

**Anticipated joint venture between the BBC through BBC Worldwide Limited, Channel Four Television Corporation, and ITV plc relating to the Video on Demand Sector: Project Kangaroo**

**Response of Time Warner Inc. ("TWI") to Competition Commission letters of 16 July 2008**

This response has been prepared on behalf of TWI and relevant members of the TWI Group on the above anticipated Joint Venture. This letter includes the response to your letters of 16 July 2008 to Mr. Dana Dunne of AOL (UK) Limited ("AOL") and Mr. Joshua Berger of Warner Bros. Entertainment UK Limited ("WBE").

TWI believes that the relevant members of the TWI Group are its subsidiaries Warner Bros. International Television Distribution Inc. ("WBITD"), Home Box Office Inc. ("HBO") (both of whom were contacted by the Office of Fair Trading ("OFT") at an earlier stage in this inquiry), Turner Broadcasting System, Inc. ("Turner"), AOL and WBE. This letter sets out the responses of all these companies to the points on which you seek views in your letters of 16<sup>th</sup> July, together with some wider comments on the anticipated Joint Venture.

We shall deal with the topics that you raise in the order that they appear in your letters of 16 July.

**1. RELEVANT MARKETS**

**Overview**

- 1.1 TWI believes that, generally speaking, many different forms of audio visual entertainment compete for consumers' attention and spending. For example, consumers choose whether to spend their leisure time and funds to go to a cinema to see a movie, to stay at home to watch a DVD or television show, or to use a mobile device to play an electronic video game.
- 1.2 Within the respect to audio visual programming available to consumers in the home, there are various competing types of programming, delivery technologies, formats, and business models.
- 1.3 The types of competing programming include movies, made-for-TV series and entertainment, documentaries, sports, news, music-based programming and other genres, of UK or other origin.
- 1.4 As explained in further detail below, the technologies used to deliver this programming include analogue and digital means, such as via "terrestrial" transmission to aerials, satellite transmission to dishes, cable transmission to homes, transmission via telephone wires, transmission via the internet, transmission to mobile devices and physical delivery of DVDs.
- 1.5 A variety of business models support the delivery of such audio visual programming. Programming may also be funded from one or more of the following: public funding, advertising funding, and consumer funding. Consumers may pay one more of the following for programming: a subscription fee, per-viewing fee, a rental fee, or purchase.

- 1.6 There are also a variety of different formats, which provide consumers with different rights to view programming. These formats include:
- (i) traditional "linear" television (in relation to which the BBC, ITV plc and Channel 4 ("Joint Venture Parties") are all major players);
  - (ii) DVDs, which can be rented (including on-line through undertakings such as LOVEFiLM) or purchased;
  - (iii) download-to-own or electronic-sell-thru ("EST") which allows the viewer to download a permanent copy of a selected movie or television episode or series in exchange for a fee;
  - (iv) video-on-demand ("VOD"), defined within paragraph 1.8 below, whether television- or internet-based, which allows the viewer to select an individual item of programming to view at a time of the consumer's choosing; and
  - (v) hybrid products, which combine features of both linear channels and VOD.
- 1.7 The types, technologies, formats, and business models involved in programming continue to evolve.

## **VOD**

- 1.8 For purposes of this submission, TWI has assumed that VOD refers to video programming which may be temporarily viewed by consumers at a time of their convenience (i.e., download-to-rent), rather than according to a schedule as with traditional, linear broadcasts. TWI has also assumed that VOD does not encompass EST.
- 1.9 VOD content can be transmitted to a variety of consumer devices (e.g., televisions, computers, mobile phones) via broadcasting, streaming or temporary downloading.
- 1.10 TWI would also note that there are a number of different business models that apply to the way in which viewers consume VOD content, the principal three of which are outlined below:
- There is free or advertising-supported VOD ("FVOD" or "AVOD") in which consumers do not pay any kind of fee to view the content on an on-demand basis, but where the content is either offered entirely for free (for example, BBC's iPlayer) or where the on-demand service is supported by sponsorship or advertising, where the advertising can be before, during, or after the programming, or can take the form of banner and contextual ads around the screen being viewed by the consumer. Examples of this latter type of service would be parts of Channel 4's 4OD service, and ITV.com's catch-up service. This business model could be viewed as comparable to the business model for free to air broadcasting;
  - There is also subscription-based VOD ("SVOD"), in which consumers pay the on-demand service a subscription fee, usually on a monthly basis, for access to on-demand content. Typically the subscription fee allows the consumer to view unlimited video on demand content during the subscription period. An example of this type of service is offered by BSKyB, which allows subscribers to its linear Sky Movies service to also view those movies on an SVOD basis via its Sky Anytime service;

