlikely to be significant even beyond that. In any event, UKVOD would be subject to the same incentives to syndicate that apply to syndicating archive content,

<sup>53</sup> [>€].

<sup>54</sup> This scenario does not apply to BBC content as catch-up will continue to be available on iPlayer and syndication decisions remain with the BBC.

as described above in paragraph 9.4 above, and PVRs provide a particularly strong alternative to storing catch up beyond the end of the catch up window.<sup>55</sup> For all of these reasons, no material competition concerns can arise in relation to the syndication of DTO catch-up rights.

**Preferences for UK content**

- 9.10 The Parties disagree with the suggestion of some third parties that access to UK content is required to provide a VOD service. In order to assess the extent to which UK content is essential for a VOD service the Parties commissioned a consumer survey. The survey sought to understand the types of programmes that consumer would like to have available to watch whenever or wherever it suited them (i.e. on-demand). Respondents were repeatedly shown a list of programme types and asked to pick the programme type which they would most want to watch and which would they least want to watch.
- 9.11 This survey showed that UK archive content is not the most popular content for a VOD service. Other content is more popular (and available for a VOD provider to retail). For UK consumers the most desirable content for VOD is film content from major studios which was rated above UK content. Content such as catch up (new release) US drama, comedy and entertainment is viewed as more desirable than UK archive content which will make up the majority of UKVOD's offering [redacted].

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<sup>55</sup>

[redacted].

[&gt;€]

[&gt;€]

[&gt;€]

- 9.12 As regards film and archive content, [>€] (see paragraphs 7.37 to 7.39 above). [>€]. As set out in paragraph 7.40 above, the Parties' current combined share of the DVD wholesale market (calculated by reference to retail sales) is less than 8 percent.

**VOD services are successful without UKVOD content**

- 9.13 The two leading closed VOD services are very successful and that success is not attributable to content that would be syndicated by UKVOD:

- Virgin Media which presently operates the most successful VOD service stated in a press release of 26 September 2008 that its VOD service has grown by 33 percent in a year and that 50 percent of Virgin Media's TV customers watched on demand regularly:

*"The significant take-up in on-demand viewing has been driven by a raft of new content partners and deals in TV, music, movies and kids programming as well as the launch of the popular BBC iPlayer on Virgin Media's TV service."*

The factors that were singled out in the press statement as being responsible for this growth were:

- music videos (*"this follows new developments such as the launch of genre based music playlists, special features including concerts by the Sugababes and Kanye West and highlights of the V Festival, alongside competitions to win sought after gig tickets"*);
- children's programming (*"The jump in viewing has been put down to great kids content including Dora the Explorer and SpongeBob SquarePants"*);
- the movie on demand service operated by FilmFlex (*"this service has now totalled over 30 million buys and offers more; first run on-demand movies than any other service in Europe"*), and
- BBC iPlayer.

None of these services will be supplied by UKVOD or in any way impacted by the proposed joint venture.

- In a speech in June 2008<sup>56</sup> Griff Parry, Director of Broadband and Mobile in Sky's Networked Media Division, said as follows.<sup>57</sup>

*"So let's talk about on demand. There's much heated debate about VOD, but I think the industry tends to make a narrower more specific view on what demand is than do customers. Going down to brass tacks, VOD, in it's most fundamental form is about allowing viewers to watch a programme of their choosing, at a time of their choosing and Sky+ has of course done this for many years. With a weekly selection of over twelve thousand shows, we believe our Sky+ customers enjoy the UK's biggest on demand service... Consumption is huge. 12 million people, in 3.4 million homes time shift 280 million shows per month from a selection of over 40, 000 shows. The number of homes using Sky+ every day is roughly double the numbers of UK Cable homes that access VOD services every month. Last year there were 3.4*

<sup>56</sup> IEA, The Future of Broadcasting, 25-26 June 2008.

<sup>57</sup> Taken from a transcript of a video of the speech - the video can be supplied to the Commission if required.

*billion instances of time shifting in Sky homes and not only does this give our current customers even more value from Sky but it's driving new customers to the business, 42% of additions to Sky+ in our last quarter for example were brand new customers to Sky.*

*"To further improve the Sky+ experience last year we launched Sky Anytime on TV which is now known simply as Sky Anytime. This service uses the partitioned area of the Sky+ disc. It's a bonus service and it offers up to 40 hours of fresh content that showcases the biggest and the best of what's on the Sky platform at any one time. So top shows and hidden gems from a range of channels pushed to set top boxes over night and available for viewing On Demand. It's available to about two and a half customers now those are the customers with later addition Sky+ boxes and all the HD customers. Usage levels are high with a significant penetration of usage within that overall basis on a weekly basis so it appears for these users at this time in a context where they already have great PVR functionality this is about the right level of choice for them. Now the success we have enjoyed with Sky+ and Sky Anytime doesn't mean that we won't add VOD as the industry understands it at some point in the future. We will; and our broadband investment will help us do that by completing a hybrid platform that combines broadcast with local storage with a high bandwidth two way pipe into the home. We recognise that while pages of catch-up content and long tail content fill a gap, it's just an add on. As far as on demand is concerned, our focus remains on Sky+ and Sky Anytime. Simplicity, built upon the value and security of linear schedules and trusted channel brands. An entry point, into fresh new content."*

Mr Parry said the following about Sky Player:

*"...this originally launched back in January 2006 offering downloadable TV programmes as a value add to our premium sports and movie services. So initially there were 300 movies available for Sky movies customers to download for free, and that number has now grown to over 500. But the service has evolved very significantly since then. So rather than only being about Sky branded channels now, it's about broad aggregation of TV content i.e. what you would expect Sky the retailer and platform operator to do. So there are now 13 channel areas in 7 genre categories, including third party channel brands such as National Geographic, ESP & Classic, most recently, Baby First. We see ourselves as the natural aggregator of TV to PC, just as we are on traditional pay TV platforms. It's not just about On Demand, it's also about live channels too; so all five of our Sky Sports channels, stream live under the Sky Player brand, Sky News too and if you'd expect to see further launches in the future. And finally, it's not just about Sky subscribers it's about non-subscribers too. For subscribers the service is principally about access to content linked to their core subscription, i.e. you've paid for your subscription that Sky Player gives you for an additional opportunity to watch when and where you want. For non-subscribers on the other hand, it's more of an opportunity to explore and sample the world of Sky."*

Thus, for Sky, catch up (which in any event will not be syndicated by UKVOD) and long tail archive are "just" add on services. Further it considers that its existing rights, including rights that it holds exclusively such as movies and sports, give it considerable strength in the VOD internet sector.

- 9.14 This means, first, that UKVOD has every incentive to syndicate content to platforms that are largely driven by content other than that which it provides thus widening UKVOD's audience base and second, even if, contrary to the business plan, UKVOD was not to syndicate to third parties this would have little impact on the ability of third party platforms to offer attractive content to consumers.

**Conclusion on syndication**

- 9.15 The proposed joint venture will not therefore give rise to unilateral or coordinated effects in relation to the syndication market. For ease of reference, a summary of the reasons why such concerns will not arise and following the framework for analysis set out in the Commission's guidelines on merger references is set out summarised in Annex 5 to this paper.

**10 The Internet Display Advertising Market****Introduction**

- 10.1 In this section the Parties explain that:

- they will each sell advertising in and around their content on UKVOD in competition with each other;
- UKVOD will sell advertising in and around common content and third parties will be free to make their own advertising arrangements;
- in each case there will be competition in the broader internet display advertising market.

**Analysis**

- 10.2 The transaction will have no material effect on the internet display advertising market, and indeed no concerns were raised about this market at the OFT stage.
- 10.3 Under the terms of the joint venture, each Party will be responsible for selling advertising separately in respect of the content that it will make available for exploitation on the UKVOD service on a free to user basis. Since there will be no reduction of competition between the Parties with regard to the sale of advertising, any further assessment is unnecessary. However, for completeness, the broader context is considered below.
- 10.4 [redacted].
- 10.5 As set out above, UKVOD will sell advertising on the non-Party specific pages of the UKVOD website. [redacted] third parties will compete with the Parties and each other in respect of advertising-funded content.
- 10.6 UKVOD advertising will compete with a very large range of internet sites that compete in the sale of display advertising space for advertisers. Within this market, websites leverage off significant consumer interest and on the basis of traffic and demographic. From launch, UKVOD will face competition from the major internet portals such as MSN (Microsoft), Yahoo and AOL; from social networking sites such as Facebook, MySpace and Bebo; from providers of internet VOD (YouTube/Google); and from other more general high-traffic websites (eBay, newspaper websites, travel sites etc) - all established and strong competitors in the market. The sale of advertising by UKVOD is likely also to be constrained by entities such as Google, which currently sells predominantly search-based advertising, but may in the future move to a more general display model.
- 10.7 According to the PwC Global Entertainment and Media Outlook 2008 - 2012 the overall UK internet advertising market generated revenue of £2.9 billion in 2007. The majority of this was from 'paid for search' (£1.6 billion). 'Classifieds' and internet display advertising both generated £0.6 billion each. By 2012, the overall internet advertising

space is expected to be worth £6.2 billion, with internet display advertising accounting for £1.0 billion.<sup>58</sup>

10.8 [redacted].

