

HD Content Management
BBC Submission to Ofcom on Competition and Copyright Law

I. Competition Law

Introduction

1. The BBC's and other PSBs collaborating with HD Freeview¹ ("the other PSBs"), propose to require that HD receiver manufacturers should introduce content protection technologies; this is likely to be compatible with Article 81 and / or 82 of the EC Treaty (or Chapter I and II of the Competition Act 1998). This requirement would be contained in a licence of the Huffman tables described below.
2. The BBC considers that it would have a robust case for arguing that:
 - a. this requirement does not restrict, or prevent, competition within the meaning of Article 81(1) EC;
 - b. this requirement would anyway satisfy Article 81(3) EC;
 - c. it has no incentive to abuse or strengthen a dominant position; and
 - d. if found to be dominant this requirement is objectively justified.
3. The BBC's reasoning is set out below.

The Facts

4. Without the introduction of a content copy protection requirement on Freeview HD receivers, a significant number of HD content owners may exercise their legitimate right under intellectual property law and chose not to license their content to Freeview HD.
5. The Huffman tables are the intellectual property of the BBC. These have been prepared to broadcast service information ("SI") data for HD.
6. The BBC is proposing to make it a condition that receiver manufacturers comply with the DTG's D-Book Content Management specification in order to be granted a free licence to use the Huffman tables; that specification includes DTCP protection on home networks and to manage Internet redistribution, HDCP protection on HDMI links to displays and AACS protection on Blu-ray recordings.

Article 81 EC

7. The BBC considers it unlikely that the requirement on receiver manufacturers to introduce content copy protection, in order to be granted a licence for the Huffman tables, would be viewed as an infringement of Article 81(1) EC.
8. It appears unlikely that a theory of harm could be presented to demonstrate that Article 81(1) EC is infringed. Three possible theories considered by the BBC would appear, at worst, to have only a marginal impact on competition.

¹ ITV, Channel 4, S4C and possibly Channel 5

1. Hinder the development of content protection technologies

9. It could be argued that by mandating the use of DTCP, HDCP and AACS, the UK PSBs are restricting the development of other content copy protection technologies.
10. DTCP, HDCP and AACS are the current industry standard copy protection technologies, for which the DTLA, DCP and AACS LA are the respective licensing bodies. Therefore, the BBC and other PSBs consider that they have no alternative but to require their use.
11. To ensure the widest interoperability of products and that Freeview HD is launched by the regulatory deadline of end 2009 / beginning 2010, the PSBs consider that they must work with the copy protection technology currently on the market which has been approved by content providers. Freeview HD cannot afford to delay in the hope that competing technologies come to market.

2. Cost to receiver manufacturers

12. The cost impact is negligible. Licences for the Huffman tables are available free of charge to receiver manufacturers and the cost to manufacturers of installing DTCP, HDCP and AACS is likely to be marginal, given that the technology is likely to be integrated into their products at production stage and will not all be required in all products.
13. It is possible that mandating content copy protection in the UK could reduce the economies of scale that manufacturers of HD receivers can achieve. However, any impact on economies of scale is unlikely to alter the structure of competition in the UK as the same consequence will arise for all receiver manufacturers.
14. Furthermore, we have had interest from other jurisdictions in our proposed solution to the European-wide problem of HD content owners being reluctant to licence selected HD content for broadcast on 'unprotected' platforms. A successful implementation in the UK may, therefore, be widely adopted across Europe.

3. Distort the market between manufacturers of set top boxes and other technologies capable of receiving HD.

15. Any distortion between different HD platforms is likely to be minimal given that the vast majority of consumers will not notice, or be affected by, content copy protection:
 - a. Consumers' normal viewing will not be hampered or prevented in any way; and
 - b. they will not be prevented from recording on DVRs, DVD recorders and new 'Blu-ray' recorders, but for the very highest value HD content some programmes may be restricted to a single copy on Blue-ray.
16. It may be the case that technologically sophisticated PC users will be able, illegally, to copy HD content and stream it within the home and internationally. In contrast, the

ability of those using HD receivers to stream HD material will be limited by DTCP and to copy HD material will be limited by DTCP and AACS.

17. However, the BBC considers it illegitimate for CE receiver manufacturers to argue they will be discriminated against, in relation to PC manufacturers, given that users of DTT HD receivers will still be able to create private copies of copy protected HD content and unrestricted copies of unprotected HD content.
18. It would be strange to argue that CE HD DTT receiver manufacturers are disadvantaged in relation to other equipment because that other equipment allows illegal activity.
19. Suppliers of PC software will be able to licence the Huffman tables in the same way as set-top box and integrated digital television manufacturers, and be bound by the same conditions.
20. In determining whether an agreement has a restrictive effect on competition, it is necessary to consider what the position would have been in absence of the agreement².
21. In the absence of the arrangement, HD content owners would not licence their highest value content to broadcasters on DTT HD. Without a range of channel operators (in particular the commercial PSBs that rely significantly on licensed HD content) the HD multiplex would not be successful and there would be a much reduced market for HD DTT receivers to the detriment of receiver manufacturers and consumer choice.
22. Were the requirement to be considered to restrict competition, it is unlikely to meet the test for infringing Article 81(1) EC. The European Court of Justice has made clear that,

*"[...], not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [81(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first be taken of the overall context in which the decision of association of undertakings was taken or produces its effects. More, particularly, account must be taken of its objectives [...] It has then to be considered whether the consequential effects of competition are inherent in the pursuit of those objectives"*³.