- There is transactional VOD ("TVOD"), in which consumers pay a transactional (or "rental") fee to view individual items of content on an on-demand basis. Examples of this type of service are offered by Filmflex, Tiscali, BT Vision, Sky Player and iTunes.

1.11 Some VOD services utilise a mixture of different business models, for example Channel Five's Demand Five which provides both FVOD and TVOD.

#### **The Joint Venture Parties and other market participants**

- 1.12 Before considering further the nature of the market or markets potentially affected by the Joint Venture, TWI describes briefly the relevant businesses of the Joint Venture Parties as it understands them, and provides further detail on the various types of audio visual programming, delivery technologies, formats, and business models referred to in sections 1.1-1.7 above, including examples of major participants other than the Joint Venture Parties in such UK audio visual media businesses.
- 1.13 TWI then briefly describes the businesses of TWI's relevant subsidiaries and how they interact, or may potentially interact, with the businesses of the Joint Venture Parties and potential business of the Joint Venture.

#### **Businesses of the Kangaroo Joint Venture Parties**

1.14 The Joint Venture Parties operate at various levels within the audio visual sector in the UK; their key activities are detailed below.

#### ***The BBC***

- 1.15 The BBC is one of the five public service broadcasters and is the UK's largest broadcasting company. It is publicly funded through the licence fee (which might be described as a form of hypothecated tax) payable in respect of all households using a television set. In addition to the operation of the major television channels, BBC1 and 2, which are available to all TV households, it operates digital free-to-air ("FTA") TV channels (BBC3, BBC4, CBBC, CBeebies, BBC News 24 and BBC Parliament), and, through BBC Worldwide, jointly owns the pay TV broadcaster, UKTV, which broadcasts a suite of pay-TV channels, funded by subscription and advertising.<sup>1</sup>
- 1.16 The BBC wholly owns BBC Worldwide; BBC Worldwide operates pay TV or FTA advertising-funded channels outside the UK, manages the exploitation of BBC owned programming worldwide and owns various magazines and other commercial operations of the BBC. These include a joint venture with the Woolworths Group plc for the distribution of DVDs for sale or hire.<sup>2</sup>
- 1.17 BBC Worldwide has preferred partner status in relation to the BBC, having right of first refusal to undertake any commercial activity on behalf of the BBC, including the licensing of content by the BBC to BBC Worldwide for commercial exploitation.
- 1.18 The BBC is also the UK's major radio broadcaster.

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<sup>1</sup> An indication of the BBC's market shares in respect of linear broadcasting is noted within section 4 below.

<sup>2</sup> See the clearance decision of the OFT dated 19 September 2004 in respect of the joint venture.

- 1.19 The BBC has major in-house production facilities for its own programming (including news, documentaries and various types of drama) and also commissions a large quantity of programming from independent production houses. It may also invest in the production of movies.
- 1.20 The BBC has a vast library of archive material, to which it is constantly adding. In addition, it and BBC Worldwide buy the rights to third-party programming for transmission on the BBC channels.
- 1.21 The BBC together with ITV operates a digital FTA satellite platform (see further below). The transmission system which it uses for traditional terrestrial broadcasting belongs to Macquarie Bank.<sup>3</sup>
- 1.22 The BBC has already commenced operations in the field of VOD. This takes the form of a service known as the BBC iPlayer (as well as the BBC separately syndicating archived content to VOD providers); the iPlayer enables consumers visiting the BBC web-site to view recent television broadcast material online within 7 days of it being broadcast, i.e., "catch-up" material. The iPlayer service, which has proved to be very popular<sup>4</sup>, now also covers radio programming.
- 1.23 The BBC has also made the iPlayer available on various platforms such as Virgin Media's television platform, the Nintendo Wii console (users having the ability to stream programmes direct to their televisions via the console), the Apple iPhone and the iPod touch.
- 1.24 In addition, the BBC licences programming to third parties for inclusion in the VOD services of web-based suppliers of programming via the internet. For example, archived content is available on iTunes.