10.9 UKVOD estimates that 'run of site' display advertising sold by UKVOD itself on its website will generate revenues of approximately £[redacted] in 2012, giving UKVOD a share of less than 1 percent of total internet display advertising.

10.10 Even if all of the advertising space concerning the Parties' content and the UKVOD 'run of site' advertising was sold collectively this would represent no more than 11 percent of the total internet display advertising market and advertising on a free advertising-funded basis.

**Conclusion on advertising**

10.11 It can therefore be seen that the merger will not give rise to any competition issues in the internet display advertising market.

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<sup>58</sup> UKVOD estimate.

## List of Annexes

**Annex 1: Glossary of Terms**

**Annex 2: Overview of VOD Providers**

**Annex 3: UK DVD Sales 2004-2007**

**Annex 4: Summary of Conclusions on the Retail Market - Why the joint venture will not give rise to unilateral or coordinated effects**

**Annex 5: Summary of Conclusions on the Syndication Market - Why the joint venture will not give rise to unilateral or coordinated effects, or to spillover concerns**

[x]

# **ANNEXES 1 - 5**

## Annex 1

### Glossary of Terms

**Archive content:** VOD content available after the initial 30 day catch-up period following its broadcast on a linear television channel.

**Catch-up content:** VOD content made available within the initial 0-30 days following its broadcast on a linear television channel.

**Closed VOD platform:** where access to VOD content is restricted to a limited group of consumers, for example on pay-TV platforms because a set-top box or a subscription is required (e.g. as operated by Virgin Media, Sky, BT Vision).

**Content Supply Agreement:** an agreement for the licensing of audio-visual content by the Parties to UKVOD.

**DRM - Digital Rights Management:** technology employed by content owners or by VOD providers which prevents downloaded VOD being copied or otherwise used outside of the licence terms that apply to its supply. Also refers to the technology that enables material that has been downloaded to rent to be deleted from the consumer's computer after a specified time. In the case of iTunes, DRM prevents content purchased from the iTunes store being copied onto or viewed on anything other than the owner's Mac, PC or Apple devices.

**DSL - Digital Subscriber Line:** a broadband technology that allows high-bandwidth data to be transmitted over telephone lines.

**DTO - Download to Own:** content available to consumers on an on demand basis such that the viewer is entitled to download and retain a permanent electronic copy. Licence terms often include 'usage rights' that allow consumers to make a limited number of copies and/or copy onto additional computers and portable devices.

**DTR - Download to Rent:** a service offering viewings of a specific programme or film on an on demand basis in return for a one-off fee, such that the viewer is entitled to download and retain a copy of the programme for a defined temporary period of time. Licence terms often include 'usage rights' that allow consumers to view the content a certain number of times or unlimited times within a defined period of time.

**DTT - Digital Terrestrial Television:** is an implementation of digital technology to provide a greater number of channels and/or better quality of picture and sound using aerial broadcasts to a conventional antenna (or aerial) instead of a satellite dish or cable connection. Currently most commonly delivered through the Freeview service.

**DVD - Digital Video Disc:** an optical disc that is widely used for the distribution of TV and film content.

**Etailers:** sellers of goods or commodities to consumers electronically over the internet.

**Free-to-air linear services:** linear television broadcasts available without subscription.

**IP - Internet Protocol:** the packet data protocol used for routing and carriage of messages across the internet and similar networks.

**IPTV - Internet Protocol Television:** the term used for television and/or video signals that are delivered to subscribers or viewers using IP, the technology that is also used to access the internet.

Typically used in the context of streamed linear and on demand content, but also sometimes for downloaded video clips.

**Linear television:** scheduled broadcast television programmes.

**Multi-bit-rate content:** digital audio or video content that is encoded at different levels of quality.

**nVOD - Near Video on Demand:** an on-demand television system in which multiple channels are used to show the same piece of content at staggered start times.

**Open source software:** software for which the source code is publicly available.

**Open VOD service:** a service used for the delivery of content on an on-demand basis, available to any consumer with a broadband connection over the open internet and where content can be accessed via a PC without further payment for access to the site.

**P2P network - Peer-to-Peer network:** a network in which each computer is treated as an equal and communicates directly with each other, as opposed to a client-server network in which communication is handled through a central server.

**P2P software - Peer-to-Peer software:** software that facilitates the creation of a P2P network, usually made freely available for download by consumers.

**Primary rights:** rights for linear TV broadcast services (i.e. across both linear and non-linear platforms but around the first transmission of a programme).

**PPV - Pay-Per-View:** a service offering single viewings of a specific film or programme, provided to consumers for a one-off fee.

**PVR - Personal Video Recorder:** a digital TV set-top box including a large hard disc drive which allows the user to record, store and access content from a digital television service. This includes content 'pushed' by the service provider (Push VOD). PVR functionality also allows users to pause and rewind live TV and to record from multiple channels, including while watching a different channel.

**Push VOD:** operates as a combination of nVOD and a PVR to allow material to be stored on a PVR at certain times, from which a viewer can select VOD content. Content is 'pushed' in anticipation of viewer demand and stored on a specially partitioned part of the PVR so that the consumer can enjoy VOD content without delay (i.e. not having to wait for download).

**Secondary rights:** rights for non-linear exploitation, including DVD distribution rights, VOD rights (excluding catch-up rights) and often also foreign-territory broadcast rights

**Streamed content:** audio or video files sent in compressed form over the internet using the IP and watched by the viewer as they arrive. Streaming is different to downloading, where content is saved on the user's hard drive before the user accesses it.

**Syndication:** exploitation of content by granting a third party VOD Provider a sub-licence of content rights, in relation to either an entire service or concerning a selection of content from the service.

**Transactional:** VOD content in relation to which a consumer must pay for access, primarily offered on a DTO or DTR basis.

**UGC - User Generated Content:** audio or visual content that is produced or remixed/edited substantially by a user (i.e. not professionally produced).

**VOD - Video on Demand:** a service or technology that enables TV viewers to watch programmes and films whenever they choose to, not restricted by a linear schedule.

## Annex 2: Overview of VOD Providers

## Pay TV and Telcos

| Service name                             | Owner(s) | Launch date | Description   |
|--|----------|-------------|---|
| BT Vision<br><i>www.btvision.bt.com</i>  | BT       | 2006        | <p>BT Vision, a BT Retail product, provides consumers with a DTT Freeview set top box with a built-in PVR ('V-box') that can access VOD through a BT broadband connection. VOD content available includes TV programmes, movies, sports and music. Content providers include 4oD, Film4oD and the BBC. Content can be purchased on a pay-per-view basis or through a number of subscription packages that provide unlimited access to on-demand content. In January 2008, BT claimed to offer approximately "3,000 TV shows, films and music and sports features from over 100 providers" on the BT Vision platform.<sup>1</sup></p> <p>Films are available to watch on-demand and cost between £1.99 and £3.95. In addition, there are pay-per-view sports packages, with Premier League football matches available for £1.99 each. Monthly subscription packages for on-demand content cost between £3 and £20 depending on the content chosen.</p> <p>In September 2008, BT Vision added a High Definition (HD) download service with a selection of movie titles available on a DTR basis for a 24 hour period. HD films are priced at £4.95 for 'new release' and £2.95 for 'library' titles.</p> <p>BT Vision also offers the BT Vision Download Store, a web-based VOD retail store that is open to all users, and not just users of the BT Vision television service (see entry in Internet Services section below for detail).</p> |
| Sky Anytime TV<br><i>anytime.sky.com</i> | BSkyB    | 2007        | <p>Sky offer subscribers a number of VOD services, including Sky Anytime TV, Sky Player and Sky Anytime Mobile (see the Internet Services section below for discussion of Sky Player, Sky's open PC-based VOD service, which is also available to non-Sky-subscribers).</p> <p>Sky promotes its Sky+ and Sky HD PVRs as central to its VOD offerings, allowing</p>  |

