Written evidence submitted by Clintons

Digital, Culture, Media and Sport Committee Inquiry
The Future of Public Service Broadcasting

Clintons Submission by Kami Naghdi and Emilie Edwards, 19 June 2020

1. Introduction:

Clintons is a tier one media and entertainment firm. Kami Naghdi and Emilie Edwards, experts from Clintons’ Film & Television team have reviewed the Call for Evidence and set out their analysis of the key points raised. Clintons is an impartial player at the heart of the audiovisual industry.

We have responded to the five key areas of questions raised in the call for evidence but have done so in an order which is different to the call for evidence. The television industry is changing at dramatic speeds and will continue to change. Public service broadcasters (“PSBs”) will need to evolve to survive in this climate in which streaming platforms (referred to in this submission as “streamers”) are outbidding the PSBs for content and taking an ever growing share of consumer’s time.

2. Impact:

What value, if any, do PSBs bring to the UK in terms of economic (local and national), cultural and societal impact?

The PSBs still have an important democratic function in the UK. Their obligations of impartiality have become increasingly important in an age of “fake news”, when social media platforms impact election results. Standards enshrined in Ofcom’s Broadcasting Code mean that investment, production and scheduling decisions are not just driven by balance sheets, but by standards of impartiality, education, diversity and fairness. Streamers and other broadcasters may at times better reflect some of these values such as diversity, but there is a clear distinction between reaching a specific audience for economic reasons or appealing to the zeitgeist and having a regulatory obligation to do so. While Ofcom has strict rules for broadcasters, streamers have limited editorial and content obligations and shows like Netflix’s “Corona Virus – Explained” or the Michelle Obama documentary “Becoming” have no yardstick for their journalistic integrity or political impartiality.

The PSBs have been a cornerstone of commissioning programmes for decades: they are vital to the ecology of the British production industry. A recent report by Ofcom found that investment by the PSBs make up the bulk of the UK production sector’s revenue. In a fluctuating market, at a time when the UK may head into recession, the funding offered by the PSBs provides a bedrock for the UK television sector. The PSBs also offer a strong counterweight in co-production negotiations where other commissioners (such as streamers) require exclusive exploitation windows, not being constricted by the Terms of Trade (as we’ll see below). The streamers are increasingly producing their own content and entering into deals securing key relationships with sizeable production companies. Without the PSBs in the mix, there is a risk of contraction in the independent British production sector.

From a legal perspective, the PSBs fulfil important duties both to audiences and the production sector. Both groups would suffer a potentially irreversible loss if PSBs ceased to

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1 See for example The Cairncross Review, A Sustainable Future For Journalism, 12 February 2019
exist. PSBs must evolve to ensure their viability and relevance. While streamers complement, they cannot replace the PSBs.

3. **Representation and Personalisation:**

How would representation be protected if changes were made to the PSB model? How would the nations and regions be affected by changes to the PSB model? Is the ‘quota’ system the most efficient way to maintain and improve representation in broadcasting?

The PSBs need to better represent British audiences and involve people from diverse backgrounds both in front of and behind the camera, particularly in commissioning teams.

The government noted\(^3\) the streamers’ effective use of personalisation technology, which allows them to build a varied catalogue of programming while targeting audiences with niche content. This then informs acquisition and production decisions. It also means that different audiences will more easily see themselves reflected in the content available on streaming platforms. The PSBs cannot compete with this offering and build similar relationships with consumers if they continue to focus efforts on linear television. The focus should shift to developing online platforms with enhanced personalisation to highlight the PSB content that individuals want to see, while maintaining balance and impartiality in relation to news and political broadcasts and guard against the pitfalls of the “echo chambers” prevalent in social media. To achieve this, the PSBs must ensure that any artificial intelligence used for personalisation complies with the PSBs’ obligations of equality and fairness enshrined under Ofcom codes and regulation. They therefore have a duty to consider and minimise the potential harm of simplistic algorithmic decisions: the algorithms can either be limited to scripted and entertainment categories of content or they might actively suggest news or political programming providing divergent views. The streamers are not bound by any such obligations.

We recommend that Ofcom considers this issue in more detail, investigates how both the PSBs and streamers intend to approach it and considers whether the streamers should be subject to similar obligations as the PSBs.

4. **Accessibility:**

How would changes to the PSB model affect the accessibility of services? How would a wholly internet-based service compare to the current PSB model?

British audiences, particularly younger audiences are increasingly consuming audiovisual content online, through an array of video on demand platforms or via platforms offering access to user generated content (YouTube, Facebook, TikTok).\(^4\) Delivery of linear television remains important to many viewers: in the medium term it should be preserved for this reason. On a prospective basis, it is essential that the PSBs become more widely available and visible online.

From a regulatory perspective one key issue for PSBs in the online space is prominence.