#### ***ITV plc***

- 1.25 The CC has recently reviewed the business of ITV plc in the BSkyB/ITV inquiry<sup>5</sup> and a description of the ITV business appears in paragraphs 2.41-2.46 of the CC's Report.
- 1.26 ITV plc is the major corporate supplier of the advertising-funded, universally available FTA channel, Channel 3 or ITV1.<sup>6</sup> ITV plc supplies the Channel 3 service in England and Wales.<sup>7</sup> The ITV providers have public service obligations, for example in relation to delivery of regional programming.
- 1.27 ITV plc is the owner of a significant stake in Independent Television News ("ITN"), which supplies news programming to the ITV network and also to Channel 4.
- 1.28 ITV plc is also the majority shareholder in the ITV2 and ITV3 and ITV4 digital television channels, and is active in content production via the in-house ITV Productions (formerly Granada Productions), as well as commissioning programming from independent

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<sup>3</sup> See the Final Report of the CC dated 11 March 2008 in respect of Macquarie UK Broadcast Ventures Limited/ National Grid Wireless Group.

<sup>4</sup> The BBC has reported, see its press release of 25 June 2008, that as of that date the iPlayer had received over 100 million requests to stream or download programmes in the 6 months since its launch, with the average number of daily requests in May 2008 being 700,000.

<sup>5</sup> CC's Report sent to Secretary of State (BERR) dated 14 December 2007.

<sup>6</sup> An indication of ITV market shares is provided in section 4 below.

<sup>7</sup> In Scotland the Scottish Media Group holds the Channel 3 franchise, in Northern Ireland the licence holder is Ulster Television and in the Channel Islands it is Channel Television Limited.

production houses. In addition, ITV acquires third-party programming for its channels. As the successor to the major participants in the second oldest UK TV broadcasting organisation, which has been the UK's largest commercial broadcaster for more than 50 years, ITV has a considerable archive of programming, which is constantly refreshed.

- 1.29 ITV also licences its programming for transmission in a wide range of third party services in the UK and elsewhere.
- 1.30 ITV together with the BBC operates a digital FTA satellite platform, as noted above.
- 1.31 ITV operates ITV.com, through which both catch-up and archived ITV content is available via VOD, and also licenses VOD content to other VOD platforms. The ITV.com service is increasing in popularity with viewers.<sup>8</sup>

#### ***Channel 4 Television Corporation***

- 1.32 Channel 4 is a public corporation without shareholders that operates the fourth universally available UK television channel, which is supported by advertising revenue and the exploitation of its programming in other media and abroad.<sup>9</sup> Channel 4 has a public service remit arising from the conditions attached to its licence.
- 1.33 Channel 4 also operates pay-TV channels, which are subscription- and advertising-funded (E4, E4+1, Film 4 and Film 4+1). It has commissioned programming and invested in movies, so that it owns a large archive of programming, which is constantly refreshed. In addition Channel 4 acquires third party programming for its channels.
- 1.34 Channel 4 also licences its programming for transmission in a range of third-party services in the UK and elsewhere.
- 1.35 Channel 4 has a free VOD service called 4OD<sup>10</sup> for both archived and catch-up content, available online and via television providers Virgin Media, Tiscali and BT Vision.

#### **UK audio visual media businesses and example of market participants**

##### ***Technological means of delivery***

- 1.36 Within the UK audio visual programming is physically delivered to viewers by a variety of different means, as follows:
  - analogue terrestrial (which currently, i.e. prior to digital switch-over, transmits BBC1, BB2, ITV, Channel 4, and Channel 5)<sup>11</sup>;
  - digital terrestrial television ("DTT") (the primary television provider currently using this technology being Freeview, for FTA television services, with Top Up TV and Setanta providing additional subscription services using this technology);

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<sup>8</sup> ITV has reported (see its press release of 20 June 2008) that since its launch in August 2007 ITV.com, combined with ITV Local, has received 69 million video views and that there has been a 362% increase in usage for video across ITV's portfolio of sites. In May 2008 ITV.com had a total of 6.8 million unique viewers.

