

Written evidence submitted by the BBC

DCMS COMMITTEE INQUIRY ON THE DRAFT MEDIA BILL

May 2023

INTRODUCTION

1. The BBC welcomes the opportunity to respond to the CMS Committee’s call for evidence on the Draft Media Bill. We’re grateful for the Committee’s continued interest, support, and expertise when looking into these areas. The BBC welcomes the Bill. It is strongly supported by all parties. Our comments are therefore mainly aimed at a small number of areas where we would urge the Government to go further in futureproofing the Bill so that it can enable the UK media industry to truly thrive into the future. We also thank DCMS for their continued engagement with the industry on the Draft Media Bill.
2. The Media Bill is a welcome and urgent intervention, which should now be passed into law as soon as possible. It is a significant step forward. However, the devil is in the detail, so it’s vital that we get the detail right now. Legislation like this only comes around rarely, and there are several areas where we believe that more is now needed to safeguard public service broadcasting into the future given the pace of consumer and market change.
3. The UK’s creative industries contributed £103.8bn to the economy in 2020 – over 5% of UK GVA.¹ Public service broadcasters (PSBs) are at the heart of this: we invest in companies across the supply chain, support jobs and skills across the whole of the UK, and attract inward investment from global companies. The BBC reaches almost everyone in the UK every week with great content – from trusted, accurate news, to the latest must-watch dramas, to moments that unite the nation such as the Coronation and Eurovision.
4. The BBC is an organisation that delivers across all forms of media at scale. We have been informing, educating, and entertaining the nation for 100 years, and our work now is increasingly digital. Last year, UK audiences spent more time watching BBC TV or iPlayer than Netflix, Disney+, and Amazon Prime Video combined.² In 2019/20, the BBC created an estimated £4.9bn of economic output in the UK economy, with approximately half of the BBC’s GVA generated outside London.³ In the same year, BBC activity supported 53,600 full-time equivalent jobs in the UK economy.⁴ We are the largest spender on original UK content, commissioning over £1.4bn of original TV content in 2021/22 working with 334 independent producers from across the UK.⁵ The BBC made available over 21,000 hours of first-run programming in 2021 – in contrast, as of April 2022, 1,389 hours on Netflix were UK-produced original series and films.⁶

¹ [DCMS Sectors Economic Estimates](#) (2020).

² [BBC Annual Plan 2023/24](#).

³ KPMG, [Assessment of the Economic Impact of the BBC](#) (2021).

⁴ *Ibid.*

⁵ BBC, [Commissioning Supply Report](#) (2022).

5. The UK's thriving media ecosystem is made up of a delicate balance of public and private organisations. It must be supported by the right regulatory framework. In an increasingly global and digital marketplace, it's vital that the 20-year-old regime is updated for the future.
6. Our response focuses on three key areas where we believe additions to the Draft Media Bill are needed: TV prominence, listed events, and audio findability. We believe these are easy, non-controversial changes to make at this stage of the process.
7. We have also identified three key principles that should inform the new regime: a futureproof approach; a responsive, agile regulator, and consistency with the BBC's Charter and Agreement.

OVERARCHING PRINCIPLES

A futureproof approach

8. As the Committee notes, the UK's legislative framework is lagging behind rapid changes in the media landscape. The Media Bill must be sufficiently flexible to keep up with the pace of change as technology and consumption habits continue to evolve. In this light, we welcome many of the Draft Media Bill's provisions – for example, a greater focus on how PSBs can deliver through online as well as linear programming. This will better enable us to use our whole portfolio of channels and iPlayer, stations, and Sounds to offer audiences what they want, how and when they want it. But there are other areas where the Bill should be more future-fit (for example, listed events, as outlined in more detail below).

A responsive, agile regulator

9. Ofcom will rightly be responsible for designing, delivering, and enforcing large parts of the new regime, which will be a key part of a futureproof approach. The regulator will need to be agile, swift, and proactive in the evolution and application of the regime.

Consistency with the BBC's Charter and Agreement

10. The BBC has a unique regulatory framework given our public funding arrangements and the rightly high public expectations on us to deliver. There are some specific differences between our obligations and those of the other PSBs (for example, see our comments below about the BBC's TV must-offer requirement and distribution policy). The Media Bill should not introduce duplication, inconsistencies or contradictions when it comes to the BBC meeting our Charter and Framework Agreement obligations. We welcome the engagement we have had with DCMS to ensure that all the BBC's regulatory requirements are aligned and no undue additional burdens are placed on the BBC.