<sup>1</sup> "Get Lost and Desperate Housewives on demand, says BT Vision," 7 January 2008, <http://www.btplc.com/News/Articles/ShowArticle.cfm?ArticleID=52fbd0a5-e5ed-4483-93e7-1e7f2e4acd3e>

| Service name  | Owner(s)         | Launch date | Description  |
|---|------------------|-------------|--|
|   |                  |             | <p>subscribers to build up programme series that can be assessed on demand through a series link, selecting from the vast range of titles on channels carried on the Sky platform (including content from BBC, ITV, Channel 4, Five, Virgin 1 and others).</p> <p>Sky Anytime TV is a TV-based push-VOD service available to Sky subscribers who have a Sky HD PVR or the most recent Sky+ PVR. Content pushed to the user's PVR is dependent on their subscription type (e.g. subscribers who do not have a Sky Movie subscription will not receive movie VOD material), and includes a selection of TV programmes and movies aired over the previous week. Sky Anytime TV does not have any additional costs to users beyond standard Sky subscription fees.</p>   |
| <p>Tiscali TV<br/><i>www.tiscali.co.uk/tv</i></p>           | <p>Tiscali</p>   | <p>2007</p> | <p>Tiscali UK, an ISP that provides DSL-based internet access and telephony services, offers users the Tiscali TV service as part of a "triple-play" communications and entertainment package. Tiscali entered the TV VOD market following the 2006 acquisition of Homechoice, an internet service provider who also offered an IPTV service with VOD capabilities.</p> <p>Tiscali TV uses IPTV and DTT Freeview technologies and includes VOD capabilities. VOD content can be purchased by subscribers on both a pay-per-view and subscription basis, with a range of entertainment, movies, music and children's programming available. Pay-per-view movies are priced from £1.99, with on-demand subscription packages priced from £5 per month. Additionally, a seven-day catch-up service for popular BBC, Channel 4 and FX content is available for free on the platform and the 4oD service can also be accessed over the platform. In total, over 1,000 TV programmes and 1,000 movies are accessible on-demand using the platform.<sup>2</sup></p> |
| <p>Top Up TV Anytime<br/><i>www.topuptv.com/anytime</i></p> | <p>Top-up TV</p> | <p>2006</p> | <p>Top-up TV is a pay TV service that offers UK users the combination of a Freeview PVR and a push-VOD service. The VOD service, known as Top-up TV Anytime, provides users with 600 titles per month selected from a range of pay-TV</p>  |

<sup>2</sup>"Tiscali TV Products," accessed 25 September 2008, <http://www.tiscali.co.uk/products/tvextra/index.html>.

| Service name   | Owner(s)     | Launch date      | Description  |
|--|--------------|------------------|--|
|  |              |                  | channels, including the History Channel, MTV and Picturebox movie service. The service costs £9.99 per month and requires users to purchase a Top-up TV+ PVR. Content is pushed to the user's PVR overnight using the Freeview DTT network and is stored on the PVR's hard drive.  |
| Unknown  | Freeview     | Has not launched | Freeview is a joint venture between the BBC, BSkyB, Channel 4, ITV and National Grid Wireless and offers free-to-air digital TV and radio stations over the DTT platform. Freeview have plans to launch a Push-VOD service in the future. <sup>3</sup> The service would require users to have a PVR capable of receiving Freeview to store the Push VOD content.  |
| Unknown  | O2 UK        | Has not launched | O2 UK, the mobile phone network operator, entered the UK broadband market in October 2007 with the launch of a DSL-based broadband service. This followed the acquisition of the UK internet services provider Be* in June 2006. Following the launch of a successful IPTV offering with on-demand capabilities in the Czech Republic, O2 is said to now be looking to launch a similar service in the UK in the near future. <sup>4</sup>   |
| Unknown  | Orange UK    | Has not launched | Orange UK, the mobile phone network operator owned by France Telecom, plans to enter the UK television market in the near future with the launch of an IPTV service that is expected to include VOD capabilities. <sup>5</sup> The service is likely to be offered in a "triple-play" bundle, complementing Orange's existing mobile telephony and broadband services. Orange, which offers VOD services in France, has announced content deals with Disney and MGM. <sup>6</sup>            |
| Virgin TV On Demand<br><i>www.virginmedia.com/tvradio/ondemand</i> | Virgin Media | 2007             | Virgin Media, the UK's leading cable communications company, offers a digital cable TV service. Users of the service have access to a range of VOD content (including a catch-up service for content chosen by Virgin from BBC, Channel 4, Bravo and Living channels) as part of the basic subscription package. The BBC iPlayer was added to the catch-up service in the first half of 2008 and a selection of 4oD catch-up and archive content is also accessible through the platform. An |

<sup>3</sup> "Freeview plans catch-up service," 6 December 2007, <http://www.guardian.co.uk/media/2007/dec/06/television.digitaltvradio>

<sup>4</sup> "O2 plans broadband battle in pay-TV market," 17 December 2007, <http://www.guardian.co.uk/business/2007/dec/17/telecoms.television>

<sup>5</sup> "Orange plans broadband TV rival to BT Vision," 1 June 2006, <http://www.guardian.co.uk/money/2006/jun/01/internetphonesbroadband.digitalmedia>

<sup>6</sup> "Orange is silent on launch date for its IPTV service," 22 April 2008, <http://www.brandrepublic.com/MediaWeek/News/803875/Orange-silent-launch-date-its-IPTV-service/>

| Service name | Owner(s) | Launch date | Description   |
|--------------|----------|-------------|---|
|              |          |             | additional subscription VOD package, costing £7 per month, gives users access to a range of premium archive on-demand TV content, including titles such as The Sopranos and Grey's Anatomy. Over 500 pay-per-view movies are available on the service and are priced between £2.00 and £3.50. |

## Games consoles

| Service name  | Owner(s)      | Launch date | Description   |
|---|---------------|-------------|---|
| Xbox LIVE Marketplace Video Store<br><a href="http://www.xbox.com/en-GB/live/videostore">www.xbox.com/en-GB/live/videostore</a> | Microsoft     | 2007        | <p>The UK Xbox LIVE Marketplace Video Store allows UK Xbox 360 users to download a selection of movies and music videos directly to their consoles on a DTR basis. Microsoft has secured content deals with Paramount and Warner and the service currently has approximately 150 movies available to download. Titles are offered in both standard and HD formats and are priced between £2.10 and £3.20.</p> <p>In July 2008 Microsoft secured a deal with Netflix, the online movie rental service, that will allow XBox 360 users in the US to access a subset of Netflix's catalogue of over 100,000 movies and TV titles on a streaming basis (approximately 12,000 titles will be accessible using the service). The Netflix streaming catalogue includes "24 of the movies rated by the American Film Institute as the greatest ever"<sup>7</sup> and a recently announced deal will bring CBS and Disney channel content to the catalogue.<sup>8</sup></p> <p>Additionally, the US Xbox LIVE Marketplace Video Store offers US users over 6,000 hours of TV shows and movies to download. The store has content from more than 45 networks and studios.<sup>9</sup></p> |
| Go!View<br><a href="http://www.goview.tv">www.goview.tv</a>   | BSkyB<br>Sony | 2008        | <p>Go!View, a joint venture between Sky and Sony, is an online VOD service for UK Playstation Portable (PSP) users. Users download content from the Go!View website to their PCs and then transfer it to their PSP for viewing.</p> <p>A selection of movies, TV programmes and sport content can be rented on a pay-per-view basis (from £1.50 per TV episode and from £2.50 per movie) or a number of subscription packages are also available (£5 per month). Content providers include BBC Worldwide, Sony Pictures Television International, NBC Universal, National Geographic and Sky Sports.</p>  |
| Playstation Video Store   | Sony          | 2008        | The Playstation Video Store allows both PS3 and PSP users to download TV programmes   |

<sup>7</sup> "Microsoft and Netflix Unveil Partnership to Instantly Stream Movies and TV Episodes to the TV via Xbox LIVE," 14 July 2008, <http://netflix.mediaroom.com/index.php?s=43&item=275>