<sup>9</sup> Channel 4 market shares are considered in section 4 below.

<sup>10</sup> Channel 4 announced on 27 February 2008 that 100 million streams or downloads had been accessed on 4OD since its launch in December 2006, and that since 1 January 2008 there had been a 110% increase in active users of the 4OD PC service.

<sup>11</sup> The transmission system used to broadcast these services is owned by Macquarie Bank.

- direct to home ("DTH") digital satellite broadcasting (one DTH platform using such technology being owned by BSkyB, and used to provide its pay TV services and those of others, for example Setanta, as well as FTA channels, and one platform being owned by the BBC and ITV Freesat joint venture, which only allows for the reception of unencrypted FTA television channels, rather than pay TV services);
  - cable television (analogue and digital) (used by Virgin Media to deliver its services);
  - IPTV, whereby content is distributed over the internet through a closed system using broadband infrastructure delivered to the television screen via a set top box (examples of operators using this technology are Tiscali in the South East of England and BT for its BT Vision service);
  - the internet, meaning "television-over-the-internet" whereby a viewer accesses a website on the open internet and views or downloads content on his or her computer (or on television screens, for example through a games console) (examples of services using this technology are the Joint Venture Parties' VOD services, Babelgum, Joost, iTunes and YouTube); and
  - mobile television, whereby content is delivered to mobile phones via cellular networks.
- 1.37 As noted above, audio visual programming can also be viewed by consumers through PVRs (such as BSkyB's Sky+) and DVDs.

#### ***Commercial means of delivery and programming formats***

##### **Linear**

- 1.38 In order to provide viewers with linear television services, channel providers (such as the Joint Venture Parties, Channel Five, BSkyB, UKTV (a BBC Worldwide/Virgin Media joint venture), Virgin Media TV, Discovery, MTV, Disney and Turner) collate a collection of audio visual programming and schedule such programming into television channels (some of which are dedicated to a particular theme or genre). Channels are then provided using a variety of different commercial models utilising the various technologies referred to above.
- 1.39 The two basic commercial models are FTA or pay TV.

##### **FTA**

- 1.40 As noted above, the analogue FTA television services are BBC1, BBC2, ITV1, Channel 4 and Channel Five (although Five does not have universal reach). These channels are also available, together with other FTA channels such as BBC3 and BBC4, E4 and ITV3, are also available on DTT through Freeview (requiring the purchase of a set top box), and through the BSkyB Freesat from Sky service, as well as being available within the pay TV retailers' packages.
- 1.41 In the case of the BBC, its channels are funded through the licence fee. Commercial broadcasters of FTA services are funded through advertising and sponsorship.

##### **Pay-TV**

- 1.42 Pay TV retailers offer packages of channels (typically alternative packages of basic and premium channels) in return for subscription fees, as well as particular programmes in return for one-off fees (pay per view), using DTH, cable, DTT or IPTV technologies.

- 1.43 Pay TV retailers also offer bundled packages of television services with broadband and telephony services.
- 1.44 Pay TV retailers include BSkyB, Virgin Media, and Setanta.

