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**Department of Culture, Media and Sport public
consultation on implementing the EU audiovisual media
services directive**

The response of the British Board of Film Classification

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Executive Summary

- The BBFC is a highly experienced, independent regulator of film, video/DVD, video games and video on demand services
- Its determinations in relation to film, video/DVD and video games have legal force and are based on published guidelines developed through extensive public consultation
- The BBFC has accumulated unrivalled experience and expertise in the regulation of extreme video material, including 'hardcore' pornography and violent or indecent material which might seriously impair the physical, mental or moral development of minors
- The BBFC pioneered the comprehensive provision of individually tailored content advice, and has developed a role as a major player in the promotion of media literacy.
- The Byron Report has this year recommended a greatly expanded role for the BBFC in relation to video games, including online games
- The Culture Media and Sport Select Committee has also this year recommended a greatly expanded role for the BBFC in relation to video games, and has recommended that online publishers join the BBFC.online scheme.
- The BBFC's voluntary BBFC.online scheme for the regulation of video on demand services, launched in May 2008 has widespread political, public and industry support, and its membership includes key content providers (eg Disney, Warner Bros, 20th Century Fox, BFI) and aggregators (eg Lovefilm, Tesco digital, i-Loaded)
- Effective labelling, trusted content advice and effective monitoring, such as that provided by the BBFC.online scheme is vital in enabling parents and others to help ensure that minors will not normally see or hear video on demand content which might seriously impair their physical, mental or moral development
- Many VOD services are more 'DVD like' than 'TV-like': it does not follow that because a VOD service offers programmes which are the same as, or similar to, those broadcast on TV, that service will inevitably create expectations that the regulatory protection will be the same as for television broadcasting
- As the stated aim is to catch only those services required by the Directive, consideration should be given to excluding from the scope of the new arrangements services which, by their nature and means of access, create a reasonable consumer expectation of 'DVD style' regulation rather than 'TV style' regulation
- A diversity of regulation is an important guard against concerns relating to civil liberties (especially freedom of expression) and this argues strongly against Ofcom being the regulator for VOD services, and in favour of powers being assigned to a range of regulatory bodies

- Concerns over a model involving direct assignment of powers are not borne out by the long experience of statutory video/DVD regulation
- The BBFC's experience in developing the BBFC.online scheme, and the support it enjoys from key players in the VOD industry, makes it well placed to take on a role as a regulator with assigned statutory powers in relation to VOD
- **Whatever the scope and structure, implementation must build upon BBFC.online, the effective model of voluntary regulation established by the BBFC in partnership with the broader VOD industry. This scheme was developed in direct response to the clear public policy of encouraging self rather than statutory regulation of the internet**
- **It would clearly not be right for any other party to be given powers to interfere with the operation of the BBFC.online scheme. Any arrangement which required VOD services to duplicate regulatory services already provided by the BBFC would be unnecessarily costly, confusing and wasteful**
- **There are clear advantages to giving the BBFC.online scheme statutory backing, either through assigning the BBFC powers as a co-regulator as part of the implementation of the AVMS directive, or by another legislative route, such as amendment to the Video Recordings Act 1984**
- **If not, then early, close and full consultation with the BBFC should be expected of any co-regulator charged with drawing up a code to ensure compliance with the Directive**
- **In the longer term there remains outstanding the issue of how to deal with the most problematic services which provide easy access to harmful video content on the internet. Such services are unlikely to be based within the EU and so fall outside the scope of the Directive. The BBFC has developed unrivalled expertise in regulating the most extreme content and has, at the request of Ministers, already offered detailed advice on how such material might effectively be regulated**
- **Implementation of the Directive is likely to create a public expectation of greater protection for children from harmful online video content, wherever the service provider is based. The BBFC is both ready and able to play a significant role in providing such protection**

DAVID COOKE

Director

Introduction

1. The BBFC welcomes the introduction of the regulation of VOD services required by the AVMS directive, indeed we have been pressing for regulation of this new medium for some years (see BBFC submissions to CMS Select Committee Inquiries: New Media and the Creative Industries 2004-5, and Harmful Content on the Internet and in Video Games 2007-8).

2. The British Board of Film Classification (BBFC) is a highly experienced regulator of the moving image (especially film, video/DVD, video games and video on demand services). In May 2008, it launched, with Ministerial support, a voluntary co-regulation scheme (BBFC.online) for video material supplied over the internet by means of download or streaming, and for online games. This year both the Byron Report and the CMS Select Committee report on harmful material on the internet and in video games have recommended a greatly increased role for the BBFC.

3. The BBFC regulates not just as a statutory designated authority but also because we believe we serve a socially useful function. Through the efficient classification of the moving image into advisory and age-related categories, the provision of content advice and the maintenance of our archive, we: give the public information that empowers them to make appropriate viewing decisions for themselves and those in their care; help to protect vulnerable viewers and society from the effects of viewing potentially harmful or unsuitable content (while respecting adult freedom of choice); provide media industries with the security and confidence of cost-effective, publicly trusted regulation; help to protect providers of moving image content from inadvertent breaches of UK law; and assist Trading Standards officers in their enforcement role.

