



## BBC On-Demand Proposals: Response of the Open Rights Group to the BBC Trust's Public Value Test provisional conclusions

### DETAILS OF RESPONDENT

Name	Becky Hogge
Position/job title	Executive Director
Organisation	Open Rights Group
Address	PO BOX 48872, London WC1H 9WR
Telephone	+44 (0)20 7096 1079
Email address	becky@openrightsgroup.org

### DECLARATION

*I confirm that the information I have submitted is a formal consultation response. It can be published in full on the BBC Trust's website, unless otherwise specified, and I authorise the BBC Trust to make use of the information in this response to meet its legal requirements. If I have sent my response by email, the BBC can disregard any standard e-mail text about not disclosing email contents and attachments.*

**Becky Hogge**  
**Executive Director**  
**The Open Rights Group**

### RESPONSE

#### **Summary**

The Open Rights Group (ORG) is an independent non-profit advocacy group which campaigns for digital rights in the UK.

As a body involved in digital rights we have grave concerns over the BBC proposal to make heavy use of Digital Restrictions Management (DRM). Digital Restrictions Management blocks and controls access to content without consideration of implied legal rights, and can cause serious problems to many users even when it functions correctly.

In addition, the Open Rights Group is gravely concerned that the BBC proposes to limit some of the services to Microsoft Windows XP and Vista. These products are associated with higher-end PC systems and upgrades which are often out of reach of poorer citizens or libraries. This will worsen the digital divide and is contrary to stated government policy.

The use of DRM criminalises making BBC-interoperable devices (software, PVRs etc) without getting



a license from an American monopoly. It requires UK technologists, companies and hobbyists to get permission from a foreign power in order to make use of BBC video. This is completely inappropriate for a public service broadcaster supported by the license fee and contrary to the Royal Charter.

This proposal is also of concern because Microsoft are currently appealing a decision by the European Commission that it unlawfully obtained monopoly positions (Decision COMP/37.792). This decision relates in part to PC video-playing tools. The BBC proposal would continue and greatly extend this distortion of the market. There is a serious likelihood of judicial review by other vendors or of the BBC decision being dragged into the ongoing Microsoft investigation. The Open Rights Group is worried both about the market distortion and the possibility that legal review could delay or disrupt the entire project, wasting licence payers' money — as happened with *Research Machines v BBC*, which required the intervention of the Culture Secretary (BBC Governors Report 2002/3, page 68) and has happened very recently with the suspension of the BBC Jam educational service, following complaints.

It is also the opinion of the Open Rights Group that such a DRM tie to Microsoft is unnecessary and inappropriate. Within our answers we provide a short term alternative model that is library-friendly, end-user-friendly and cross-platform. This would be far preferable to the BBC's use of DRM, in particular of Microsoft-specific DRM products.

## Questions

*1. Do you agree with the BBC Trust's proposal to approve the new BBC on-demand services, subject to the modifications outlined in the Trust's report of its provisional conclusions?*

We believe that the Trust's conditions are inadequate. We question the value of the internet-based service as proposed. We do not believe the use of extensive DRM for television has been adequately justified or explained. Nor, more importantly, do we believe that it will create a viable service.

*2. In a market in which most broadcasters are expected to be offering on-demand services, would you agree that it is a priority for the BBC to be investing in this area?*

There is clear value in the BBC supporting on-demand services where appropriate, including via cable services. The notion that recycling existing content onto the internet using DRM is providing value is dubious at best. The report itself observes that "simulcast and non-DRM download" offer the greatest value (1.8). The statement that "public value is primarily delivered through content consumption" also illustrates the failure of the BBC to grasp the further opportunities for the internet as a medium including increased availability of archive programming through the internet.

We further note the low interest in the DRM based services (page 43) and the low value for money they offer (page 82).

*3. The BBC Trust has proposed setting a limit of 30 days as the amount of time that programmes can be stored on a computer before being viewed. As this is an emerging market, there is currently no clear standard on the length of the storage window. On balance, the Trust thinks 30 days is the right length of time. How long do you think consumers should be able to store BBC programmes on their computers*

*before viewing them?*

Existing PVR systems provide equivalent facilities without DRM restrictions and without time limits. This is true both of standalone devices and PC plug-in cards that receive “free to air” transmissions. Many of these allow the recording to be saved to tape or digital storage media indefinitely. Regardless of the finer points of law, end-users consider this to be “fair” and expect that facility. The Gowers proposals may also change the law in this area in favour of the end-user, making the DRM even less appealing.

The report estimates 47% penetration of PVR devices into the target market area. As the prices of PVR devices fall, the ability of a restrictive and less convenient internet service to compete will be non-existent. If launched with the proposed restrictions, the service is probably doomed to failure.