<sup>8</sup> "Netflix Announces Agreements With CBS and Disney Channel to Stream an Array of Current Hit TV Shows at Netflix," 23 September 2008, <http://netflix.mediaroom.com/index.php?s=43&item=282>

<sup>9</sup> See (7).

| Service name                 | Owner(s) | Launch date | Description   |
|------------------------------|----------|-------------|---|
| <i>store.playstation.com</i> |          |             | and movies on a DTO and DTR basis to their consoles. Initially, the service is offering 300 movies and 1,200 TV titles and is currently only accessible by US users. The service is likely to be available in the UK sometime in 2009. Content providers include 20th Century Fox, Paramount Pictures, Sony Pictures Entertainment and Warner Bros Entertainment. |

## Internet services

The following is not an exhaustive list of open VOD services available over the internet, but is intended to give an indication of the range of services currently available to users.

| Service name  | Owner(s)  | Launch date | Description   |
|---|-----------|-------------|---|
| 4oD<br><i>www.channel4.com/4od</i>                            | Channel 4 | 2006        | The 4oD online VOD platform provides access to a range of free ad-funded VOD content, including film and TV, with both download and streaming options and some content available on a pay (DTR or DTO) basis. Prices are typically 99p for a DTR TV programme and £1.99 for a DTR film. The service is accessible through PCs, via a free software download, and also through BT Vision, Tiscali TV, and Virgin Media closed VOD platforms.   |
| Amazon Video on Demand<br><i>www.amazon.com/gp/video/ontv</i> | Amazon    | 2008        | In September 2008, Amazon launched the “Amazon Video on Demand” service in the US, which allows users to both stream and download content to their PCs from a library of over 40,000 movie and TV titles. Amazon’s previous on-demand offering, “Amazon Unbox”, launched in 2006, offered only a download option, with users being unable to stream content. The new service offers free, DTR and DTO content, with DTR titles priced from \$0.99. The service can also be accessed through certain models of the TiVo PVR and new Sony BRAVIA TVs that have an Internet Video Link device installed.<br><br>Although the Amazon service is currently only available to US users, Amazon has announced plans to begin an international rollout of their MP3 store and launch of a Amazon Video on Demand in the UK is therefore a distinct possibility. <sup>10</sup> |
| AOL Video<br><i>video.aol.co.uk</i>                           | AOL       | 2006        | The online portal of AOL, the US internet services and media company, includes a range of video content. In the UK, AOL Video offers a limited selection of short-form professionally produced content, primarily free clips from TV shows and movie trailers. The US AOL video site has a more comprehensive content range, offering free long form streaming TV episodes from major US networks, and it is possible that the UK service will be extended to include long form content, including TV shows.  |
| iTunes video store UK<br><i>www.apple.com/itunes</i>          | Apple     | 2007        | Apple added pay DTO TV programmes to the UK version of its popular iTunes online media store, in August 2007. DTO and DTR movies were added in June 2008. BBC   |

<sup>10</sup> “Amazon to Begin International Rollout of Amazon MP3 in 2008,” 27 January 2008, <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1100347>

| Service name                                | Owner(s)                       | Launch date | Description   |
|---|--------------------------------|-------------|---|
|   |                                |             | Worldwide, Channel 4 and ITV all currently have content available on the iTunes platform.<br><br>Movies are priced from £6.99 to buy and from £2.49 to rent and TV content from £1.89 per episode to rent. Downloaded content can be viewed on users' PCs and transferred to a number of Apple iPods and iPhones.   |
| Babelgum<br><i>www.babelgum.com</i>         | Babel Networks Ltd             | 2007        | Babelgum describes itself as a "free, interactive Internet TV service which offers independent and brand new content." Babelgum launched in beta form in early 2007 and the service focuses primarily on independently produced content, particularly film. Content providers include Ministry of Sound TV, 3DD, IMG and Off the Fence and deals with larger content providers have also been secured, including BBC Worldwide, Reuters and the Associated Press. |
| BBC iPlayer<br><i>www.bbc.co.uk/iplayer</i> | BBC                            | 2007        | The BBC iPlayer launched commercially in December 2007 and received over 100 million requests to view video content in its first six months of service. <sup>11</sup> The service features a range of free 0-7 day catch-up content from the BBC's terrestrial and digital TV channels. Accessible only over the internet at launch, the iPlayer is now available on the Virgin Media cable TV service, Apple iPhone and Nintendo Wii gaming platform.            |
| Bebo Video<br><i>www.bebo.com/Video.jsp</i> | Bebo                           | 2005        | Bebo, the social networking website, allows users to upload short-form video content onto their profiles. This can be done either by creating a link to YouTube or uploading the video directly to Bebo via VideoEgg (a web-based publishing service allows users to capture video content and publish it to the web). Bebo has made video a central content proposition, and has begun to stream made-for-Bebo content, such as the series "Kate Modern".        |
| blinkBox<br><i>www.blinkbox.com</i>         | blinkBox Entertainment Limited | 2008        | blinkBox offers users a range of pay long-form DTR and DTO film and TV content, along with a selection of free short-form video. Social networking features are also present on the site, including the ability for users to create "blinks", short videos that combine clips of content available on the site along with custom messages.  |
| Break.com<br><i>www.break.com</i>           | TMFT Enterprises               | 1998        | Break.com is a US-based video sharing website that has an emphasis on humour and entertainment videos, and is accessible from the UK. Break.com has begun to sign   |

<sup>11</sup> "Next generation BBC iPlayer launches, " 6 June 2008, [http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/06\\_june/25/iplayer.shtml](http://www.bbc.co.uk/pressoffice/pressreleases/stories/2008/06_june/25/iplayer.shtml)

| Service name  | Owner(s)        | Launch date | Description  |
|---|-----------------|-------------|--|
|   |                 |             | contracts with major content producers such as Showtime and NBC to produce exclusive short-form content to the site. In 2007 Break.com reached a deal with Endemol USA to host a specially produced programme called 'Record Breakers', with Endemol favouring the ability of Break.com to reach the young male demographic.   |
| Brightcove<br><i>www.brightcove.com</i>                     | Brightcove Inc  | 2004        | Brightcove, a US internet TV platform provider, provides services that allow companies to offer online video on their own websites. These services include the provision of video content management, customisable video players and video analytics. Brightcove can also syndicate clients' content to a range of affiliate online video websites, optimise video search engine listings and provides a range of advertising-related services. Brightcove also runs its own internet TV website, Brightcove.tv, which showcases video content from Brightcove's clients. Sky and UKTV are examples of Brightcove's UK clients. Other clients include HBO, 20 <sup>th</sup> Century Fox and the Discovery Channel. |
| BT Vision Download Store<br><i>www.downloadstore.bt.com</i> | BT              | 2006        | The BT Vision Download Store is an online download store that allows users to download movies and TV content to a Windows-based PC. Downloads are on a DTO basis and the store also includes support for some portable devices. The service is available to all users, and not just users of the BT Vision TV platform.  |
| CinemaNow<br><i>www.cinemanow.com</i>                       | CinemaNow Inc   | 1999        | CinemaNow, founded in 1999, was one of the first internet VOD services established. The company offers over 4,000 titles (primarily movies) that can be purchased on a DTO and DTR basis. Once purchased, certain movies can also be burned to DVD. The company claims to work with over 250 content licensors, including 20th Century Fox, Disney and Paramount. CinemaNow can be accessed from the UK.   |
| Comedy Demon<br><i>www.comedydemon.com</i>                  | RDF Media Group | 2008        | Comedy Demon is a UK website that features long- and short-form professionally produced comedy video and audio content. The site was launched by RDF Media Group, a UK television production company, in July 2008. Full episodes of comedy shows are available on a pay basis for £1.79, while short clips are available to view for free. Content providers include BBC Worldwide, Talkback Thames, and Hat Trick.   |
| Coolroom<br><i>www.coolroom.com</i>                         | Coolroom Ltd    | 2006        | Coolroom is a UK-based digital download store that provides users with a selection of pay DTR and DTO film and TV content. Coolroom is accessible on Windows PCs via a web browser or alternatively through Windows Media Centre software, which comes pre-installed with the new Windows Vista operating system. Coolroom currently offers around 150 titles and has partnered with content providers Universal Pictures and  |