**Non-Linear**

- 1.45 As outlined above in paragraphs 1.6-1.11, programming can also be delivered in non-linear form such as VOD and EST.
- 1.46 By way of example, a brief description of the businesses of a number of parties other than the Joint Venture Parties active in the provision of non-linear VOD broadcasting follows.
- 1.47 BSkyB broadcasts a number of pay TV channels and VOD services. It offers a VOD platform, "Sky Player", for online viewing, which provides free content equivalent to a customer's pay TV subscription, together with TVOD for non-subscribers. BSkyB also offers push-VOD for television viewing through Sky Anytime.
- 1.48 Virgin Media offers a VOD service to its subscribers, using a mixture of AVOD, TVOD and SVOD. Its offering includes the iPlayer and 4OD, and offers the on-demand movie VOD service provided by FilmFlex (a joint venture between Columbia Pictures Corporation (Sony Pictures) and The Walt Disney Company).
- 1.49 Channel Five (which provides the fifth channel licensed for universal reception as well as a number of FTA digital channels) has a VOD service, Demand Five, with a mixture of FVOD and TVOD.
- 1.50 BT uses its landline network for the delivery of BT Vision, a VOD service.
- 1.51 Tiscali operates a telephony-based service in London and south-east England offering packages of television channels and VOD services.
- 1.52 Blinkbox offers online movie on-demand to buy (on an EST basis) or to rent as VOD, as well as clips which can be customised.
- 1.53 Joost offers online television on an AVOD basis.
- 1.54 iTunes provides TVOD online, as well as other content, and also offers content on a permanent EST basis.
- 1.55 VOD services are also provided by internet content aggregators, such as Yahoo!, MSN, and AOL, who obtain a wide variety of video content in different forms, including VOD, from various sources and make this available to consumers on their websites.

**Content**

- 1.56 All channel providers and broadcasters, content aggregators, and providers of VOD services depend on content.
- 1.57 Content is derived by such market participants from a variety of sources. Some broadcasters, primarily the BBC and ITV, have large in-house production capability (as indicated above) and produce their own content, of various genres, for both captive use and licensing to third parties.

- 1.58 Broadcasters also commission content from independent production companies, such as Endemol and All3Media.
- 1.59 Providers of broadcasting services also acquire from content rights-holders the rights to show archive or library programming (for example from the Joint Venture Parties), non-UK produced programming, movies (for example from TWI, Paramount and Universal) and sporting events. Rights may be obtained for exploitation of the content exclusively, or by multiple licensees utilising different methods of delivery, either simultaneously or for distinct windows of exploitation.

#### **Description of TWI's business**

- 1.60 TWI is a leading media and entertainment company, whose businesses include interactive services, cable systems in the United States, filmed entertainment, television networks and publishing. Its subsidiaries include Time Inc., Time Warner Cable Inc., HBO, Turner, AOL, and Warner Bros. Entertainment Inc. ("Warner").
- 1.61 TWI's involvement in VOD services in the UK is primarily through two of its subsidiaries, Warner and HBO. Turner also has some involvement in VOD, and a broader involvement in television, in the UK. In the UK, AOL is an internet content aggregator, which acquires a variety of forms of content that is generally made available to consumers free of charge in an advertising-supported business model.

#### **Warner**

- 1.62 Through its international television distribution business (WBITD) and its digital distribution business, Warner Bros. Digital Distribution ("WBDD"), which is part of WBE, Warner distributes Warner Bros. produced and licensed programming worldwide on television and digital platforms outside the US.
- 1.63 Warner licenses television and digital distribution rights to over 5,500 movies, over 30,000 hours of television programming, and over 7,000 episodes of animation throughout Europe, including the UK.
- 1.64 Warner licenses movies and other forms of television programming for linear transmission on free-to-air, basic subscription, and premium subscription television channels. It also licenses VOD rights to such programming to these television channels and to other platforms (see further below). Further, it licenses permanent download rights (EST) to various platforms.
- 1.65 WBE is a UK subsidiary of Warner. Its activities in the UK are in the licensing of movies for theatrical (cinema) distribution, the distribution of DVDs for sale and hire, consumer products, and digital distribution through WBDD.

#### **HBO**

- 1.66 HBO undertakes television distribution worldwide of HBO-produced, owned and/or licensed programming through three outlets.
- 1.67 First, HBO licenses its content to HBO-branded, linear premium-pay subscription television services, which are operated by joint ventures and distributed by third-party platform operators (for example cable and satellite (DTH)). HBO does *not* operate any HBO-branded linear premium-pay subscription television services in the UK.
- 1.68 Second, HBO licenses television programming (for example series, mini-series, movies, documentaries, comedy specials, concerts) throughout Europe, including the UK, for linear

broadcast to free-to-air, basic subscription, and premium subscription television channels. It also licenses certain SVOD rights to its programming to television channels.