History tells us that DRM technology does not work. DVD was cracked with ease, HDMI is believed to have been cracked, and recently the AACS encryption used for high definition discs has been broken. In another case (that of Sony), the software installed to implement the restrictions was flawed and led to a class action lawsuit in the USA. The report maintains that the risk of DRM being cracked is low but all the evidence is to the contrary: people will crack DRM schemes when they feel excluded (eg by the Windows XP requirement). HD DVD was cracked by a single individual who was simply upset that he could not watch the film on his monitor. (<http://www.slyck.com/story1390.html>)

Curiously, the BBC itself has recently been active in dropping DRM and encryption on their satellite feeds. This proposal implies that the same content being watched, on the same computer, with the same ability to record the data or share it is somehow different. Media convergence means there is no practical difference between unencrypted satellite, free-to-air digital TV, DAB or the internet in terms of control of content.

The BBC has also failed to explain why DRM is needed for video but not audio and what the distinction is. When you consider the simulcast of the Proms on television and radio, the value is clearly in the audio rather than the video of the musicians, yet the simplistic BBC proposal suggests that it is necessary only to lock up pictures of trombones, arm-waving conductors and the reactions of the audience.

*4. The BBC Trust concluded that public value would be created by allowing series stacking. This would allow viewers to catch-up with all episodes of a series for the duration of its run. The Trust recognised that although it would provide increased opportunities to view BBC programmes, it could also deter people from buying DVDs or using commercial video-on-demand services. Do you consider series stacking to be a useful feature? What kind of series would you expect to be included? Should there be any limitation on the number of episodes of a series made available for catch-up or the length of time for which they can be viewed?*

This essentially falls within the answer to Question 3 above. Stacking restrictions assume that users will not simply adapt their habits or switch to existing PVR technology that does not enforce awkward rules. This technology is cheap and getting cheaper.



Stacking restrictions have an additional problem. They imply that the user owns the system and will download and watch material on the same computer. There are many cases where this is not true. Users travel, families share a PC, and people also use services such as libraries. In libraries, watching educational series is a legitimate purpose, yet the PC is not owed by an individual. Such a requirement is exclusionary, and hurts the poorest most. It is very difficult to see how such stacking would work in a household with a shared computer.

There is a better approach to implementing this service than the use of heavy DRM restrictions and library-unfriendly, market-distorting technology which will serve to widen — not narrow — the digital divide.

The BBC could provide the following instead, which can easily be implemented with current tools and infrastructure:

- A system where, given licence or other information, a user may create an account with the BBC.
- Having logged in, the user is then permitted to see live streams (restricted by location), and ‘catch-up’ TV. This would be implemented by streaming the data from the BBC site, **not** by placing files on end users' hard discs where the data will be vulnerable to DRM cracks.
- Any policy for stacking would be implemented on the BBC website, which also means the stacking policy could be tuned per programme and dynamically if problems are found.
- No new streaming video tools are needed beyond those currently used.

Such an approach is cheaper, lower risk, more inclusive (it works for example in libraries) and more flexible than the current BBC proposal. It may not appeal to consultants looking to make huge profits at public expense however, precisely because it is simple, clean and low-risk.

It does not, of itself, address the desire for users to obtain content in DRM-free downloadable form for any platform, but it provides a basis until the BBC is able to identify more open solutions for the download of content, preferably ones which do not depend upon DRM. Such solutions would provide interoperating implementations for playback available from different manufacturers and for many pieces of equipment. The Open Rights Group considers it is quite possible that, as already is clearly happening in the music world, the use of DRM will soon be abandoned by the market itself.

The BBC may also want to consider quality and DRM issues together. It is not unreasonable to argue that the basis of the existing BBC “protection” of internet streaming is not in fact DRM but the quality limits of the footage.

*5. How important is it that the proposed seven-day catch-up service over the internet is available to consumers who are not using Microsoft software?*

The proposal is not limited to Microsoft software but specifically to Windows XP and Vista. The question is thus phrased in a misleading fashion as it is estimated around 20% of users (often the poorer ones) do not have Windows XP or Vista but do have Microsoft Windows products.



The BBC Charter requires that the independence of the BBC is maintained, that it acts in the public interest, and that it must have regard to the competitive impact of its actions; it is clear the proposal meets none of these conditions. It is also clear that an enormous commercial incentive exists for competitors to Microsoft to seek judicial review or to refer the proposal to the EU Commissioners — who are already pursuing Microsoft for monopoly abuses involving video clients. The recent £150m BBC Jam suspension illustrates the harm that can be caused by non-compliance with the Charter and the regulations.

Meglana Kuneva, the EU Commissioner for Consumer Rights, was recently quoted in *Focus* magazine: “Do you find it reasonable that a CD will play in all CD players, but an iTunes song will only play on an iPod?” asked Kuneva. “It doesn't [seem reasonable] to me. Something must change.” It is likely that EU consumer legislation will address this problem and the BBC should be proactive and avoid potentially expensive changes to or curtailment of the service when European law is changed.

As an alternative implementation scheme exists, there is no justification for the BBC being permitted to proceed in this manner. The Trust would, without doubt, have thrown out a proposal that some programmes did not work on anything smaller than a 36” TV set or did not work on Sony TV sets. The computer world is no different.

The proposed “within two years” is valueless. Windows Vista is a product of the moment; the desktop battle with Apple and Linux is underway and, two years on, the damage is done. At the very least it should defer such a Microsoft-only decision until the end of the final appeals in *European Commission v Microsoft* and its verdict.