TV PROMINENCE

What the TV prominence regime currently does

11. The impact of public service broadcasting depends not just on creating high-quality, distinctive UK content, but also on providing easy access for people to consume it. The

⁶ Ofcom, [Media Nations](#) (2022).

prominence regime aims to ensure that audiences can easily find PSB content.

12. The current regime was introduced in 2003 when most households watched broadcast linear channels on a traditional TV set, and therefore only applies to services included in the linear EPG. But technological developments are fundamentally changing the ways people watch programmes, with the BBC operating in an increasingly international and digital marketplace – from global companies like Amazon and Google entering the UK market with their own devices, platforms and operating systems, and even content, to new distribution mechanisms like internet-delivered TV and the accelerated growth of free ad-supported TV (FAST) channels.

An updated TV prominence regime is welcome and urgently needed

13. The draft legislation is a significant positive step forward in securing the objective of ensuring public service content is available and easy to find, however people choose to watch TV. Given the pace of change, it's important that the Bill isn't disproportionately prescriptive, and it's right that Ofcom guidance will be more detailed in setting out the requirements of the new regime.
14. Equally, the new legislation must strike the right balance between allowing for innovation and providing adequate safeguards to ensure that PSB services and content have prominence into the future. At the moment, the BBC believes there are some fundamental elements missing, which could undermine its objectives.

A clearer definition of "appropriate prominence"

15. The Committee asks whether the draft Bill should provide a clear definition of what prominence in online services looks like. We believe that it should.
16. Our current experience with the linear regime has shown that poorly defined "*appropriate prominence*" is a subjective and ambiguous term, which can lead to unnecessary friction in negotiations and, most importantly, failure to meet audience expectations. For example, CBBC and CBeebies appear on page two of Sky's children's EPG, behind Sky's own channels – despite the views of 72% of parents that they should be at the top of the channel menu.⁷ The challenge is only likely to grow with the entry into the market of more global technology companies with desires of scaling globally and little interest in supporting UK PSM, and the rise of self-preferencing as well as "paid-for" prominence where global players can secure prominence for their own content in exchange for financial payment.
17. For this reason, the BBC has consistently called for *significant* prominence for public service broadcasters. We believe this would be proportionate, particularly given that platforms will only be regulated under the regime if they reach a significant number of UK users.
18. The primary legislation should set out that designated PSB services (and relevant public service content or listed channels included within those services) should be among the most prominent in the user interface, across all major access routes, including but not limited to homepages, app pages, search and voice search functionality. We believe that this would ensure sufficient guardrails in the legislation, without disproportionately impacting

⁷ BBC research, 2018.

innovation or the ability for the regulator to flex its approach as technology and viewing habits change.

Alignment with the BBC's must-offer and Distribution Policy

19. The BBC Charter and Framework Agreement require us to publish a Distribution Policy, following consultation with the public and Ofcom, outlining the reasonable conditions under which we will make our output and services available to third parties, for example to secure appropriate prominence, data, attribution, quality, and value for money. We are required to do all that is reasonably practicable to ensure that audiences can access our UK Public Services. In particular, the BBC's Framework Agreement with DCMS and Distribution Policy legally require that the BBC must offer the UK Public Services to third parties and act on a FRND basis in doing so. We may only limit distribution of the UK Public Services where we are satisfied that this is reasonable and in the public interest.
20. We welcome the Media Bill's recognition that the BBC's existing and comprehensive must-offer requirements as set out in our Framework Agreement apply, rather than introducing a separate must-offer obligation under the Media Bill. We believe the Bill needs to provide for a distinctive must-carry offer for the BBC, which acknowledges the BBC's existing obligations including our distribution policy. This would ensure that the BBC's extensive must-offer requirements under our Framework Agreement are balanced with new must-carry requirements on platforms. This would mirror the arrangements that are being proposed for the commercial PSBs. We welcome the ongoing engagement we have had with DCMS officials to ensure that the prominence regime does not undermine our Charter and Framework Agreement obligations.

Inclusion of multi-use devices

21. Beyond smart TVs, set-top boxes, and streaming sticks, audiences are increasingly watching shows through smartphones, tablets, games consoles, and laptops or PCs. In 2022, around a quarter of iPlayer content hours were consumed using these "multi-use devices".
22. In order to be a designated TV service, providers must firstly be classed as "internet television equipment" and then have a "significant" number of UK users. Our understanding is that multi-use devices won't initially count as "internet television equipment" and will therefore be excluded from the regime to begin with, although this will be kept under review.
23. While the BBC agrees that services like iPlayer should not be in competition with non-TV services such as WhatsApp or Gmail on phones and tablets, we do think that freestanding TV apps with a significant number of UK users should be in scope of the regime, irrespective of the hardware they are being accessed through. For example, this might include aggregators such as TVPlayer or Sky Go, which enable users to watch programmes via mobile, tablet, or laptop.
24. With the continuous growth of ubiquitous operating systems and smart home systems that increasingly dictate how audiences access TV services and content, the Secretary of State should be required to review which internet television equipment is in scope at least every three years.