23. The BBC considers that linking the licensing of the Huffman tables with the introduction of content copy protection would meet this test:

² Case 56/55 *Société Technique Minière* [1966] ECR 235, paragraphs 249-250.

³ Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 97

- a. its purpose is to achieve a legitimate objective of ensuring that the rights of third party content owners are protected;
- b. the restriction is inherent in the pursuit of that objective; and
- c. the restriction is proportionate to achieving this objective.

Article 81 (3) EC

- 24. The BBC considers that, in the event Article 81(1) EC is engaged, the criteria for exemption set-out in Article 81(3) EC will be fulfilled.
- 25. Each of the four elements of Article 81(3) and the reasons why these are likely to be satisfied are considered individually below:

1. Contribute to improving the production or distribution of goods or to promoting technical and economic progress

- 26. The proposed Freeview HD platform will increase the availability of HD television to consumers without the need to take out a subscription.
- 27. The Freeview HD platform will work only if the non BBC PSBs are on board.
- 28. The non BBC PSBs rely heavily on third party content⁴. If they are unable to secure a wide range of content then the business rationale for their participation in Freeview HD is likely to be undermined. With the result that Freeview HD is likely to be significantly compromised.
- 29. The proposed licensing condition therefore helps protect inter-platform competition between DTT and the already HD enabled cable and satellite platforms.

2. Allowing consumers a fair share of the resulting benefit.

- 30. Copy content protection will allow UK consumers access to premium television and film content in HD, on a 'free-to-air basis', sooner than would otherwise be the case.
- 31. In the absence of copy content protection the BBC is likely, for instance, have to remove some [S43(2)] content from the HD schedules [S43(2)]
- 32. Other PSBs are likely to be severely restricted as to the HD content they could make available to consumers on DTT.
- 33. It is standard industry practice for content to be licensed unencrypted to 'free-to-air' services later than to encrypted 'pay TV', to ensure that pirated copies do not undermine revenues from DVD sales and other markets.

⁴ Channel 4 estimates that between 10 and 20% of its programme schedule would not be available for the HD simulcast service as a result of no copy protection being available. Channel 4's letter to Ofcom of 25 September 2009, at annex 1.

⁵ On this point please see [S43(2)] agreement between [S43(2)] and the BBC, at Annex 2

34. By protecting content after reception, the addition of DTCP, HDCP and AACS will, in 'free-to-air' receivers, give content owners incentives to make content available earlier on 'free-to-air' receivers than they would otherwise.

3. The restrictions are indispensable to the attainment of these objectives

35. The BBC considers it has no viable alternative but to use its IP rights over the Huffman tables as the means of enforcing a requirement on HD receiver manufacturers to install copy content protection, and the inclusion of this technology is indispensable to the provision of HD content for a Freeview platform.
36. The BBC, and other PSBs, has been working with the DTLA to find a means to introduce DTCP onto the Freeview HD⁶.
37. The initial proposal from the BBC, and other PSBs, to the DTLA was to mandate the use of DTCP though the "Freeview HD" trademark licence. However, as the trademark is not compulsory for manufacturers, the DTLA considered that it would not be a sufficiently strong mechanism to satisfy the receiver compliance requirements of their Content Participants. Significant numbers of manufacturers might choose not to take the "Freeview HD" trademark and so not implement content management.
38. The BBC also considered making the downloading of the D-Book 6.0 specifications conditional on the implementation of DTCP. However, as the D-Book 6.0 specifications had already been published, it was impossible for the BBC to impose conditionality retrospectively. Hence the search for licensable IP in the unpublished D-Book 6.1, with the Huffman tables being the only viable option⁷.
39. The only two alternatives that the BBC considers would satisfy the requirements of DTLA are: (a) full encryption of audio and visual data; or (b) government regulation of HD box standards.
- a. **Full encryption** – this would not be possible without an amendment to the multiplex B licence.
- Clause 7 A (2) of Variation 9 of the Multiplex B licence states:

"For the purpose of Condition 7A(1), "Reserved Capacity" means, in relation to each tranche, such digital capacity that is available on the frequencies operated in the High Capacity Transmission Mode which is sufficient for the broadcasting of one high definition television service for each day throughout the High Capacity Coverage Area so as to be available for reception by members of the public on a free to air basis, the amount of which capacity is

⁶ The BBC understands that the DTLA's requirements would also satisfy those of the AACS LA for the introduction of AACS. There are no content related licensing restrictions for HDCP as it is simply intended to protect connections to displays and has no relevance to recording devices.