- 1.69 Third, HBO licenses HBO-branded linear and on-demand subscription-based services distributed via third-party broadband and/or mobile platforms.

**Turner**

- 1.70 Turner both creates and programs branded news, entertainment, animation and movie programming on television and other platforms, primarily for pay TV, for consumers around the world. It generally aggregates this content under Turner's own brands (its networks/channels including CNN, Turner Classic Movies ("TCM") and the Cartoon Network), but also licenses content, including news footage, to third parties.
- 1.71 Its UK channels include CNN, TCM, TCM2, Cartoon Network, Cartoon Network Too, Cartoonito, Boomerang and Nuts TV. It also licences content to third-party, free-to-air channels.

**AOL**

- 1.72 Following the sale of AOL's UK access business to the Carphone Warehouse, AOL provides consumers with a variety of online services (such as email) and content, including radio, video, news and entertainment, which it offers to consumers through an advertising-supported business model. AOL does so under its own brand and using other branded websites (for example Asylum), and for distribution partners (for example Carphone Warehouse's Talk Talk and HP).
- 1.73 AOL, acting through its advertising arm, Platform A, sells advertising space on its own websites, as well as advertising space on third-party websites, to advertisers.

**TWI's involvement in VOD activities in the UK**

**Warner**

- 1.74 In the UK, Warner is active in licensing content to all three of the principal VOD business models described in paragraph 1.10 above.
- 1.75 Warner licenses AVOD/FVOD and TVOD rights for various first-run television series (*i.e.*, television series that are having their first broadcast in the UK) to broadcasters. These include the rights to enable the broadcaster to offer viewers the chance to either preview up-coming episodes, or to "catch up" with a series if the viewer has missed the linear broadcast, within a period of time after the linear broadcast.
- 1.76 Second, Warner licenses SVOD rights to television series and animation to various platforms for use in branded areas, under the brand name "Warner TV." The programs available in such services have usually had their broadcast premiere in the UK.
- 1.77 Warner also licenses TVOD rights to movies to various platforms in the UK. The first-run movies available on such services are usually in the pay per view window, which traditionally was between the DVD release and the pay TV availability.
- 1.78 Outside of the UK, Warner licenses content in a similar manner and is involved with similar "Warner TV" branded services in countries such as France, Germany and Japan.
- 1.79 TWI notes that Warner is also involved in EST activities in the UK, licensing EST rights to movies and television series to various platforms in the UK.

**HBO**

- 1.80 In the UK, HBO's VOD licensing activity currently falls in to two primary areas: (i) catch up rights; and (ii) HBO-branded on-demand services, which are distributed under license to third-party operators.
- 1.81 HBO licenses catch-up SVOD rights for various first-run series and other television programming to the broadcaster of the particular series or television program.
- 1.82 Second, HBO licenses SVOD rights to series and other television programming to various platforms for use in branded areas, under the brand name "HBO." The programs available in such services have usually had their broadcast premiere in the UK, and the selection and scheduling of programs in the HBO-branded areas is generally determined by the third-party operator in consultation with HBO.
- 1.83 Similar HBO-branded on-demand services on television platforms (cable, DSL, IPTV) exist outside of the UK, in countries such as Israel, Japan and Cyprus. Similar HBO-branded on-demand services on the mobile telephone/wireless platform exist in Canada and Sweden.

**Turner**

- 1.84 Turner currently licences VOD content to platforms as part of branded areas/channels to pay TV customers.
- 1.85 Turner is also active in relation to the provision of VOD by mobile telephony, on a TVOD or SVOD basis, including the provision of animation and CNN news clips.

**AOL**

- 1.86 Currently, AOL's video offering consists of short form programming on its music, motoring, travel and news channels, together with video search facilities (provided using its Truveo video search subsidiary) which allow customers to search for and view video content available on the open internet.

**2. MORE DETAILED COMMENTS ON THE MARKET IN RESPONSE TO THE OFT'S QUESTIONS**

- 2.1 The OFT asked TWI, through questionnaires addressed to WBITD and HBO, to, *inter alia*, consider the market specifically in terms of the questions set out below; TWI believes it useful to reiterate its comments made to the OFT in response to these questions to the CC, together with some further observations on the issues raised.