The concept of prominence comes from a time when audiovisual content was only available to the public in two places: in cinemas and on television sets. Because there were only 3 and

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later 5 channels, the PSBs dominated television. When cable and satellite brought hundreds of channels to television sets, updating rules around electronic program guides and teletext were simple solutions for maintaining PSB prominence as the first five channels. Viewers are now flooded with alternative services. Major US studios and tech companies have created fantastic VOD services (Disney+, Peacock, Apple TV, Amazon Prime, Netflix) and gaming and social media vie for viewers’ leisure time. If prominence is going to mean anything today it has to exist in this space, which means prominence in search engine searches and mobile app stores as well as on smart televisions and electronic programme guides. While the PSBs remain prominent on smart televisions, this is because of negotiated contracts rather than regulation, which means it is not guaranteed in the future.

The complexity of online media and evolution of consumer habits may make regulation challenging but, absent meaningful online prominence requirements, the PSBs will disappear from view for younger audiences (which have abandoned linear television), with the result that younger audiences won’t benefit from access. Notably the trend of viewers migrating away from linear television is likely to be true for other age groups too.5

5. Looking Ahead – What the PSBs can do

What should a PSB look like in a digital age? What services should they provide, and to whom? In what way, and to whom, should they be accountable? Is the term ‘public service broadcasting’ still relevant and, if not, what is a suitable alternative?

We have set out our views on PSBs’ relevance and their need to be online above. What other things could the PSBs be doing?

- **Trust.** What the PSBs have is UK audience trust, a British focus and libraries of much loved programming. During the global pandemic, the importance of the PSBs has never been clearer. It’s time to emphasise the educational and journalistic role played by PSBs as a trusted news source during a crisis to reinforce the relationship with viewers.

- **Negotiation Style.** We’ve had mixed experiences representing counterparties to the PSBs in financing and production deals. At times the size and structure of the PSBs’ organisations has meant that business decisions are slow and intransigent. The result: PSBs are less easily adaptable and counterparties may find greater flexibility or speed dealing with streamers. An effective change the PSBs could make is to introduce greater flexibility and commercial thinking into their negotiations.

- **Guild Agreements.** The PSBs could seek to re-negotiate the terms of union agreements to reduce residual and guild payments for programming where it is exploited online. This would reduce production and exploitation costs and allow the PSBs to establish quality programming online. This is not without precedent – we saw in 2004 that the guilds were willing to reduce rates for BBC3 programming and so, with a successful negotiation with the guilds, the same could be possible here.6

- **Innovative and Low Budget Content.** Lower budget niche productions can be hugely successful. Take the Norwegian teen series SKAM which was released on a Norwegian PSB’s SVOD service but became a global phenomenon and was eventually remade in seven territories. During lockdown, we’ve seen an increase in animation and archive-based commissioning which can be produced at lower cost. Younger audiences tend to prefer shorter programming that’s imbedded in social media – is there the opportunity for a collaboration between the PSBs and other

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content delivery platforms? Being at the cutting edge of content trends doesn’t have to mean high budget, world class scripted drama. Creative innovation and exciting new British talent can be discovered through low budget production.

6. Regulation – What Ofcom and the UK government can do

Are the current regulations and obligations placed on PSBs, in return for benefits such as prominence and public funding, proportionate? What (if any regulation) should be introduced for SVoDs and other streaming services?

There exists an imbalance between onerous regulation of linear television services (from PSBs and other broadcasters) and regulation of online content like video on demand (“VOD”) services and platforms which provide access to user generated content. To some extent that imbalance provides the PSBs with their USP (of trusted British content that complies with high standards). Given the breadth and depth of changes in the television industry, Ofcom and the UK government might consider the following options to level the playing field going forward.

6.1. Exploitation Rights

The PSBs need to make content widely available to remain relevant, particularly to younger audiences. One of the reasons they haven’t been able to do so is because the industry’s formal codes of practice agreed between the PSBs and PACT (known as Terms of Trade, here “ToTs”) limit the PSBs to exploiting only linear television rights. The ToTs allow independent production companies to monetise ‘secondary rights’ (such as video/DVD, inflight and shipping, theatrical and international TV rights) and British independent production companies have thrived. Today, streamers offer an alternative source of commissioning and, with large pockets but unrestricted by ToTs, are known for striking a hard bargain and requiring exclusive exploitation across all categories of rights. The result is that streaming platforms can either outbid the PSBs for the best independent UK content (The Crown, Sex Education) or, in co-commissioning by the PSBs and streamers (Good Omens, Giri/Haji), PSBs are limited in their exploitation, while streamers are able to negotiate a more valuable basket of rights (greater exclusivity, across more territories, for longer). Greater demand for content has caused inflation in production costs: production companies need to contend with additional sources of financing to match their rising budgets and as a result must sell the rights to PSB programming (excluding UK Television Rights) to other content providers. Streamers become the go-to place for audiences to watch their favourite shows while PSBs lag behind. Even in cases where the PSBs provide the risky early development funding or majority funding which secures the creation of a project, the PSBs are unable to protect their brand and prevent their shows from being sold to direct competitors. The House of Lords recently recommended that Ofcom consider whether ToTs unfairly disadvantage the PSBs in a competitive market. We support the extension to an automatic 12-month BBC iPlayer window in recent ToTs negotiations and agree that Ofcom needs to review this dynamic further.