| Service name                              | Owner(s)             | Launch date | Description  |
|---|----------------------|-------------|--|
|   |                      |             | Paramount Pictures.  |
| Dailymotion<br><i>www.dailymotion.com</i> | Dailymotion          | 2006        | Dailymotion, a French company, offers a short-form video hosting website that allows users to browse videos by searching tags, user groups and channels. The website is accessible from the UK.  |
| Demand Five<br><i>demand.five.tv</i>      | Five                 | 2008        | Five re-launched its VOD offerings (including Five Download) as Demand Five in July 2008. This web-based service allows users access to a range of programmes from Five and digital channels Five US and Fiver, as well as hundreds of hours of archived content from its channels. Access to 30-day catch-up content is free, on a streamed or download basis, and most archive programmes are offered free, with some popular US drama titles (e.g. CSI and Grey's Anatomy) available on a DTR basis priced at 99p (shows that have not yet aired on a Five TV channel are priced at £1.99 each). Five says content deals will allow more content to be unlocked for free download and that it is also currently negotiating deals to deliver Demand Five via TV, online and mobile. |
| eMule<br><i>www.emule-project.net</i>     | Open source software | 2002        | eMule is an open-source peer-to-peer file-sharing program for Windows systems. Users of eMule are able to download a wide range of film and TV content from other users. The use of eMule to download copyright material will constitute copyright infringement.   |
| Facebook Video<br><i>www.facebook.com</i> | Facebook             | 2007        | Facebook, the US-based social networking site, allows users to upload and embed short-form videos in their user profiles.  |
| Filmon<br><i>www.filmon.com</i>           | 111 Pictures Ltd     | 2008        | Filmon.com is a UK-based website that offers users the ability to stream and download films. The business model is a mixture of free-ad-funded films and pay downloads. Filmon also provides a platform for independent producers to distribute their content, who share revenues with the site's owners.  |
| Google Video<br><i>video.google.com</i>   | Google               | 2006        | Google Video is a free video hosting website that allows users to upload and share videos. The site hosts a mixture of UGC and professionally produced content. In January 2006, Google launched the Google Video Store, which offered a range of paid content to US users, on both DTR and DTO basis. The store subsequently closed in August 2007,   |

<sup>12</sup> "Google Closes Video Marketplace; Users Out Of Luck," 10 August 2007, "<http://www.techcrunch.com/2007/08/10/google-closes-video-marketplace-users-out-of-luck/>

| Service name                  | Owner(s)  | Launch date      | Description   |
|-------------------------------|---|------------------|---|
|                               |   |                  | with Google citing as the reason “an effort to improve all Google services.” <sup>12</sup>  |
| Unknown                       | HMV   | Not yet launched | HMV is a UK music and video retailer, which offers both physical retail outlets and an online store, HMV.com. The online store currently does not offer video downloads but it has been reported that HMV plan to launch such a service in the near future. <sup>13</sup>   |
| Hulu<br><i>www.hulu.com</i>   | NBC Universal<br>News Corp<br>Providence Equity<br>Partners | 2007             | Hulu, launched in the US in October 2007 by NBC Universal and News Corp, is an online service that offers users a combination of free professionally produced long-form video content (TV shows and movies) and user generated content (UGC). Content partners include FOX, NBC Universal, MGM, Sony Pictures Television, and Warner Bros.<br><br>Hulu is not currently accessible from the UK. However, Peter Chernin, COO of News Corp, revealed that Hulu plans to launch the service internationally in the future, most likely through deals with rights holders in specific countries. <sup>14</sup>  |
| ITV.com<br><i>www.itv.com</i> | ITV   | 2007             | ITV.com, which was re-launched in May 2007, offers free streaming video of recently-aired ITV content on a 0-30 day catch-up basis. Streaming video of selected ‘classic’ ITV archive content is also available for free. Selected ITV content is also available to download from iTunes.   |
| Joost<br><i>www.joost.com</i> | Joost N.V.  | 2007             | Joost is an online platform for long-form professionally produced video distribution. Joost launched in commercial beta form in May 2007 and claims to offer over 28,000 TV shows on over 480 channels with programming across all genres, including cartoons and animation; entertainment and film; sports; comedy; lifestyle and documentaries; and sci-fi. Channels and programs available on Joost vary by geographic region. Joost has secured a number of deals with content providers, including deals with Viacom, CBS, Turner Broadcasting, Sony Pictures Television and ALL3MEDIA. On 28 September 2008, Joost announced it had expanded its deal with ALL3MEDIA to include “hundreds of hours of shows to viewers in the UK”, including UK TV content such as <i>Peep Show</i> , <i>Shameless</i> , <i>Ultimate Force</i> , <i>North Square</i> and <i>Derren Brown</i> . Joost also has deals with a number of strong brand partners, which include HP, Nike and Coca-Cola. |

<sup>13</sup> “HMV and Play trial film downloads,” 8 November 2007, <http://www.nma.co.uk/Articles/35615/+HMV+and+Play+trial+film+downloads.html>

<sup>14</sup> “News Corp COO Chernin: Hulu Will Go International, Slowly,” 22 July 2008, <http://www.alleyinsider.com/2008/7/news-corp-coo-chernin-hulu-will-go-international-slowly-nws->

| Service name                          | Owner(s)                   | Launch date | Description  |
|---------------------------------------|----------------------------|-------------|--|
| Limewire<br><i>www.limewire.com</i>   | Lime Wire LLC              | 2000        | Limewire is a peer-to-peer file sharing programme that allows users to download a wide selection of content, including software, music, and TV programmes and movies. The use of Limewire to download copyright material will constitute copyright infringement.   |
| LOVEFiLM<br><i>www.lovefilm.com</i>   | LOVEFiLM International Ltd | 2006        | LOVEFiLM claims to be Europe's leading online DVD rental subscription service and are active in the UK, Germany and Scandinavia. <sup>15</sup> LOVEFiLM introduced a DTO VOD movie service in the UK in April 2006 following a deal with NBC Universal. The company has subsequently begun to offer DTR titles and currently offers a total of around 2,500 VOD titles to rent or purchase. Users need to have a Windows based system and downloaded movies can be transferred to PlaysforSure compatible portable devices.<br><br>LOVEFiLM acquired Amazon's UK and German online DVD rental businesses in February 2008, with Amazon securing a 30% equity stake in LOVEFiLM as part of the transaction. |
| Megavideo<br><i>www.megavideo.com</i> | Megavideo Ltd              | 2007        | Megavideo, is a Hong Kong-based video sharing website and has positioned itself as a direct competitor to YouTube. Premium members, who must pay a fee to use the service, are entitled to keep all advertising revenue generated by their videos. The service is currently available to UK users.   |
| Metacafe<br><i>www.metacafe.com</i>   | Metacafe Inc               | 2004        | US-based Metacafe is a video sharing web site that specialises in short-form original content, with users uploading, viewing and sharing video clips. The site can be accessed by users in the UK.   |
| Movielink<br><i>movielink.com</i>     | Blockbuster Inc            | 2002        | Movielink, which is currently only available to US users, is an internet-based VOD store. The service was acquired by Blockbuster, the US DVD rental company, in 2008 and offers a wide range of film content on both a DTO and DTR basis. Given Blockbuster's presence in the UK, it is likely that the service will also be launched in the UK.  |
| MSN Video UK<br><i>video.msn.com</i>  | Microsoft                  | 2007        | MSN Video UK offers a range of short-form VOD content including news, music videos, sports and movies as well as user-generated content. Content providers include the BBC, Channel 4, ITN, and MTV.   |
| MTV Video                             | MTV                        | Unknown     | MTV, the US music and youth entertainment cable TV network, offers a selection of  |