4. The BBFC's independence is protected by its status as a not-for-profit private company and its statutory work is funded by the fees it charges for making its determinations. The fee tariff is based on the cost of considering the submitted material and is agreed by the Secretary of State for Culture, Media and Sport. The voluntary BBFC.online scheme for the regulation of VOD services is funded separately, and relies on a combination of membership fees and charges to register content .

5. The BBFC's structure reflects the importance of keeping decisions relating to finance separate from those relating to classification determinations. Responsibility for classification decisions and policy ultimately rests with the President and two Vice-Presidents, while the BBFC's business affairs are controlled by a separate Council of Management which has no involvement in policy work or classification. This submission is being made on behalf of the BBFC by the Director, who is delegated to make executive decisions, and to formulate and ensure the execution of policy.

6. This submission was prepared specially for the consultation and its purpose is to offer the Department the perspective, knowledge and expertise of a media regulator specialising in the moving image for whom issues of harm to children are of the utmost importance. Paragraphs 7 to 14 deal with background issues, paragraphs 15 to 19 deal with issues raised by the Byron Review, paragraphs 20 to 21 note the conclusion of the Culture Media and Sport Select Committee enquiry and paragraphs 22 to 32 set out details of the BBFC online scheme. Paragraphs 33 to 48 discuss issues around the scope of the proposed regulatory arrangements, paragraphs 49 to 56 deal with the structure of those arrangements, and paragraphs 57 to 59 deal with their impact. Concluding comments are at paragraphs 60 to 64.

Background

7. Founded in 1912, the BBFC's role in the regulation of cinema films has evolved over many years, both through legislation relating to the licensing of cinemas and through changes in the nature of the material and in public attitudes towards it. Although licensing concerns were originally focussed on issues such as fire safety they quickly expanded to cover the potential effects of the films themselves on audiences, including child audiences. The current statutory basis for the regulation of cinema films is found in the Licensing Act 2003 which requires that the admission of under 18s must be restricted in accordance with any recommendation made by the licensing authority or by the film classification body designated under section 4 of the Video Recordings Act 1984 (namely the President and Vice-Presidents of the BBFC). In practice, almost all cinema films released in the UK are classified by the BBFC according to its own thoroughly researched guidelines in order to satisfy the licensing objectives set out in the legislation: the prevention of crime and disorder; public safety; the prevention of public nuisance; and the protection of children from harm. The current classification categories for cinema films are 'U', 'PG', '12A', '15', '18' and 'R18', though the latter category is very rarely used in practice. ('R18' is, however, an important and well-used category for video/DVD.)

8. The advent of domestic video recorders in the early 1980s led to widespread concern about the way in which the new technology enabled children, especially, to gain access to unregulated and inappropriate material, including pornography and extreme horror films. Parliament responded by introducing statutory regulation of video works by means of the Video Recordings Act 1984 (the VRA), and the President and Vice-Presidents of the BBFC were designated as the authorities responsible for making arrangements for determining whether video works are suitable to be classified (having special regard to the likelihood of videos being viewed in the home), and the classification to be awarded to a suitable video. Since the amendment made by the Criminal Justice and Public Order Act 1994, the BBFC has also been obliged to have special regard to any

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harm that may be caused to potential viewers (including underage viewers) or, through their behaviour, to society by the manner in which a video work deals with criminal behaviour, illegal drugs, violent behaviour or incidents, horrific behaviour or incidents, or human sexual activity. The current classification categories for video works are: 'Uc', 'U', 'PG', '12', '15', '18' and 'R18'.

9. The definition of a video work under the VRA is any series of visual images (with or without sound) produced electronically by the use of information contained on any disc, magnetic tape or any other device capable of storing data electronically and shown as a moving picture. It therefore encompasses moving image material supplied on VHS tape, DVD, UMD (a disc for playing films on the handheld Sony PSP games console), games console cartridges, memory sticks or similar, but not moving images which are transmitted to the user via, for example, the internet or mobile phone networks. A video work is also exempt from classification if, taken as a whole, it is designed to inform, educate or instruct, or if it is concerned with sport, religion or music.

10. Drafted at a time when video games had not advanced far beyond 'Pong', 'Pacman', and 'Space Invaders', the VRA also offers exemption to video games. Exemption is lost if to any significant extent, the work depicts: human sexual activity or acts of force or restraint associated with such activity; mutilation or torture of, or other acts of gross violence towards, humans or animals; human genital organs or human urinary or excretory functions; or techniques likely to be useful in the commission of offences. Exemption is also lost if the work is likely to stimulate or encourage human sexual activity (to a significant extent); or mutilation or torture of, or other acts of gross violence towards, humans or animals (to any extent). The presence of linear (ie non-interactive) material may also cause a game to lose exemption. In addition to video games which lose exemption, the BBFC also classifies a large number of exempt games which are submitted to the BBFC by the publisher by choice. (Once classified the statutory restrictions on sales of age restricted games apply with full force). Both the Byron Report and the CMS select committee have this year recommended that all games, whether offline or online, which would be unsuitable for children under 12 should be classified by the BBFC. This recommendation is currently the subject of a separate DCMS consultation