**"What do you consider to be the product market relevant to VOD content supplied to VOD websites and TV platforms? For example, what are your views on substitutability between:**

- a. **Film and television content;**
  - b. **UK- and US-originated TV content;**
  - c. **Long form and short form VOD content;**
  - d. **Recently broadcast ('catch-up') and archive TV content?"**
- 2.2 TWI notes that it has not undertaken an in-depth economic analysis of relevant product markets, but notes that it believes that any product market in relation to VOD is evolving.
- 2.3 The degree of substitutability between VOD content provided to television platforms and VOD content provided to VOD websites varies, depending on various factors including:

- the extent to which consumers own both a television and a computer (or other device that accesses websites);
  - the speed of connectivity;
  - the VOD business model;
  - consumers' evolving viewing habits; and
  - the quality and nature of the programming.
- 2.4 With respect to the nature of the programming, TWI notes that the OFT in its referral decision left open the question as to whether US TV content should be considered as forming part of the same product market as UK TV content, as well as leaving open the question as to whether movie and television content should be regarded as forming part of the same product market. TWI believes that UK and US-originated content, as well as television and movie content, are frequently substitutable in the VOD environment, and are also frequently regarded as substitutable by viewers in other environments.
- 2.5 Long-form and short-form content may be substitutable, and "catch up" and archived television content may also be substitutable, depending on the specific content, age of the content, and viewing environment.

**"Do you licence content for UK VOD exploitation direct to VOD platforms or via UK broadcasters, or both. What factors influence such decisions?"**

- 2.6 As noted above, Warner, HBO and Turner licence VOD content to UK broadcasters and directly to a variety of other platforms.
- 2.7 Generally speaking, TWI (content owning) companies seek to distribute their programming on as wide array of distribution platforms as they profitably and securely can.

**3. EVOLUTION OF THE MARKETS OVER TIME**

- 3.1 The market for programming rights and the delivery of that programming to consumers has evolved in the UK largely as a result of technological innovation. As recently as 1990, almost all UK TV homes had access to only four free-to-air terrestrial television channels. Now, Ofcom estimates that 87.2% of TV households had multi-channel television at the end of Q1 2008 (including both pay-TV services of various types, and free-to-air digital services, including both linear channels and VOD).<sup>12</sup> These may be delivered by satellite or cable, the forms of delivery that have driven this vast expansion of availability, but these technologies are being added to by various forms of delivery using telephony networks and the internet. Technological advances in internet streaming and in relation to mobile telephony capability are likely to result in an increase in importance of these means of delivery.
- 3.2 Analogue television services will be discontinued in the course of the next few years, with the result that all homes in the UK will be forced to move on from the limited four-five channel offering on analogue terrestrial TV and are likely to access a wide range of programming in digital form.
- 3.3 The wide penetration of computers in UK homes, together with the introduction of broadband internet access and improved streaming technology, is already encouraging the take up of viewing of audio/visual programming via computer. The BBC iPlayer has demonstrated the great potential of this medium.

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<sup>12</sup> Ofcom's eighteenth Digital Progress Report.

- 3.4 Removal of regulatory restrictions has resulted in BT and a number of competitors entering the market using telephony networks to offer both linear channels and VOD services.
- 3.5 Although currently linear broadcasting (on various platforms) is the main source of revenue for rights-holders, this position will develop over time.