<sup>15</sup> "What we're about," Site accessed 25 September 2008, <http://www.lovefilm.com/corporate/about.html>

| Service name                              | Owner(s)        | Launch date | Description  |
|---|-----------------|-------------|--|
| <i>www.mtv.co.uk/video</i>                |                 |             | VOD content on their UK website. A mixture of short clips from MTV TV shows and music videos are available for streaming. Links are also provided to a range of MTV content that is available for download from iTunes.  |
| MySpaceTV<br><i>vids.myspace.com</i>      | MySpace         | 2003        | Myspace, the social network website owned by News Corp, offers video content through its MySpaceTV portal, which can be accessed by UK users. The portal hosts free short-form content that is a mixture of both user-generated and professionally-produced material. BBC Worldwide, Five News and National Geographic all have branded "channels" on the site that feature a selection of short videos for their respective archives.   |
| Narrowstep<br><i>player.narrowstep.tv</i> | Narrowstep Inc. | 2002        | Narrowstep, a US company, is an internet video platform provider. Their services include a video content management system, content delivery network, and monetisation and front-end tools (e.g. player customisation). Its clients include ITV Local (UK), Cycling.tv (Canada) and the Outdoor Channel (US).  |
| Pirate Bay<br><i>thepiratebay.org</i>     | Privately owned | 2003        | The Pirate Bay, a Swedish website, is as a searchable index of Torrent files. Using the links to these Torrent files, users are able to download content, including TV episodes and movies, via a BitTorrent client such as Limewire. A large amount of the material available through the website is subject to copyright, which means downloading will constitute copyright infringement.  |
| Revver<br><i>revver.com</i>               | Revver Inc.     | 2005        | Revver is a US-based UGC video sharing website that is accessible to UK users. Revver shares advertising revenue with content owners on a 50/50 basis, with revenue being generated by a static clickable ad that is inserted at the end of each video.  |
| Sky Player<br><i>sky.com/skyplayer</i>    | BSkyB           | 2008        | <p>Sky Player is a PC-based internet pay VOD service that is open to all users, in addition to Sky TV subscribers. Sky Player features a range of movie, sports and entertainment VOD content from Sky channels, and also offers live streams from a selection of Sky channels.</p> <p>For non-Sky subscribers, a Sky Sports highlights pack is available at £5 per month, which individual programmes from channels including Sky One and National Geographic are priced at £1 each.</p> <p>For Sky satellite subscribers, provided that they have the appropriate linear channel</p> |

| Service name                                     | Owner(s)                | Launch date                      | Description   |
|--|-------------------------|----------------------------------|---|
|  |                         |                                  | subscriptions, archive movies and non-sports linear channels are free to view, whilst new movies and live Sky Sports are available on a pay-per view basis. (Sky Sports are available for free on the Sky Player for Sky 'Multi-room' subscribers.)   |
| Tesco Digital<br><i>www.tescodigital.com</i>     | Tesco                   | Video downloads not yet launched | Tesco Digital is Tesco's online music and video game download store that was launched in April 2008. It has been reported that Tesco is currently in negotiations with several content providers, including BBC Worldwide, ITV Worldwide and Fremantle Media, to bring video download content to the store. <sup>16</sup>   |
| Torrent Reactor<br><i>www.torrentreactor.net</i> | Unknown                 | Unknown                          | Torrent Reactor is a website that provides links to Torrent files and allows users to download, using a Bittorrent client, a range of software, music and videos, including films and TV episodes. A large amount of the material available through the website will be subject to copyright, which means downloading will constitute copyright infringement.   |
| Torrentz<br><i>www.torrentz.com</i>              | Unknown                 | 2003                             | Torrentz is a Torrent meta-search engine that searches other Torrent indexing websites and enables users to download a range of content, including films and TV episodes. A large amount of the material available via the website will be subject to copyright, which means downloading will constitute copyright infringement.  |
| TVcatchup.com<br><i>www.tvcatchup.com</i>        | Privately owned company | 2007                             | TVCatchup is a UK website that allows users to record content from a number of broadcast TV channels to an online account and to then stream that content to their PC. The site has sold advertising around the streamed video content. The service was suspended in February 2008 following complaints from the BBC, Channel 4, ITV and Channel Five surrounding the legality of the service, but has recently re-launched in closed beta. |
| UKTV.co.uk<br><i>uktv.co.uk</i>                  | UKTV                    | 2008                             | UKTV, a joint venture between BBC Worldwide and Virgin Media, offers nine TV channels that can be received on the Virgin and Sky pay TV platforms. A subset of these channels can be received on Freeview and Top-up TV. The UKTV website, UKTV.co.uk, added free short-form videos to its website in 2008 and features clips from content aired on UKTV channels.  |
| Veoh   | Veoh Networks Inc       | 2007                             | Veoh, which can be accessed by UK users, is an online VOD service that counts   |

<sup>16</sup> "Tesco Digital in talks to enter TV and film download arena," 11 September 2008, <http://www.nma.co.uk/Articles/39578/Tesco+Digital+in+talks+to+enter+TV+and+film+download.html>

| Service name                              | Owner(s)                  | Launch date     | Description  |
|---|---------------------------|-----------------|--|
| <i>www.veoh.com</i>                       |                           |                 | Michael Eisner (ex-Disney Chairman and CEO) among its investors. The company claims to work with more than 85,000 content publishers, including CBS, Lions Gate and PBS. All content is free and is a mixture of short- and long-form user-generated and professionally-produced material. Content can be streamed from the Veoh website directly or downloaded using the VeohTV software, which employs a peer-to-peer download technology. Content hosted on the Veoh site can also be embedded in publishers' own websites. |
| Vongo<br><i>www.vongo.com</i>             | Starz Entertainment Group | 2006            | Vongo, which not available to users in the UK, is an online pay VOD service that offers a selection of DTR movies on a pay-per-view and subscription basis. Starz, the US cable TV network and owner of Vongo, recently announced that they were shutting the service down at the end of September 2008. Starz explained that they had decided to shut the service down because they planned to focus instead on selling VOD content in the wholesale market. <sup>17</sup>  |
| WinMX<br><i>www.winmx.co.uk</i>           | Frontcode Technologies    | 2001            | WinMX is a Windows-based peer-to-peer file-sharing program. Much of this content available using the software will be subject to copyright, which means downloading will constitute copyright infringement.  |
| Yahoo! Video<br><i>uk.video.yahoo.com</i> | Yahoo!                    | 2008 (relaunch) | Yahoo!, the online portal, offers users the Yahoo! Video website, which provides a combination of short-form user-generated and professionally produced content and links to video content across the Yahoo! Network.  |
| Youtube<br><i>www.youtube.com</i>         | Google                    | 2005            | YouTube is the world's largest user-generated-content (UGC) video hosting website. YouTube was purchased by Google in 2006 for \$US1.65 billion. <sup>18</sup> The site generally features short-form UGC, but free professionally-produced content from "premium" partners is also available. Sponsored "channels" allow companies to brand the website around videos of their choosing, and display and in-video advertising space is sold on selected pages and videos within the site.                                     |
| Zattoo<br><i>zattoo.com</i>               | Zattoo Inc.               | 2007            | Zattoo is a piece of software that allows users to watch a selection of live TV channels through their PC. The service is based on peer-to-peer technology and is compatible   |

<sup>17</sup> "Starz Closes Online Movie Service Vongo; Focus on Partners; Clickstar's Dead Star," 12 August 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081200152.html>

<sup>18</sup> "Google buys YouTube for \$1.65 billion", 10 October 2006, <http://www.msnbc.msn.com/id/15196982/>

| Service name | Owner(s) | Launch date      | Description  |
|--------------|----------|------------------|--|
|              |          |                  | with Windows, Mac and Linux operating systems. Zattoo was launched in the UK in 2007 and 30 channels are currently offered to UK users, including BBC, Channel 4, and ITV channels.  |
| Unknown      | Zavvi    | Not yet launched | Zavvi, formerly known as 'Virgin Megastores', is a UK music and entertainment retailer. The company has both a physical retail presence and an online store, Zavvi.co.uk. The company currently does not offer a VOD service, but given their position as a DVD retailer they are a possible future entrant into the VOD market. |