11. In performing its classification function under the VRA and in relation to the Licensing Act, the BBFC recognises its status as a public authority under the Human Rights Act 1998 and also acts effectively to ensure that regulated works do not transgress against other pieces of legislation. These include the Cinematograph Films (Animals) Act 1937 (CFA), which makes it an offence to exhibit a work containing real animal cruelty orchestrated by the film maker; the Protection of Children Act 1978 (POCA), which outlaws the taking, possession, showing or distribution of indecent photographs or pseudo-photographs of children; and the Obscene Publications Acts 1959 & 1964 (OPA). In carrying out its responsibilities, the BBFC also has regard to whether the material

has arisen from the commission of an unlawful act. The BBFC provides a convenient and streamlined single source of authority in considering whether such statutes may have been breached. In doing so, it assists not just the public but also the industry in making available its experience and expertise on possible inadvertent breaches of the law.

12. In recent years, particularly with the establishment of Ofcom (the regulator and competition authority for television, radio, telecommunications and wireless communications services), content regulation has been concentrated in fewer hands. The BBFC believes that there is a self-evident benefit in having a diversity of regulation to guard against concerns relating to freedom of expression and other civil liberties: the main forms of regulated, popular, cultural content should not all be overseen by a single, statutory body.

13. The form of regulation practised by the BBFC has traditionally been quite distinct from that practised by, for example, Ofcom, for reasons which, historically, have derived from the nature of film and video content and the different nature of the media concerned. In short, the main difference has been that between pre-publication and post-publication oversight. The BBFC's traditional role of carrying out an independent and thorough assessment of content prior to its public release is performed swiftly and efficiently and makes possible an accumulation of expertise and an authority in advice provision which are not available under purely post hoc regulatory systems.

14. During 2008, the reports of two separate major inquiries into harmful content on the internet and in video games have acknowledged the BBFC's expertise in content regulation in new media, and the advantages of using the BBFC's trusted and understood classifications when trying to give parents the information and confidence they need in order to make informed decisions about the suitability of online content (whether VOD or video game) for their child.

The Byron Report: Safer Children in a Digital World

15. In her comprehensive and well received analysis, Dr Byron noted that many of the difficulties of protecting children from unsuitable content online stem from the reversal of expertise that sees children more at home in the digital world than their parents:

*“Our children....have grown up with an increasingly sophisticated use of the internet and video games. They have greater experience of these worlds which often merge with their offline lives. In effect there exists a **generational digital divide** between children and parents that many adults find impossible to navigate. Roles are often reversed*

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with children understanding and being far more adept in the use of technologies than their parents. For adults to educate, empower and protect children about issues they are less familiar with, have less experience, understanding and knowledge of, makes for an uncomfortable dynamic between the adult and child.” (1.30)

16. In many ways, children and parents lack a common language in the online world. This leaves many parents feeling like ‘digital immigrants’ struggling to understand an online world their ‘digital native’ children were born into and can navigate with ease (but lack the wisdom and experience required to protect themselves effectively). Many parents lack not only the expertise but also the confidence to intervene in their children’s online activities, with the result that many feel powerless and do not make effective use of the tools that are available. In relation to both offline and online games, Dr Byron concluded that parents needed clear content advice:

“This is the most important change that is needed to support children and young people and to provide information to parents.the best way to achieve this would be to build on the already established brand of the BBFC and parental awareness and understanding of what those ratings mean when it comes to films and DVDs.” (7.41)

17. We note that the reasoning behind the Byron conclusion in relation to video games applies equally to VOD services, especially those which are offering content which is identical or very similar to that supplied on DVD (including much TV content). The established brand of the BBFC, and parental awareness and understanding of what its ratings mean, give it a distinct advantage over other self regulators in the VOD sector.

18. Looking at the issue of protecting children from the whole gamut of risks posed by the internet, Dr Byron concluded:

“There is no ‘silver bullet’. Neither Government nor industry can make the internet completely safe. The nature of the internet means that there will always be risks, and children and parents need to understand how to manage the risks of the internet.Industry and Government and others must work together to ensure not only that parents and children understand the risks, but that, as far as possible, the products and systems available support users to manage the risks” (4.2)

19. The BBFC online scheme described at paragraphs 22 to 32 below is just such a system. As it stands, it provides an effective means of ensuring compliance with key requirements of the AVMS Directive, especially relating to the protection of children. It also demonstrates the expertise and industry support that resides in the BBFC in relation to regulation of VOD content

CMS Select Committee Report: Harmful content on the Internet and in video games

20. The CMS Select Committee mirrored Dr Byron's recommendations with respect to video games, calling for statutory BBFC regulation to be extended to all games rated 12 and above, and calling for publishers of online games to join the BBFC.online scheme:

"We believe that, ideally, a single classification system should be adopted..... we believe that the widespread recognition of the BBFC's classification categories in the UK..... offer significant advantages..... We therefore agree that the BBFC should continue to rate games with adult content and should have responsibility for rating games with content appropriate only for players aged 12 or above, and that these ratings should appear prominently. Online distributors should be encouraged to take advantage of the BBFC.online scheme which should be promoted as offering greater confidence to parents about the nature of the game." (para 203)

21. Taking evidence before the launch of BBFC.online, the Committee, looking at the management of risks associated with online content, noted that:

"Although most witnesses were complimentary about the efforts of the industry, we were struck by the considerable anxiety expressed by the Chief Executive of Ofcom about the effectiveness of self-regulation as presently operated. He believed that current arrangements "cannot persist" and was particularly critical of the lack of clarity about take-down procedures and the lack of transparency about complaints. In his view, "we do not have anything even approaching an effective self-regulatory model for this" (para 147)

In our view, the BBFC.online scheme provides precisely such a model in relation to VOD services.