⁷ On this point see the letter from the DTLA to the BBC, received on 22 May, at Annex 3.

*specified in Part 11 of Annex A by Ofcom from time to time as calculated and determined in accordance with the provisions of the 2008 Order*⁸.

- b. **Government regulation of HD box standards** – this is outside of the control of the BBC / UK PSBs, and is a matter for the UK Government / European Commission.

4. Will not lead to the elimination of competition in respect of a substantial part of the products in question.

- 40. The supporting arguments have already been set out in the section dealing theories of harm (see paragraphs 9 to 19 above). In addition, by facilitating successful HD channels on DTT, the proposal protects current inter-platform competition between DTT, cable and satellite.

Article 82

- 41. Should the BBC be viewed as dominant in any relevant market, the BBC considers it unlikely that it would be considered to have any incentive to abuse, or strengthen a position of dominance.
- 42. Licenses for the Huffman tables are provided free of charge. Therefore, there is no financial impact on the BBC whether there is one, or a number of, manufacturers of HD receivers.
- 43. Further, ensuring competition between receiver manufacturers is likely to lead to lower prices. This, in turn, is likely to result in greater take-up of Freeview HD, a key objective of the BBC and other PSBs.
- 44. Indeed, it is the BBC's objective to encourage horizontal competition between receiver manufacturers by making standards and licenses as open and as freely available as possible.

Objective justification

- 45. While "objective justification" has not been defined in the EC Treaty, it is considered to exist where the conduct is to protect an undertaking's "own commercial interests", provided this is not done to strengthen a dominant position and abuse it⁹.

⁸ The BBC's view is that "free to air" means unencrypted, and this appears also to be the view of Ofcom as stated in its letter of the 3rd September: "*It appears to Ofcom inappropriate to encrypt public service broadcast content on DTT. The current licensing regime requires that content is broadcast free to air. Any proposed change to this would require careful consideration and may involve a lengthy process.*"

⁹ Case 27/76 United Brands v Commission, [1978] ECR 207 paragraphs 189-191

46. Without content protection systems on receivers sold in the UK, the launch of HD services on Freeview is highly likely to be compromised. Therefore, the BBC considers that it has no alternative but to link its intellectual property rights in the Huffman tables to ensure that manufacturers of receivers supporting Home Networks install DTCP, receivers with HDMI outputs install HDCP and receivers with the ability to connect to Blu-ray recorders install AACS.
47. It is the BBC's considered view that without any acceptable form of content copy protection, content owners would be unlikely to licence as wide a range of HD content to the UK PSBs for free to air purposes.
48. This would significantly undermine the business rationale behind the non BBC PSBs' collaboration with Freeview HD. The consequence of this may be to halt the launch of Freeview HD.
49. Equally, there does not appear to be credible evidence that the BBC is seeking to license the Huffman table to strengthen or abuse a dominant position.
50. For the reasons already discussed, the BBC considers that linking the Huffman tables to ensure that receiver manufacturers install content copy protection systems is both indispensable and proportionate.

II. Copyright Issues

51. It has been suggested that the application of content management on Freeview HD could interfere with a viewer's legitimate rights under the Copyright, Designs and Patents Act 1988 ("CDPA"). We do not believe that this is the case.
52. Before considering the legal issues in more detail, we would emphasise that copy content protection limits only the number of HD copies of content, it does not limit the number of standard definition copies that a viewer can make.
53. Turning to the legal issues, there is no general "private use" exception in the CDPA but instead viewers have the right to record a broadcast for private and domestic use solely for the purposes of enabling them to view it at a more convenient time. Content copy protection does not interfere with this. There is also no general "fair use" exception in the CDPA but rather specific fair dealing exceptions allowing content to be copied for the purposes of reporting current events, criticism or review and for research and private study. This third fair dealing exception does not currently cover audiovisual works or broadcasts although the Gowers Review did propose extending the exception to do so. Again we do not consider that content copy protection will interfere with these rights particularly given the ability of viewers to make whatever number of standard definition copies they need to be able to use the content within the context of these fair dealing exceptions.

54. The issue of a viewer's right to make a back up copy has also been raised but the exception in the CDPA which allows the making of back up copies relates only to computer programs.
55. Finally, the Gowers Review also proposed a format shifting exception. It still remains unclear whether or not such an exception will be enacted at all and even if it is, what the extent of the right will be, what classes of works it will cover and how many format shifts will be allowed. The Government did though make clear in the consultation document "Taking Forward the Gowers Review of Intellectual Property - Proposed Changes to Copyright Exceptions" that the exception would not affect right holders' ability to incorporate DRM or technological protection measures into their works nor would it confer any right to circumvent DRM or technological protection measures. In the light of that and given that any number of standard definition copies will be able to be made, therefore still allowing viewers to watch or listen to content on other devices for their personal use, we do not believe there should be any conflict with any future format shifting exception if the current content management proposals are adopted.

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