#### **4. THE JV PARTNERS' COMPETITORS, CUSTOMERS AND SUPPLIERS**

##### **Competitors to the Joint Venture Parties**

- 4.1 The three Joint Venture Parties are competitors of each other and a wide number of other broadcasters, including Turner, for share of viewership.
- 4.2 According to the OFT's referral decision, measured by viewing share, the Joint Venture Parties have a combined market share of over 63% in "multi-channel homes" (*i.e.*, homes that receive satellite, cable, digital terrestrial or other channel packages, whether free to air or paid for) and accounted for 70% of viewing across all television platforms.<sup>13</sup> The viewing shares of the Kangaroo partners will be much higher in non-digital homes, where the Joint Venture Parties own four of the five channels and Channel Five is likely (as in multi-channel homes) to have a low share.
- 4.3 ITV, Channel 4 and UKTV (which is jointly owned by BBC Worldwide and Virgin Media) compete with a wide range of other broadcasters, including Turner, for advertising revenue and for programming sponsorship. TWI understands that the BBC and BBC Worldwide do not compete directly in the UK for advertising revenue and for programming sponsorship.
- 4.4 Channel 4, ITV and BBC Worldwide compete with each other and a wide range of other content suppliers, including Warner, HBO and Turner, to sell content to other broadcasters worldwide. This is discussed further under the heading "Customers" below.
- 4.5 Channel 4, ITV, and the BBC compete with each other and with a wide range of other content acquirers for the acquisition of broadcast rights to programming from a number of sources, including Warner, HBO, Turner, and other content providers, and for the commissioning of programming. This is discussed further under the heading "Suppliers" below.
- 4.6 Channel 4, ITV, and the BBC also compete in respect of the carriage of channels and related content within the various television platforms.
- 4.7 The Joint Venture Parties also currently compete in respect of the provision of VOD, with each other and with other VOD providers, including internet content aggregators such as AOL (see paragraphs 1.47-1.55 above).

##### **Customers of the Joint Venture Parties**

- 4.8 Channel 4, ITV and BBC Worldwide compete with each other and a wide range of other content suppliers - including Warner, HBO and Turner - to sell content to other broadcasters worldwide.

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<sup>13</sup> By way of an example, TWI notes that for the week ending 8 June 2008, based on BARB viewing figures: the various BBC channels had a viewing share in multi-channel homes of nearly 30%, even before taking into account the UKTV joint venture; the ITV channels a share of over 21%; and the Channel 4 channels over 11%. This represents a combined total of over 62%. This can be compared to a share for the Five channels of under 6%, and a share of just over 6% for all BSkyB channels.

- 4.9 Generally, in the UK, the Joint Venture Parties distribute their programming on their own services. However, in some instances they do sell content rights to others; for example, the BBC supplies a large amount of archive (or "library") content to its joint venture, UKTV.

#### **Suppliers to the Joint Venture Parties**

- 4.10 Channel 4, ITV, and the BBC currently compete for the broadcast rights to programming from a number of sources - including Warner and HBO - and other content providers.
- 4.11 In addition, they self-supply by producing programming themselves and by commissioning programming from independent producers. These rights are intended to be deployed in the Joint Venture Parties' linear television channels and VOD services. The OFT in its referral decision estimates that the Parties' combined share of investment in UK first-run programming in 2006 was 92%, and that the Parties' total investment in programme expenditure excluding movies and sports accounted for around 80% of UK total programme expenditure.

### **5. CURRENT AND FUTURE COMPETITION IN THE RELEVANT MARKETS**

- 5.1 Current competition and the evolution in markets over time are described in sections 3 and 4 above.
- 5.2 TWI would expect competition in respect of VOD to increase in the future, unless any structural impediments or distortions arise.

### **6. BARRIERS TO ENTRY**

- 6.1 Barriers to entry vary according to the nature of the business in question. The barriers to distributing VOD on the internet, for example, are generally lower than launching an analogue or digital television channel.
- 6.2 Launching a successful, large-scale, VOD business on the internet does require (i) producing or acquiring programming, (ii) developing a business model to support that production/acquisition of programming (which involves developing public, advertiser, or consumer revenue streams), and (iii) marketing and distributing that content through the appropriate platform.

### **7. THE EFFECT OF THE JV ON CURRENT AND FUTURE COMPETITORS, CUSTOMERS AND SUPPLIERS**

- 7.1 TWI notes that if the Joint Venture has the effect of allowing third-party content to become more widely available, this would be a positive result for consumers (and would be in line with TWI's desire to distribute its content on as wide an array of distribution platforms as is profitably and securely possible).
- 7.2 However, whilst VOD in the UK is at a relatively early stage of development and it is not yet clear how the Joint Venture will operate, TWI believes it would not be in consumers' interest if the Joint Venture were to hinder the emergence or growth of competing platforms and business models for on-demand video content.