BBFC.online : a working VOD regulation scheme

22. In 2006, at the request of, and in cooperation with, leading aggregators and content providers, the BBFC started development of scheme which would allow its successful regulation of film and DVD content to carry over into the world of VOD. Key industry players saw the benefit of being able to supply to their customers content which:

- had been subject to independent scrutiny
- had been classified according to criteria derived from widespread public consultation

- had trusted and understood BBFC category symbols and 'black cards' attached
- had clear, independent and trusted content advice attached
- was restricted according to age-appropriateness using effective gate-keeping measures
- was displayed and supplied in accordance with rules, compliance with which was ensured by independent monitoring and enforcement

23. The VOD industry understood that simply re-using the classifications awarded for supply as a cinema film or a DVD was not a suitable solution because:

- in future much content would be supplied on VOD but not on film or DVD
- there was no monitoring or enforcement mechanism to ensure that the classifications were being used appropriately, especially in relation to refusing to supply age inappropriate material to children
- BBFC symbols and other intellectual property are copyright and trademark protected and their use is only permitted in relation to works being distributed in the medium for which the classification was awarded. (The issue of a video certificate for a work allows use of the relevant symbol in relation to the distribution of that work on a video recording – a tape, disc or other physical artefact – but does not allow use of the symbol in relation to the supply of the same work by download, streaming or any other kind of data transfer.)

24. A BBFC/Industry working party was established and resulted in a set of rules (Appendix A), licence agreements (Appendices B and C), classification processes and compliance arrangements which met the needs of the industry, offered real 'added value' to potential customers, and maintained the integrity of the BBFC as a trusted regulator. Both quantitative¹ and qualitative² research has demonstrated substantial public support for the scheme

25. BBFC.online operates on a membership basis, with the annual membership fee set at a maximum of £900, and is open to both content providers and aggregators.

26. Content provider members can request from the BBFC 'online classification certificates' for video material they are intending to licence for sale via streaming or download or similar. If the work has already been classified under the VRA, or is being classified under the VRA for DVD release, the additional cost is minimal. New works submitted by a scheme member for classification under the VRA are eligible to receive an online classification free of charge. Online classifications can also be provided for works previously classified under the VRA for a fee of just

¹ Downloading classification study – TNS Worldpanel 2007 (<http://www.bbfc.co.uk/downloads/index.php>)

² BBFC.online presentation – GoldstonePerl/Slesenger Research 2007 (available on request)

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£45 per title. On classification, the member is sent an 'electronic black card' which they are obliged to place at the front of the content file so that when the consumer plays the video, the first thing they see is the BBFC black card, just as they do in the cinema (see images in Appendix B).

27. Aggregator members are obliged to display category and consumer advice information in a manner prescribed by the scheme, and using materials provided by the BBFC. For web based aggregators this involves display of the appropriate BBFC symbol next to the title of the work being offered. Moving the computer mouse over the symbol brings up a hover box 'white card' certificate (see Appendix D) certifying that the work has been classified by the BBFC for supply via download, streaming or similar, displaying the symbol with its definition, displaying the unique consumer advice for that work, and featuring a live link to the relevant classification record on the BBFC's own website. Alternative 'point of sale' solutions are available for non-web based aggregators (eg set-top-box platforms). Aggregator members are also required to display information about the scheme, about how to contact the service provider, and about how to complain.

28. All members are also obliged to ensure that appropriate gate keeping mechanisms are in place to ensure that age restricted material (eg that classified '12', '15', '18') is not sold to persons below that age. Unlike the ATVOD Code, the BBFC.online rules do not allow 'self certification' as a means of ensuring that age inappropriate material is not supplied to children.

29. Compliance with the scheme rules is actively monitored by the BBFC (funded by the membership and classification fees). Failure to comply with the scheme rules could ultimately lead to expulsion from the scheme and the loss of the right to display the BBFC's intellectual property (classification symbols, white card design, black card on content file).

30. BBFC.online operates both as a stand alone scheme and as a means of complying with some of the requirements of the ATVOD code, the IMCB classification framework and the AVMS Directive. BBFC.online membership does not conflict with or forestall ATVOD or IMCB membership (a number of ATVOD members are currently actively considering joining BBFC.online), as ATVOD's guidance and the IMCB classification framework make clear:

"ATVOD acknowledges that Members may provide pre-complied material on their services either in the form of individual programmes or series or separately identified channels from the following third party producers/distributors and be entitled at first instance to rely on the compliance processes undergone by that material:

(a) Content supplied or produced by one ATVOD Member to or for another ATVOD Member.