## Annex 3

## UK DVD Sales 2004-2007

| Figure 1: Total DVD Shares - Film and TV <sup>19</sup> |  |          |          |          |          |
|--|--|----------|----------|----------|----------|
|  | Typical content  | 2004 (%) | 2005 (%) | 2006 (%) | 2007 (%) |
| <b>2entertain<sup>20</sup></b>                         | <u>Film</u> Billy Elliot, East is East, Notes on a Scandal, the History Boys, Miss Potter, Shine<br><u>TV</u> Dr Who, the Graham Norton Show, Little Britain, This Life, Dad's Army    | 7.6      | 6.9      | 6.1      | 5.6      |
| <b>C4C<sup>21</sup></b>                                | <u>Film</u> Bombon El Perro, Phone Booth, Aliens and I, Robot<br><u>TV</u> Ugly Betty, Shameless, Father Ted, The Peep Show  | -        | -        | 1.4      | 0.9      |
| <b>ITV<sup>22</sup></b>                                | <u>Film</u> Shawshank Redemption, Emma, recent television screened films available on catch up i.e. The Queen,<br><u>TV</u> Sharpe, Heartbeat, Cold Feet, Cracker, Inspector Morse     | 1.0      | 1.3      | 1.7      | 1.4      |
| <b>Total for 2entertain, C4C and ITV<sup>23</sup></b>  |  | 8.6      | 8.2      | 9.2      | 7.9      |
| <b>20<sup>th</sup> Century Fox</b>                     | <u>Film</u> The Die Hard series, Simpsons – the Movie, Fight Club, Ice Age, Star Wars<br><u>TV</u> 24, Buffy the Vampire Slayer  | 12.0     | 14.3     | 15.3     | 16.9     |
| <b>Universal Pictures</b>                              | <u>Film</u> Bourne series, Elizabeth, American Pie series, Brokeback Mountain, Meet the Parents/Fockers,<br><u>TV</u> House, Law and Order   | 14.1     | 17.2     | 14.6     | 14.0     |
| <b>Warner</b>  | <u>Film</u> Oceans series, Harry Potter series, The Matrix series<br><u>TV</u> Smallville, Nip/Tuck, Friends, ER, The OC, Sex in the City, Six Feet Under, The Sopranos, The West Wing | 14.5     | 12.5     | 12.5     | 12.0     |
| <b>Buena Vista/ Walt Disney</b>                        | <u>Film</u> Ratatouille, The Queen, High School Musical  | 14.6     | 11.6     | 12.5     | 9.1      |

<sup>19</sup> Totals include including children's, sport/fitness, music and specialist.

<sup>20</sup> In 2004 BBCW's share of DVD sales for film and TV was 3.6% according to the BVA. The BVA does not publish a figure for BBCW's share of DVD sales for subsequent years. However, 2entertain estimates that in 2007 approximately 1% of 2entertain's DVD sales revenue was attributable to BBCW titles (of a total 2entertain share of 5.6%). 2entertain considers that sales of BBCW titles were particularly strong in 2007 due to the commercial success of *Planet Earth*. As a consequence, sales of BBC Worldwide titles would be expected to be a smaller proportion of 2e's DVD sales in 2005 and 2006.

<sup>21</sup> Channel 4 distribution was undertaken by 2entertain until April 2005.

<sup>22</sup> Including figures for Granada Ventures and Carlton.

<sup>23</sup> See the above explanation of BBCW revenues share in 2entertain.

| Figure 1: Total DVD Shares - Film and TV <sup>19</sup>                 |   |     |                   |     |      |
|--|---|-----|-------------------|-----|------|
|  | TV Scrubs, Grey's Anatomy, Desperate Housewives, Lost   |     |                   |     |      |
| <b>Sony Pictures</b>   | Film Spiderman, the Hostel series, Memories of a Geisha, the Da Vinci Code<br>TV Dawsons Creek, Married with Children | -   | 9.9               | 9.8 | 9.7  |
| <b>Paramount</b>   | Film Dreamgirls, Blades of Glory, Transformers, Titanic<br>TV Southpark, Charmed                                      | 6.3 | 7.3               | 6.5 | 10.4 |
| <b>EV/EIV (Entertainment in Video/Entertainment Film Distributors)</b> | Film The Lord of the Rings, Austin Powers, Traffic, Million Dollar Baby, Goya's Ghost, Ladies in Lavender, Hairspray. | 5.3 | 4.2               | 4.9 | 4.2  |
| <b>Momentum</b>  | Film Amazing Grace, Vera Drake, Lord of War<br>TV CSI Miami and NY  | 1.7 | 2.0               | 2.3 | 2.5  |
| <b>Contender</b>   | Film The Grudge, City of Violence<br>TV Spooks, Will & Grace  | 0.8 | 0.9               | 1.3 | 1.2  |
| <b>Prism</b>   | TV Beat the Cyborg, Lan Jam, The Stables  | 1.6 | 1.4               | 1.0 | 0.5  |
| <b>Optimum</b>   | Film Death of a President, Brick Lane, Pan's Labyrinth  | -   | -                 | 0.8 | 0.7  |
| <b>Fremantle Media</b>   | TV American Idol, The X Factor, Neighbours  | 0.4 | 0.4               | 0.6 | 0.5  |
| <b>Sony BMG</b>  | Music   | 0.4 | 0.7               | 0.6 | -    |
| <b>Universal Music</b>   | Music   | 0.3 | 0.5               | 0.5 | -    |
| <b>EMI</b>   | Music   | 0.5 | 0.6               | 0.5 | -    |
| <b>Anchor Bay</b>  | Film Nuns on the Run, Mona Lisa, Highlander<br>TV Roseanne  | -   | 0.4               | 0.5 | -    |
| <b>Hit Entertainment</b>   | TV Bob the Builder, Thomas the Tank Engine, Fireman Sam   | 0.6 | 0.7               | 0.5 | 0.5  |
| <b>Columbia Tristar</b>  | Renamed as Sony Pictures and Sony Pictures Television in 2002   | 8.7 | -                 | -   | -    |
| <b>MGM</b>   | Film Lord of the Rings trilogy, Austin Powers series<br>TV The Addams Family, Cagney and Lacey                        | 3.6 | 0.7 <sup>24</sup> | -   | -    |

Source: BVA data

<sup>24</sup> Q1 only

| Figure 1: Total DVD Shares - TV <sup>25</sup>         |   |          |          |          |          |
|---|---|----------|----------|----------|----------|
|   | Typical content   | 2004 (%) | 2005 (%) | 2006 (%) | 2007 (%) |
| <b>2 entertain<sup>26</sup></b>                       | Dr Who, the Graham Norton Show, Little Britain, This Life, Dad's Army                                   | 43.2     | 35.0     | 28.5     | 26.4     |
| <b>C4C</b>  | Ugly Betty, Shameless, Father Ted, The Peep Show  | –        | 2.8      | 6.3      | 4.5      |
| <b>ITV</b>  | Sharpe, Heartbeat, Cold Feet, Cracker, Inspector Morse  | 2.4      | 3.7      | 4.8      | 5.1      |
| <b>Total for 2entertain, C4C and ITV<sup>27</sup></b> |   | 45.6     | 41.5     | 39.6     | 36.0     |
| <b>20<sup>th</sup> Century Fox</b>                    | 24, Buffy the Vampire Slayer  | 13.6     | 13.6     | 16.2     | 14.9     |
| <b>Warner</b>   | Smallville, Nip/Tuck, Friends, ER, The OC, Sex in the City, Six Feet Under, The Sopranos, The West Wing | 18.1     | 13.0     | 10.4     | 10.6     |
| <b>Buena Vista</b>                                    | Scrubs, Grey's Anatomy, Desperate Housewives, Lost  | –        | 2.7      | 8.1      | -        |
| <b>Universal Pictures</b>                             | House, Law and Order  | 5.1      | 7.2      | 6.2      | 7.7      |
| <b>Paramount</b>                                      | Southpark, Charmed  | 4.4      | 4.0      | 3.6      | 4.4      |
| <b>Momentum</b>                                       | CSI Miami and NY  | 2.0      | 3.6      | 3.6      | 2.8      |
| <b>Contender</b>                                      | Spooks, Will & Grace  | 2.8      | 2.5      | 3.0      | 3.7      |
| <b>Columbia Tristar</b>                               | Renamed as Sony Pictures and Sony Pictures Television in 2002   | 1.2      | –        | –        | -        |

Source: BVA data

<sup>25</sup> These shares include video as well as DVD. However, the BVA 2008 Yearbook stated that "the DVD format represents over 99% of all sales in the market [in 2007] and as such it would be expected that the overall Video and DVD charts should be identical."

<sup>26</sup> In 2004 BBCW's share of DVD sales for TV was 25.6% according to the BVA. The BVA does not publish a figure for BBCW's share of DVD sales for subsequent years. However, 2entertain estimate that in 2007 approximately [~] % of 2entertain's DVD sales revenue was attributable to BBCW titles. 2entertain considers that sales of BBCW titles were particularly strong in 2007 due to the commercial success of *Planet Earth*. As a consequence, sales of BBC Worldwide titles would be expected to be a smaller proportion of 2entertain's DVD sales in 2005 and 2006.

<sup>27</sup> See the above explanation of the treatment of BBCW revenues from 2entertain.