Previously ToTs were an intervention in free market economics intended to reward entrepreneurial independent companies in the UK television sector; now, they result in overpayment by PSBs for an outdated, narrow basket of rights with a fast-reducing value, inadvertently subsidising the streamers. This inquiry might consider levelling the playing field between PSBs and streaming platforms who commission UK productions by introducing similar codes of practice for non-PSB content providers who outweigh independent.

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7 Apple has announced a spend of $2bn on new content, which is only a fraction of Netflix’s $15bn budget.
9 BBC and PACT agree historic new terms of trade deal, 6 May 2020, available here: https://www.bbc.co.uk/mediacentre/latestnews/2020/bbc-pact
production companies in negotiations with an eye on the lobbying power of technology giants. If it finds that to be inappropriate, this inquiry might then revisit ToTs as applied to the PSBs.

6.2. Funding and Production Budget Inflation

Production budgets are surging to unprecedented levels. With the streamers having extensive content budgets, how can the PSBs compete? This inquiry should consider (i) the value of retransmission fees for PSB programming exploited by alternative services like VOD and (ii) the BBC Funding Commission proposed by the House of Lords inquiry\(^\text{11}\) and alternative funding sources. If the BBC’s licence fee is to be replaced, this will need to be done with careful and public scrutiny of the pros and cons of different funding options.

If the PSBs are to reach all audiences then they need the funding to deliver this service. Restructuring rights to fit new financial structures is not unheard of (as the introduction of ToTs in 2003 or the recent residual changes in US guild negotiations can attest). There are no easy answers but one thing is for sure: funding is one of the key areas that needs to be reconsidered if UK audiences and independent production companies are to continue to benefit from the PSB system.

6.3. Possible VOD Regulation

Across the European Union, member states must bring into force legislation which complies with the Audiovisual Media Services Directive 2018/1808 ("AVMS") by 19 September 2020.\(^\text{12}\) The UK government has announced that it will implement AVMS by updating various pieces of existing legislation. Under AVMS, VOD services will be subject to quotas which require them to secure at least a 30% share of European works in their catalogues and ensure prominence of those works.\(^\text{13}\) Pertinent to this inquiry are:

- **Quotas**
  The UK could consider imposing specific quotas for UK works if it wants to protect the UK television industry in these ways. AVMS provides quotas relating to shares of content libraries. More fitting and relevant would be quotas relating to production spend or portions of global revenues which should be invested in audiovisual content production in the UK.

- **Tax Incentives**
  Along with quotas, the UK government could consider encouraging investment by streamers and other entities in the UK television industry while promoting PSB values by creating tax incentives for content which meets certain criteria (diversity, impartial investigative journalism and educational programming for instance), akin to those imposed on the PSBs. With international streamers investing in this type of programming, we might see a diversification in the pool of television producers creating content which is beneficial to UK audiences.

- **Expand Ofcom’s reach**
  AVMS encourages the use of self-regulation through codes of conduct.\(^\text{14}\) Ofcom currently regulates UK broadcasters (including the PSBs) and radio but not online

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\(^{10}\) See articles in UK and US press [https://www.nytimes.com/2019/06/05/us/politics/amazon-apple-facebook-google-lobbying.html](https://www.nytimes.com/2019/06/05/us/politics/amazon-apple-facebook-google-lobbying.html) and [https://www.ft.com/content/7147935c-1f34-11e9-b126-46fc3ad87c65](https://www.ft.com/content/7147935c-1f34-11e9-b126-46fc3ad87c65)

\(^{11}\) See paragraphs 198 to 204 of House of Lords Select Committee on Communication and Digital Report Public service broadcasting: as vital as ever, available here: [https://publications.parliament.uk/pa/ld201919/ldselect/ldcomuni/16/16.pdf](https://publications.parliament.uk/pa/ld201919/ldselect/ldcomuni/16/16.pdf)

\(^{12}\) Article 2(1) AVMS

\(^{13}\) Article 13 AVMS

\(^{14}\) Article 4a AVMS
services (beyond on-demand licences). Ofcom’s reach could be extended with an outcome-based code of conduct that would allow decisions to be made at speed, as recommended by the House of Lords inquiry, but there are necessarily limits to the extent streamers can be required to deliver the corner stones of public broadcasting. It is not in their DNA or their business plan.

7. Conclusions

The PSBs serve a vital function for UK audiences, in particular in reference to news, political and children’s programming, as well as fostering new creative talents in scripted and entertainment programming. When investing licence payers’ money, non-commercial PSBs cannot properly protect their brand or acquire the necessary exclusive rights. The market intervention resulting from the Communications Act 2003, which once led to a flourishing ecology in the television sector is now outdated with unwitting and undesirable market effects from the point of view of UK audiences. The playing field needs to be levelled, with a greater purchasing freedom for PSBs. PSBs must shift even more of their focus to delivery of online services. Prominence of PSBs for news and political programming remains key for younger audiences. While streamers might be incentivised to create content which is underpinned by journalistic standards, they are hard-wired to create great entertainment. A diverse ecology of streamers and PSBs is beneficial for audiences: both should be permitted to co-exist.

This submission and/or any part of it is not a legal opinion or advice and should not be taken or relied on as such. We would be delighted to provide any further information that you might need.