(b) Content supplied by producers/distributors of content which has been broadcast in the

UK and complied under the Ofcom Broadcasting Code, by the British Broadcasting Corporation (BBC) or films and associated material which have been classified for distribution in the UK by the British Board of Film Classification (BBFC)." (ATVOD Guidance Note 6)

"The Classification Framework has been drawn up taking account of the need to be consistent, as far as is possible, with standards for other media produced by the Agreed Bodies such as the British Board of Film Classification (BBFC)" (IMCB Classification Framework Document section 1.1)

"if the content in question would be likely to be rated as 18 by an Agreed Body if it was relevant to that body, then it should be rated as 18 under this Classification Framework" (IMCB Classification Framework Document section 2)

31. Launched in May 2008, with support from DCMS Minister Margaret Hodge and the British Video Association, the BBFC.online scheme has already secured the membership of key content providers (including Disney, Warners, 20th Century Fox, 2 Entertain, and the BFI) and aggregators (including Tesco Digital, LOVEFiLM and iloaded). Other key content providers and aggregators are poised to join, including a number of set-top-box platform operators. This compares well with ATVOD's total of seven full members.

32. The Board has an archive of well over 200,000 video classification decisions which can be converted into an online classification for VOD at the click of a button and at minimal expense. Existing members have between them over 35,000 classified works in their back catalogues and have already been issued with over 1,700 online certificates.

Scope

33. We note the stated intention of DCMS to limit the scope of the regulation to “a narrow range of services falling within the scope of the AVMS Directive, rather than extending regulation to a wide range of audiovisual services” (p9). We note also the definitional difficulties involved, given the nature of the seven conditions set out in the Directive.

34. This is particularly true in relation to the seventh condition that must be satisfied if an on-demand service is to be considered covered by the Directive (Recital 17). This states that the service must be ‘television-like’ in that it competes for the same audience as television broadcasting and the nature and means of access to the service mean that reasonable consumer expectations of it (in terms of regulatory protection) would be the same as for television broadcasting. There is, of course, an inherent contradiction in this condition: by virtue of being ‘on demand’ offerings from a catalogue of works, VOD services are very unlike television broadcasts which are characterised by being linear offerings supplied according to a schedule determined by the broadcaster.

35. We observe that during the various stakeholder and issue group meetings it has become evident that attempts to solve the definitional difficulties have led officials to broadened the range of services which are deemed likely to fall within the scope of the new regulatory arrangements, from services which have a strong TV connection (primarily the VOD services provided by TV broadcasters) to the much larger range of services offering ‘programmes’ which, for the most part, were not made for, and which do not originate from, television.

36. In our view, it is reasonable to conclude that VOD services which are offered with branding and in formats which mimic TV broadcast services will provoke reasonable consumer expectations that the regulatory protection will be the same as for broadcast television. This is particularly true of the TV catch-up services offered by many broadcasters (BBC i-player, 4OD, ITV.com, etc), which offer TV content displayed according its place in the original broadcast schedule (though regulation of the BBC service will, of course, fall to the BBC Trust). It may also be true of providers which offer a ‘bouquet’ of services which include broadcast TV, catch up TV, and the ability to select programmes on demand from a catalogue.

37. However, many on-demand services make no attempt to present themselves as part of the expanding TV landscape, even though they may offer a catalogue of films and programmes which may, at some point in the past or future, also feature on broadcast TV. To the extent that such models are based on traditional media services, these services are modelled not on television, but on the long established video/DVD rental and retail sector. Examples include Tesco Digital

(<http://www.tescodigital.com/Store/>), LOVEFiLM (<http://www.lovefilm.com/store>), iloaded (<http://www.iloaded.com>), and Apple's iTunes store. Screen shots from these services are set out in appendices E to H and these make it clear that the consumer experience is of a 'virtual shop' rather than a television-like service. In each case, the nature and means of access to the service mean that if a reasonable consumer expects any kind of regulatory protection, then it is the protection they would expect in relation to DVD rental and retail rather than television broadcasting. Selling copies of DVDs containing episodes of *The Sopranos* or *The Simpsons* does not make an HMV or Woolworths store a television-like service. Renting the same DVDs by mail order via the internet does not make LOVEFiLM a television-like service. Nor does downloading or streaming the same content from a virtual retail store such as Tesco Digital.

38. BBFC research supports such a conclusion: quantitative research from leading market researcher TNS³, who investigated public concerns and requirements through a panel of over 4000 adults in the UK, suggests that 91% of parents wanted to see BBFC symbols on films or programmes offered for download or streaming. Separate qualitative research (available on request) provides further evidence of support for this view. Focus groups across the various demographic groups were invited to look at a mock website with the BBFC.online classification symbols in place, to compare it with live video on demand websites in the UK and the USA and to discuss their informational and gatekeeping needs with regard to such services. The results were uniform: respondents expressed strong support for use of BBFC symbols and content advice for VOD services. Respondents were dismayed at the idea of downloadable films being offered without a BBFC classification; liked the way in which the scheme presented content information through use of familiar symbols, iconography and consumer advice; and trusted the BBFC as a source of such information. Asked whether they were more likely to use a site which was a member of the BBFC.online scheme there was a clear affirmative response. It was also clear that there was some incredulity at the fact that the law allowed the sale of films via download without any requirement for prior classification or effective gatekeeping. Many assumed that the rules applying to films supplied on DVD would automatically apply to the same films supplied via VOD services. None of the respondents expressed any expectation that 'TV style' regulation would be involved.