## Annex 4

### Summary of Conclusions on the Retail Market

#### Why the proposed joint venture will not give rise to unilateral or to coordinated effects

- 1.1 The proposed joint venture will not give rise to unilateral effects for the following reasons:
- UKVOD will not have a large market share. Even if only TV VOD is considered the share of the transactional market will be less than 25 percent - below the level normally considered sufficient to raise competition concerns.<sup>28</sup>
  - For free content, which is the bulk of material available on UKVOD, the Parties will compete with each other for advertisers and viewers and will face strong competition from other sites and platforms.
  - There are financially strong and experienced competitors with significant advantages such as closed platforms, subscription services, hardware devices and global deals – advantages not shared by UKVOD.
  - Innovation will be driven at least as much by the competitors as by UKVOD and the Parties. Thus, companies such as Apple, Amazon, Microsoft and Sony have been strong innovators, and will continue to, leverage commercial and technological innovation from core markets in the US into the UK.
  - There are strong potential new entrants including the leading US free internet VOD provider, Hulu, and, in closed platforms, mobile phone operators.
  - Consumer switching is easy over the internet and most consumers will have relationships with at least one of UKVOD's competitors. There are no costs associated with switching (or multi-sourcing) over the internet.
  - VOD is largely a secondary content market and capacity growth is generated by production for film and linear free-to-air television. There are therefore no capacity constraints and the combination of regulatory and commercial considerations (in the case of UK content) and commercial considerations (in relation to US content) will ensure plentiful supply to the VOD sector.
  - The Parties are not the closest competitors in relation to sites or content and much of their content (including nearly all transactional content) will be available from other retail sites or platforms.
- 1.2 In considering coordinated effects it is necessary to consider first whether the merger will give rise to coordination between UKVOD and its competitors and second whether it will give rise to coordination or spillover between the Parties in areas of activity outside the scope of the joint venture.
- 1.3 There are no coordinated effects concerns as between UKVOD and its competitors at this level:
- The retail market is not highly concentrated. For free content there are a number of strong competitors including the closed platforms and Sky. For transactional content major competitors include Apple, Sky, Amazon, Microsoft and Sony.

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<sup>28</sup>

CC2, Merger Reference Guidelines, para 3.4

- This is a new market, particularly so far as the internet is concerned. There has been significant recent entry and expansion and all of the major players are planning further growth.
- Competitors have differentiated product offerings - UKVOD will focus on editorial quality and content range; Sky has a strong film component; Apple, Microsoft and Sony focus sales around their hardware; the closed platforms offer bundled offerings of VOD and other products; retailers rely on broader relationships with consumers and a mix of VOD and physical sales.
- Switching is not difficult.
- The secondary nature of the market means that it is difficult to control capacity. Further the global nature of a significant part of the rights acquisition market means that conditions of competition are not materially impacted by UK market conditions.
- The market is nascent. The speed and size of its development is uncertain as is its future structure, for example, free versus pay, closed as against open, DTR versus DTO. There is limited predictability as to market shares.
- Most of the major participants in the market (with the exception of UKVOD) are not primarily driven by their VOD businesses - they have wider business operations of which VOD is only a part. Their corporate strategies therefore differ significantly from each other.
- As with all technology markets there is considerable pressure to innovate and the major players have a strong history of innovation. Early mover advantage to take advantage of a new idea or technology can be significant even to smaller firms. Thus, for example, LOVEFiLM gained a high share of the online DVD market through its early investment.

1.4 The joint venture will not give rise to coordination between the Parties or spillover in retail markets for the reasons described above and the following additional reasons:

- The Parties are not competitors in retail transactional markets - only C4C has a transactional business.
- For the businesses that are going into the joint venture - including most retail archive business and all transactional material - UKVOD will be providing the service and the Parties will have no or only limited relevant market activities.
- Catch up will be provided by UKVOD and C4C and ITV. Catch up is a free service and closely linked to free-to-air linear TV services. In financial terms linear free-to-air television is considerably more valuable to the Parties than VOD and the relationship with linear is the main driver of decisions concerning what content to offer on catch up. The Parties are major competitors on free-to-air linear television and the joint venture will not impact this.
- BBC iPlayer is outside of the joint venture and under the management of the BBC public service arm rather than BBCW. The independent operation of this major free competitor driven by public service obligations and free of advertising is a further factor undermining any scope for coordination. There will also be competition on catch up from other sites and platforms including Sky, Demand Five, closed platforms and PVRs.
- There will be a limited amount of free archive material available on the Parties' web sites, outside the joint venture. This will largely be related to supporting the

Parties' free-to-air linear offerings and decisions will be driven by free-to-air linear scheduling and editorial issues.

- There is no scope for spillover from the retail market to the rights acquisition market. The Parties are strongly financially incentivised to place attractive content on UKVOD) and producers, UK and US, have alternative customers for VOD content.

## Annex 5

### Summary of Conclusions on the Syndication Market

#### Why the joint venture will not give rise to unilateral or to coordinated effects, or to spillover concerns

- 1.5 The joint venture will not give rise to unilateral effects in the syndication market for the following reasons:
- It is difficult to precisely estimate UKVOD's syndication market share but based on the retail market share it will be well under 25 percent.
  - There are strong purchasers, such as iTunes, Amazon, Sky and Virgin Media.
  - ITV has no significant presence in the syndication market and, in relation to archive content, there are strong competitors to the Parties including the producers themselves, content aggregators and US Studios.
  - There are no significant switching costs if a site or platform wishes to change, or increase the number of, content suppliers and it would be usual to multi-source content.
  - VOD is a secondary market and competing suppliers will continue to have a growing supply of content reflecting the demand of linear channels in the UK and the US.
  - It is not the case that UKVOD content will represent first or second best choices for sites and platforms, particularly in the absence of catch up. The Parties' archive content has only a very limited representation in, for example, the iTunes Top 10 video download, and the most popular DVD sales.
- 1.6 The joint venture will not give rise to coordinated effects as between UKVOD and its competitors or as between the Parties.
- 1.7 It will not give rise to coordinated effects between UKVOD and its competitors for the following reasons:
- The syndication/content supply market is not highly concentrated. It is clear from iTunes Top 10 VOD and DVD charts that there are a number of leading suppliers.
  - Entry barriers are not high and the terms of trade support entry into the wholesaling market by independent producers such as ALL3MEDIA.
  - Popularity of content will vary by type of content and over time. While certain titles such as *The Simpsons* retain long term popularity, others may be subject to a limited exploitation window.
  - Switching costs are low.
  - Capacity is driven by factors outside of the VOD sector - in particular, linear free-to-air market demand. For much content, it is also driven from outside the UK.
  - The market is nascent and it is unclear how it will develop, for example it is not clear what content will be popular on VOD and where the major sources of demand will be focussed.

- There is scope for more aggressive exercise by independent producers of their right to supply DTO and other VOD rights - they can be expected to do this if prices increase or supplies from broadcasters are withheld. Competing platforms are likely to encourage this.
- In VOD markets there will be continued pressure for improved quality - for example high definition and supplementary content which will drive innovation and product differentiation.

1.8 The joint venture will not give rise to coordination or spillover concerns between the Parties in the syndication market for the following reasons:

- Syndication of catch up is closely linked to linear platforms and this will drive the Parties' decisions on catch up.
- Syndication of iPlayer will be determined on the basis of BBC public service obligations and decisions will be made by BBC rather than BBCW. There is no scope to coordinate commercial decisions on catch up syndication of C4C and ITV with those of BBC.
- C4C and ITV are themselves driven by different commercial and corporate strategies. ITV as a listed company has different corporate incentives than C4C which is more focused on its public service obligations. C4C is entirely dependant on external producers whereas ITV has a mix of in-house and external content.
- Apart from catch up, the main area in which the Parties will continue to compete in syndication is in respect of the DTO/DVD carve out. The carve out reflects the commercial reality that DTO is increasingly an alternative to DVD distribution for retailers. The DVD businesses are considerably more valuable than the VOD businesses of the Parties. Decisions on when the carve out will be exercised and terms of supply will therefore be driven by considerations relating to the DVD business. DTO/DVD carve out rights will be in respect of the most popular content where the Parties will face competition from other popular content and the purchasers are powerful buyers such as Amazon and Tesco. There is, therefore, no scope for coordinated action.
- BBCW and C4C do not have any in-house production and as distributors of content they must ensure effective distribution arrangements in order to remain credible with producers. The pressure from producers and, in the case of BBCW, from BBC Vision would undermine any coordination