Inclusion of remote controls

25. Remote controls are a major gateway to content on TV sets and user interfaces – their importance demonstrated by fierce competition between the largest content providers for branded buttons. Without a legislative backstop, PSBs are losing out to global platforms. For example, French prominence legislation sets a clear precedent for this, and the UK risks falling behind in protecting the ability of audiences to find PSB content.
26. There should be a requirement for a dedicated PSB button on remote controls in instances where there are similar buttons for non-PSB audio-visual services, or a direct route to PSB apps from the remote in other instances (such as a long press on a numbered button).
27. We do not believe the UK would be contravening international trade rules set out by the World Trade Organisation (WTO), which prohibit measures that are protectionist and/or arbitrary and unjustifiable discrimination. Specifically, it does not favour UK producers of remote controls against foreign competitors and it serves a legitimate objective.

Inclusion of joint ventures

28. We believe that ensuring PSB joint ventures (for example, Freeview Play) are within scope of the prominence regime and capable of potential designation would be in line with the intent of the legislation. One of the key reasons PSBs pursue joint ventures in this area is to ensure audiences are able to access high-quality public service content as the content distribution landscape evolves and powerful market players innovate themselves.

Threshold for RTSS designation

29. We support a proportionate approach where only platforms of the right scale have must-carry requirements under the new regime. In order to avoid loopholes, we believe that a sensible approach might be for Ofcom and the Secretary of State to consider a threshold based on organisations (or undertakings) whose combined platforms are used by a certain number of unique users per month (for example, 350k) to watch TV or TV-like content. We look forward to engaging with Ofcom on this threshold. This will help to futureproof protections for PSBs from new entrants to the market who have strong audience acquisition projections due to the prominence of their existing businesses.

LISTED EVENTS

What the listed events regime currently does

30. Sport is fundamental to the UK's national identity and listed events continue to have a profound cultural and social impact. They unite the UK and its constituent nations and regions in ways very few other things can manage. They create national pride. They play a vital role in the nation's well-being, are important to the UK economy and influential in the UK's standing overseas.
31. The current legislation was introduced in 1996. It ensures rights are offered on fair and reasonable terms to qualifying broadcasters (in essence the PSBs) and essentially prohibits any broadcaster (including the PSBs) showing exclusive coverage of an event on the list without the prior consent of Ofcom.

32. It does not guarantee that:

- A listed event will be shown by a PSB – just that if the event is on TV, the PSBs must have had the chance to buy the rights in show it on fair terms.
- Rights sellers sell their rights.
- Qualifying broadcasters make a bid to acquire rights.

33. But it has meant that for the past 25 years – at a time when pay operators and now streamers have grown in size and have acquired many non-listed sports rights – audiences across the UK have been able to come together for the biggest sporting moments irrespective of their ability to pay. It has benefited sports participation and physical activity and helped build positive role models that continue to inspire the next generation of elite performers.

The legal framework needs updating

34. But the legislation needs updating and we welcome the Government's intention to do so. Audiences now want to consume in a way not envisaged by the legislation. This is unsurprising. When the legislation was made just 4% of the UK population had any access to the internet – now fewer than 4% of UK homes do not, with "superfast" now available to c95% of UK homes.

35. The Media Bill is a once-in-a-generation opportunity to update the framework around listed events. If it is not taken now, the audience and societal benefits of the listed events regime will be diluted over time. Indeed, given the pace of change in how audiences want to consume content, the future viability of the regime itself will be at risk.

36. There are three high-level issues we believe need to be addressed in forthcoming legislation, outlined below.

First, sufficient clarity and certainty of new qualifying criteria

37. Qualifying services are currently those services which are received by 95% of the UK population and without any consideration being required for the reception of that service.⁸

38. This approach worked well for the linear broadcast era, but less so today. The draft media bill seeks to more directly designate the PSBs as the qualifying broadcasters. We believe the drafting provides clarity and a robust, future-proof way of capturing the PSBs and delineating them from other providers.