39. It is therefore open to Government to exclude from the scope of the regulation services which are clearly more akin to DVD rental and retail than to television broadcasting. Such an approach would be consistent with the aim of capturing "a narrow range of services falling within the scope of the AVMS Directive". Such an exclusion could be achieved by defining 'television-like' services as those which offer, whether as part of a bouquet of services or otherwise, access to live broadcast

³ Downloading classification study – TNS Worldpanel 2007 (<http://www.bbfc.co.uk/downloads/index.php>)
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television, or which, to a significant extent, feature branding associated with television broadcasting, or display a catalogue of programmes in a schedule format resembling a TV schedule or electronic programme guide.

40. The Board is concerned that the proposals in the consultation document place too little emphasis on the 'television-like' criteria and will therefore have the effect of extending the scope to cover services for which the Directive does not require regulation.

41. The advantages of making such a distinction should be clear to a Government which fought long and hard to restrict the scope of the Directive to those services which are truly 'television-like'. In accordance with this clear public policy objective, services which are not television-like in any meaningful way should, in the first instance, be allowed to continue to pursue the course of non-statutory regulation through schemes such as BBFC.online. Statutory regulation for such services should only be considered if such schemes fail to deal in a satisfactory way with harm that may result from the provision of such services. Given the uptake of the BBFC.online scheme by the major mainstream content providers and aggregators, this is only likely to be required in relation to the most extreme content, such as 'extreme reality material' and 'hardcore' pornography.

42. A work refused classification by the BBFC, illustrates the nature of 'extreme reality material'. *Bumfights: A Cause for Concern* is a US video/DVD work in which the film makers persuade real homeless people, who are often incapacitated through drink or drugs, to fight or take part in dangerous stunts. Some of the incidents result in significant injuries, for instance one man pulls his own tooth out with pliers and another sustains a broken ankle during a fight. Part of the work is given over to a spoof wildlife programme in which the film makers approach homeless men who are asleep in public areas and treat them as if they are wild animals. This typically involves startling, forcibly subduing and then binding their arms, legs and mouths with duct tape. Their physical attributes are then discussed as if they are not human. There is considerable doubt as to whether the homeless men in these sequences are consenting and they appear bewildered, frightened and angry. The film makers were convicted for soliciting an assault during filming and the video is reported to have sold over three hundred thousand copies in the USA. Two sequels have been made. This and similar works are available to download or stream on a variety of VOD sites.

43. The BBFC is unrivalled in the UK in its experience in relation to the regulation of pornography. Since the adoption of new guidelines in the summer of 2000, legal material designed to sexually arouse and featuring clear sight of real sex between consenting adults has been classified in the specially restricted 'R18' category. Video recordings containing 'R18' video works can only be sold to adults who visit a licensed sex shop and must not be supplied by mail order. During 2007, the

BBFC classified over 1150 video works 'R18'. The type of material classified at 'R18' is that informally known as 'hardcore'. Such works normally feature close up images of genitals during the performance of various sex acts, including oral, anal and vaginal penetration, masturbation and ejaculation. Unlike the 'softcore' images commonly passed at '18', in 'R18' works there is normally no doubt that the sexual act is being performed for real rather than simulated.

44. The regulation of 'hardcore' sex material is a particularly difficult and specialised enterprise which is not well suited to a 'light touch' approach based on responses to complaints, not least because the audience is unlikely to complain at the excesses. Much of the material deliberately skirts the boundaries of consent, legality, abuse, and harm with the result that the BBFC is forced to intervene with a regularity unmatched in other types of material: during 2007 over 27% of 'R18' features were subjected to compulsory cuts. It is abundantly clear to us that self-regulation does not work in such an area, and leaves serious abuses.

45. The modern trend in explicit 'hardcore' sex works is to depict sexual activity free from any pretence at narrative or relationships, and to show participants (especially women) being pushed to the very limits of their physical capabilities, often in a group sex scenario. Consensual adult activities are carried out in a manner which ranges in tone from gentle to mechanical to domineering to aggressive to abusive, and the task of establishing at which point to draw the line is not at all straightforward. Many 'hardcore' works also play around with notions of consent, youth, innocence, inappropriate relationships, pain and violence in ways which range from relatively innocuous to extremely disturbing. Over the course of years of experience of classifying thousands of 'hardcore' submissions, the BBFC has developed policies and procedures which allow for the consistent application of the tests of harm and legality.

46. Much of this extreme material falls into the awkward and unhappy overlap between what is lawful (especially in terms of the Obscene Publications Act 1959 & 1964) and what is likely to seriously impair the physical, mental or moral development of minors. Such material will, for the most part, be completely untouched by implementation of the Directive because:

- Although freely available in the UK, most services providing such content are operated by media service providers who are not within the jurisdiction of a member state
- The Ofcom code specifically outlaws the transmission of 'R18' material or its equivalent on UK television so such services providing hardcore pornography are arguably not 'television-like' because they are not competing for the same audience as TV broadcasting and their

nature means that reasonable consumer expectations are not the same as for television broadcasting

- The trend towards 'you tube' style services, especially for hardcore pornography (see, for example Red Tube, You Porn, Porn Hub, Tube 8, and X Tube) mean that the service provider is not exercising editorial responsibility.