*6. Should the BBC be allowed to offer book readings from its radio services as audio downloads over the internet?*

The BBC already provides digital MPEG1L2 streams of the radio services to DAB users. DAB devices such as 'The Bug' permit the recording and transfer of these streams to personal computers or PDA devices. In short, the BBC already offers this service easily and conveniently in all but name. We welcome the BBC providing such a service in accordance with copyright law and proper remuneration of authors for in-copyright works.

*7. The BBC Trust concluded there was fine balance between public value and market impact in deciding whether to allow the BBC to offer audio downloads of classical music. While such downloads could help introduce new listeners to classical music, they could also deter purchases of commercial recordings. What is your view on whether — and to what extent — the BBC should be allowed to offer radio broadcasts of classical music as audio downloads over the internet?*

The Open Rights Group does not understand why the BBC distinguishes classical music from other audio works. If the BBC wishes to offer out-of-copyright works it should say so; and if it wishes to offer a performance by musicians of a work still within copyright it should say so. The Open Rights Group does not understand why a 1750s folk song would be considered different to a Bach piece.

The Open Rights Group welcomes the availability of more content on the internet and hopes that the BBC will look at ways to use the internet to increase the value to society, by including features not available via conventional non-interactive media. Such features include web-based notes synchronised with the audio feed, or the ability to listen to specific channels of the recording to understand how the music is built up.

The Open Rights Group furthermore notes that, as with question 6, the BBC already streams MPEG1L2 audio of their concerts to DAB users who have the technology to record the audio.

*8. How important is it to you that the BBC provides some means for parents to control which of its programmes are accessible on-demand to children? Is such a facility necessary or is it more a matter for parents to exercise controls over how children use the internet?*

The internet provides standard content-labelling mechanisms, known as PICS. The tools to use them are present in most operating systems and publically documented for open implementation in any others. The BBC should use those standards. The basis for internet service from a public service organisation should always be open standards, freely-implementable and well documented.

If the BBC persists in using DRM and further protection of video feeds is needed, then it should be integrated with the DRM and the age rules set by the person who types in the TV licence details. This could be a condition of the licence modification if DRM is used — or the use of the PICS standard if not.

*9. What are your views on whether the BBC should offer content from non-BBC providers on the on-demand service on its website?*

The BBC should provide links to non-BBC material when appropriate and be allowed to host material that is directly relevant to a programme, with the permission of the rights owners. This is necessary as the BBC may want to refer to a piece of content that is hosted on a small system unable to cope with the demand caused by linking, or on the other side of the world, such as end-user video clips of a news event.

It is this ability to tie together media, for the user to explore, which is at the heart of the internet — not the recycling of existing, non-interactive content. The BBC should therefore be encouraged to embrace these opportunities.

The increasing trend for the BBC to buy in content, including content commissioned directly for the BBC itself, means that the ability to offer non-BBC content will grow more important over time.

*10. What are your views on whether and how the BBC should make available on-demand content on services run by other providers — such as multi-channel services or internet-based audio and video downloading services?*

The BBC should evaluate such opportunities as they arise. When they are in the interest of the BBC (as

defined by the BBC Charter), it should make use of those opportunities, whilst taking care not to harm its good name by poor choices of association. It must not, however, be allowed to use such options to “farm out” responsibilities to other parties who then fail to fulfil them.

*11. Do the revisions proposed to BBC Service Licences to allow the new services to go ahead seem appropriate?*

They do not. The proposed use of DRM is poor and the high-cost, low-value internet provision of existing content under restrictive DRM policies should not go ahead in this form. The highly exclusionary — and potentially unlawful — proposals which tie the services to recent computers and software made by a single manufacturer should not be accepted, particularly in the light of the continuing EU case against Microsoft.

*12. Are there any other issues you would like the BBC Trust to consider in relation to the proposed services?*

The BBC Trust needs to consider the following questions more fully:

- What are the impacts of current DRM technology on the disabled user (and not just to the blind user)?
- What are the implications of DRM on shared computers such as library terminals?
- If the current proposal is allowed and 24 months later the BBC says “we haven't fixed the platform problem”, would the Trust really have the ability to kill the service?
- What is the impact of the *European Commission v Microsoft* case and the fact it directly bears upon the choice of supporting only a single platform?
- What is the market impact of the proposals on the desktop personal computer market?
- Whether it would accept a BBC TV proposal that did not work on Sony TV sets, but which would “hopefully” be fixed in 24 months. If not, why are computers different?
- What is the time and financial impact of judicial review or European level intervention ?

We believe the Trust evidence indicates that the Trust is weak in its understanding of internet technology and has failed to consider the broader markets outside the media, despite this proposal having a huge impact on the technology markets. In particular, it has failed to consider the personal computer market; this despite the main beneficiary of the proposals being a convicted US monopolist currently on trial in the EU for alleged monopoly offences related directly to media players.

In short, the Trust does not appear to have done its job at this point and should urgently visit those areas and rework the decision after the consultation period.