Second, tackling the "streamer loophole"

39. The legislation only captures broadcasters which hold an Ofcom licence. So it is currently possible for a streaming service – which does not hold a broadcast licence – to acquire exclusive rights to a listed event, stream them online and deny qualifying services any opportunity to acquire the rights/show them free to air. The streamer could license some matches or moments to the FTA broadcaster, but, given they would have paid a high premium for the rights, this would likely be at highly unfavourable terms to the PSB, for

⁸ Channels currently meeting both criteria are BBC1, BBC2, BBC Four, CBBC, CBeebies, BBC News, BBC Parliament, Channel 3 Network (broadcast as ITV, STV and UTV), ITV2, ITV3, ITV4, Channel 4, More 4, Film 4 and Channel 5.

example with heavy branding of the streamer, high cost etc.

40. Under this scenario Ofcom could not intervene as no consent would be required. This risk is becoming more material over time due to the buying power and competition of streamers and the attitudes of some rights sellers.
41. Our understanding is that the Government recognises this risk, and wants to use existing powers, rather than the Media Bill to address it.
42. Specifically, we understand Government intends to use existing powers to designate new EPGs including those with IP linear streams. This reflects the White Paper aim to *“close the loophole that allows unregulated internet-delivered services to appear on TV sets in the UK by designating additional regulated electronic programme guides.”*
43. In effect, the Government’s approach is that a live streaming service (even one based outside of UK and which features on that EPG) would come in scope of the existing listed events regime, should that EPG be designated by the Secretary of State.
44. We are working through the details of how this could work in practice. But, on the face of it, we are not convinced it will fully address the issue. For example, how would it capture pop-up channels streaming particular matches, or streaming via apps? “EPGs” have a precise legal definition and this approach might lead to further loopholes.
45. The BBC believes this is a missed opportunity to introduce clarity and certainty to the regime. Elsewhere in the Media Bill, new concepts have been introduced specifically to plug gaps in the regulatory framework. We believe there is scope for similar here to comprehensively address the streamer loophole.

Third, digital, on-demand rights

46. The inclusion of digital on demand rights within the listed events regime would ensure that the sporting events continue to reach the widest possible audience. The risks were recognised in the White Paper which highlighted a theoretical example:

“If for example the Olympic 100 metre final was broadcast live in the middle of the night on the BBC, but all streaming and catch-up rights were sold to a different broadcaster and kept behind a paywall, then a culturally relevant event might not be available to a wide audience on a free-to-air basis. We want to ensure that as viewing habits change and technology evolves the regulatory framework remains fit for purpose. We will therefore undertake a review to look at whether the scope of the listed events regime should be extended to include digital rights.”
47. DCMS consulted on digital rights back in November 2022. In its press release announcing the draft bill DCMS said:

“we continue to review whether digital rights should be included in the listed events regime. Further detail on the review will be set out in due course.”
48. The BBC remains committed to investing in live sport. It can still deliver large audiences on linear broadcast TV. The Men’s Euro final was watched by more than 31 million people last

year while 27.4m people watched at least 15 consecutive minutes of the 2022 Women's Euros coverage on BBC TV. The Lionesses drew a peak audience of 17.4m for the final – the biggest TV audience for a women's football match on record.

49. But live sport is not immune to the broader changes in audience behaviour. Between 2011 and 2021, average reach on sports channels amongst 16-34-year-olds fell from 20% to 15%, trends broadly mirrored in the reach of many of the BBC's TV sporting events.
50. At Tokyo 2020 (in 2021) the availability of on demand short-form clips on the BBC Sport website meant, in some instances where a British success happened overnight, a ten-fold increase in audience on the live TV transmission. For example, the gold medal winning performance by BMX specialist Charlotte Worthington was watched by just 0.4m people on TV (due to it taking place overnight); yet in the days that followed, different forms of short-form coverage of the race generated an eight-fold increase in engagement (c3.4 million clip views). If the BBC did not have access to such digital, on-demand rights (which is likely in future without regulatory protection), availability and reach of national moments such as these would very likely be restricted, contrary to the objectives of the listed events regime.
51. The Government has recognised the issue at hand in its White Paper. We think its review should conclude that inclusion of digital, on demand rights within the listed events regime is fundamental to delivering the regime's policy objectives.
52. We would then urge the Government to introduce the necessary legal reforms within the Media Bill, and Ofcom to update its accompanying Code.⁹ This would allow a complementary and proportionate level of protection for on-demand coverage of listed events on qualifying services to that which currently exists for TV rights.
53. If the Government's review is not completed by the time the Bill is ready for Royal Assent, or there are obstacles to incorporating the substantive protections for on-demand coverage immediately, then we recommend an enabling provision should be included. This would pave the way for evidence-based updates to the regime via secondary legislation, at the conclusion of this current review and/or in future to keep pace with further shifts in viewing habits. Such delegated authority is already a feature of the existing architecture of the regime, and indeed other legislation in this sector, and appropriately accommodates a level of parliamentary scrutiny and Ofcom involvement.