47. It makes no sense to include within the scope of the regulation mainstream VOD services which are DVD-like rather than TV-like, while extreme VOD services which pose a real threat to children are left outside.

48. If, however, DVD-like on-demand services with little or no connection with TV broadcasting are to be included within the scope of the regulatory arrangements then it is vital that those arrangements build upon rather than undo the good work that has already been done on a voluntary basis by content providers and aggregators who have helped to develop, and who have signed up to, the BBFC.online scheme. The point is also highlighted under 'Impact' in paragraphs 57 to 59.

Structure

49. In recent years, particularly with the establishment of Ofcom (the regulator and competition authority for television, radio, telecommunications and wireless communications services), content regulation has been concentrated in fewer hands. As noted earlier, the BBFC believes that there is a self-evident benefit in having a diversity of regulation to guard against concerns relating to freedom of expression and other civil liberties: the main forms of regulated, popular, cultural content should not all be overseen by a single, statutory body. There is also a powerful case for applying a single regulatory approach to the non-broadcast supply of films whether they are exhibited in a cinema, supplied on DVDs or supplied via a VOD service.

50. If the scope of the regulation is to include 'DVD-like' services, it is imperative that the structure recognises and makes use of the established BBFC.online scheme. As set out at paragraphs 22 to 32, this has been developed in partnership with the section of the VOD industry which is not an offshoot of broadcast TV, and has the support of major forces in the industry, including Tesco Digital, LOVEFiLM, iloaded, Disney, Warners, 20th Century Fox, 2 Entertain, the BFI and the British Video Association. The BBFC.online scheme sets a 'gold standard' for regulation of VOD content and its requirements for protecting minors go far beyond those required by the directive. Although membership of BBFC.online is compatible with membership of ATVOD (as noted earlier, ATVOD

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explicitly accepts use of BBFC classifications), it would be perverse to require a member of BBFC.online to become a member of another regulatory body.

51. Given the commitment of key players in the VOD industry to the BBFC.online scheme, numerous briefings to DCMS and Ofcom officials, and the support of the relevant Minister at scheme launch, it is surprising that the consultation document makes no mention of the scheme as a model on which the new regulation can build, preferring to cite just ATVOD and IMCB as potential co-regulatory bodies. As is evident from the scheme rules and licence agreements set out in appendices A to C, the BBFC has developed a fully operational scheme complete with not just complaints protocols but also monitoring and compliance procedures.

52. As a voluntary scheme, BBFC.online currently ensures that works supplied by VOD services with BBFC symbols attached are properly labelled, are supplied only to those of an appropriate age, are accompanied by clear information on the service supplier and complaints and regulatory procedure, and are subject to independent monitoring and enforcement procedures. If asked to be a co-regulatory body in relation to the Directive, the BBFC would work closely with the VOD industry to ensure that BBFC.online membership rules also covered the additional Directive requirements relating to incitement to hatred, accessibility to those with a visual or hearing disability, transmission of films outside periods agreed with rights holders, sponsorship and product placement. If, contrary to the preference expressed in the consultation document, the regulation of advertising and content were to be covered by a single arrangement, the Directive's requirements in relation to advertising would also be incorporated. Given the very good relationship between the BBFC and its BBFC.online members, and the cooperative way in which the scheme was developed, expanding the remit of the scheme in this way is not likely to be problematic.

53. As currently constituted, BBFC.online is designed to be a 'gold standard' in terms of informing potential viewers and protecting children. It is based around the well established BBFC methodology of thorough, independent, pre-publication oversight of audio-visual content. This clearly goes beyond what is required by the directive. The new regulatory structure could offer VOD services a choice of joining an approved regulatory membership scheme, such as BBFC.online, or complying with a (lighter touch) code of conduct. The code of conduct could be administered by another regulatory body (such as ATVOD or the IMCB) or by the BBFC, or by a new body which drew on the expertise of all the existing VOD regulators. Given the range of VOD services, their different business models and customer expectations, their relationships with different technologies, and the success that each regulator has had in its own sector of the broad VOD market, there is clearly significant merit in the third option.

54. For reasons relating to the need for plurality in regulation, and to the need to build on existing (voluntary) regulation of VOD developed in partnership with the industry, the BBFC therefore does not support Model 3. Model 2 allows existing arrangements to be built upon and provides some distance between Ofcom and the regulation of VOD, but does not entirely remove the concern that a regulatory body which already covers so many means of mass communication is extending its reach still further. We note that the consultation paper contains an implicit assumption that ATVOD and IMCB will both be co-regulators for content under the preferred Model 2. The BBFC should also be considered as a front runner for such a role.

55. We note the concern that Model 1 *“would in our view lead to a relatively inflexible arrangement that might not be able to respond in the most appropriate way if there were difficulties in the system that needed to be addressed.”* (p27) , but observe that exactly such an arrangement (direct designation by government) has worked very well in relation to video (viewed ‘on demand’ on VHS or DVD) for nearly 25 years. Far from being ‘unable to respond’, the arrangement has actually smoothly and successfully dealt with the advent of new technology (DVD, Blu-ray, sophisticated games consoles), new legislation, new forms of content, massive increases in workload, and significant changes in public expectations without breaking stride. We would therefore challenge the assumption that direct designation by Government leads to an inability to respond. History suggests that the difficulties of dealing with catastrophic failure are theoretical rather than realistic, and the particular difficulty of being able to de-designate a regulator without leaving a gap can be dealt with by ensuring that more than one regulator is designated in the first place.

56. We note that, in contrast to the position taken on content regulation, the consultation document does not suggest that there are strong reasons for not directly assigning powers to the Advertising Standards Authority in relation to advertising on VOD services. We also note the advantages cited in respect of advertising for having a ‘one stop shop’ for regulation. We observe that similar advantages would flow to film-like and DVD-like VOD services from having a one stop shop for their content. Indeed this is the principle on which BBFC.online has been built: that BBFC regulation of DVD content should be allowed to carry over into the VOD market at minimal cost and inconvenience. Unless regulation by the BBFC is an option for VOD services, the same content will be regulated by the BBFC for cinema exhibition and DVD release, by Ofcom for TV broadcast, and by another body for supply via VOD. Triple regulation is both undesirable and unnecessary.

Impact

57. Whatever the scope and structure of the arrangements chosen to implement the requirements of the Directive, it is vital that resulting regulation does not undo the work that existing regulators and industry partners have already done in voluntarily addressing issues covered by the directive, especially in relation to protecting children from potentially harmful content. These current arrangements are complementary rather than competitive.

58. As noted earlier, the IMCB's Classification framework states:

"The Classification Framework has been drawn up taking account of the need to be consistent, as far as is possible, with standards for other media produced by the Agreed Bodies such as the British Board of Film Classification (BBFC)" (Classification Framework Document section 1.1)

And requires that:

"if the content in question would be likely to be rated as 18 by an Agreed Body if it was relevant to that body, then it should be rated as 18 under this Classification Framework" (Classification Framework Document section 2)

59. Similarly, the ATVOD Code allows members to rely on regulation carried out by the BBFC:

"ATVOD acknowledges that Members may provide pre-complied material on their services either in the form of individual programmes or series or separately identified channels from the following third party producers/distributors and be entitled at first instance to rely on the compliance processes undergone by that material:

- (a) Content supplied or produced by one ATVOD Member to or for another ATVOD Member.*
- (b) Content supplied by producers/distributors of content which has been broadcast in the UK and complied under the Ofcom Broadcasting Code, by the British Broadcasting Corporation (BBC) or films and associated material which have been classified for distribution in the UK by the British Board of Film Classification (BBFC)." (ATVOD Guidance Note No 6)*

Conclusion

60. If proper account is taken of the Directive's definition of 'television-like' services, there is no need to include within the scope of the new regulatory arrangements for VOD those services which are much closer in nature to DVD rental and retail than they are to TV broadcast. Indeed, given the

Government's stated position that the scope should not extend beyond that required by the Directive, such a position would be perverse.

61. In terms of structure, we agree that it would be undesirable for Ofcom to be the regulator. Given the diversity of technologies and business models involved in the provision of VOD services, there is merit in a model which allows powers to be assigned to a range of co-regulators. In our view the concern expressed about direct assignment has not been borne out by the experience of such an arrangements in relation to the regulation of video and DVD. In any case, regardless of whether powers are assigned directly by Government, or are devolved by Ofcom, the BBFC's proven expertise in this area, and the strong support it enjoys among significant players in the VOD industry, argues strongly in favour of the BBFC being a co-regulator, and we stand ready to take on that role if Parliament so decides.

62. Whatever the scope and structure, implementation must build upon BBFC.online, the effective model of voluntary regulation established by the BBFC in partnership with the broader VOD industry. This scheme was developed in direct response to the clear public policy of encouraging self rather than statutory regulation of the internet. It would clearly not be right for any other party to be given powers to interfere with the operation of the BBFC.online scheme. Any arrangement which required VOD services to duplicate regulatory services already provided by the BBFC would be unnecessarily costly, confusing and wasteful.

63. There are clear advantages to giving the BBFC.online scheme statutory backing, either through assigning the BBFC powers as a co-regulator as part of the implementation of the AVMS directive, or by another legislative route, such as amendment to the Video Recordings Act 1984. If not, then early, close and full consultation with the BBFC should be expected of any co-regulator charged with drawing up a code to ensure compliance with the Directive.

64. In the longer term there remains outstanding the issue of how to deal with the most problematic services which provide easy access to harmful video content on the internet. Such services are unlikely to be based within the EU and so fall outside the scope of the Directive. The BBFC has developed unrivalled expertise in regulating the most extreme content and has, at the request of Ministers, already offered detailed advice on how such material might effectively be regulated. Implementation of the Directive is likely to create a public expectation of greater protection for children from harmful online video content ,

wherever the service provider is based. The BBFC is both ready and able to play a significant role in providing such protection.

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