AUDIO FINDABILITY

The BBC welcomes a number of audio provisions in the Draft Media Bill

54. The inclusion of provisions to protect access to radio via voice-activated devices is a welcome development, demonstrating a clear commitment to the future of UK radio, and to

⁹ For example, Ofcom's code could helpfully be amended to:

- make it a factor for Ofcom to consider, when evaluating if qualifying broadcasters have had a genuine opportunity to acquire live rights, whether adequate on-demand rights were included in the offer.
- redefine "live" in relevant sections of Part IV such that protection for live TV coverage includes a portion of on-demand coverage that is complementary to, and necessary to meeting audience expectations in respect of the live TV coverage. This could be particularly helpful when a UK listed event is taking place "live" in different time-zones.

delivering the recommendations in the Government's Digital Radio and Audio Review.

55. We are pleased to see a number of the protections included in the Bill. The provision to allow radio content providers to specify which service is used to play their content on regulated voice-activated devices (i.e. BBC Sounds for the BBC) is particularly important. This provision will ensure we can offer the best-quality service to Licence Fee payers.

However, the Bill should go further

56. UK radio and audio services reach a combined audience of around 49.5 million people each week, or 90% of the adult population. Our services are a vital source of news, entertainment, and information for these audiences, easily accessible and free of charge.
57. The policy intent of these provisions is to protect access to BBC and UK commercial radio content, acknowledged to bring vital benefits to UK audiences and UK interests as distribution and access increasingly shift to digital means. Smart speakers are an increasingly important gateway for audiences to this content.
58. The new legislation is a welcome development, but there are a number of areas where it can do more to truly reflect the digital landscape and ensure the measures can stand the test of time.

Inclusion of smart TVs and in-car audio

59. It is unclear whether the provisions are intended to regulate access to radio on smart TVs – the legislation should apply to all devices which can be activated by voice search.
60. It is also unclear whether the legislation offers adequate protections for access to audio in-car. In-car listening accounts for a large proportion of radio listeners, and it is vital that access in this environment is protected, as we increasingly see connected cars or in-car infotainment systems operated by major platforms.

Protections for on-demand audio content

61. The Bill explicitly excludes protections for on-demand audio content (for example, the *Today* programme on catchup, or the *Newscast* podcast). This is a fast-growing area, and listeners are increasingly choosing to access UK radio content on-demand. This is of high value to audiences. We have worked with commercial radio to develop a definition of on-demand content which would offer protections for on-demand content provided by radio services already protected under the legislation. We believe this is in line with the Government's stated policy objectives, to protect valuable UK audio content.

Inclusion of internet-delivered live linear radio

62. For live linear radio, the Bill only protects internet radio stations which are live simulcasts of broadcast stations. Again, this is not sufficiently forward-looking. The intent of the Bill is to protect radio content, not a particular means of distribution. It would be perverse if radio stations, faced with audiences all moving to online listening, were unable to move to all-IP distribution because doing so would lead to loss of protections intended to apply to IP listening.

Further protections for recognised radio services

63. The protections for recognised radio services do not go far enough. The legislation should compel RSS to provide access to adequate data to radio providers, and also prevent self-preferencing of their own content in search or discovery, or services for playback. Recognised radio services should be able to request which verbal commands cause their service to play, and radio selection services should not be able to turn down reasonable requests (for example, a user command of “Radio 1” should cause that station to play – users shouldn’t have to ask for “BBC Radio 1” specifically). In addition, the prohibition of carriage charges should cover non-financial barriers to carriage, as well as financial charges.

Uncertainty about how the new regulatory regime will function for audio

64. There remain some questions about how the new regulatory regime will function.
65. Firstly, it is vital that Ofcom consults on RSS designation decisions. Radio providers should have an opportunity to feed into designation decisions – to explain the impact that particular radio selection services have on access to our content.
66. Secondly, the Draft Media Bill provides for the cost of regulation to be borne by both parties – radio selection services and recognised radio services. This goes against regulatory precedent that it is the regulated that should fund a regulatory regime. Levying costs on both sides risks creating disincentives to make any complaints under the regime.