

**PROPOSALS FOR THE REGULATION OF VIDEO ON DEMAND SERVICES
OFCOM CONSULTATION**



**Response
From
Periodical Publishers Association
(PPA)
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Response from Periodical Publishers Association (PPA)

1. Introduction

PPA is the trade body for UK magazine, journal and business media publishers.

PPA's membership consists of some 250 members who publish consumer, customer (for example magazines produced for third parties such as retailers, TV companies or airlines) and business magazines, journals and directories in addition to conducting research, organising conferences and exhibitions.

PPA members offer both electronic and online services, including websites, online and electronic versions of print publications and publications only available online or through electronic transmission. Online publications encompass consumer, customer and business to business journals, magazines and media and increasingly involve the use of new electronic rights management systems to help improve the provision of publications and services to subscribers.

For the purposes of this consultation we will refer to PPA member online publications as "Magazines".

A full list of PPA members is available at: <http://www.ppa.co.uk/cgi-bin/go.pl/ppamembers/index.html>

It should be noted that for PPA members online audiovisual ("AV") services are forming an increasingly important part of the exploitation of their content. However, the majority of AV services offered by PPA members are almost certainly outside the intended scope of the Audiovisual Media Services Directive (AVMS) ¹ as their "form and content" are not "comparable to the form and content of programmes of a kind normally included in television programme services."²

And indeed electronic versions of magazines are excluded from the scope of AVMS (as recognised in the current consultation). Instead, AV services on magazine websites will tend to fall under the remit of the Press Complaints Commission and the Committee of Advertising Practice (the self-regulatory part).

PPA members are significant contributors to the UK creative industries. The total value of the UK magazine and journal industry is estimated at £5.7bn³, with consumer magazines contributing around £2.8bn⁴, business media (including magazines and directories) around £2.0bn⁵ and customer magazines £900m⁶. This is four times the size of the UK recorded music industry (£1.39bn⁷) and twice the size of the UK film industry (£3.22bn⁸). It is approximately the same size as the UK audiovisual content production sector (£5.5bn£6bn⁹). The UK magazine and journal industry directly employs 114,000 people¹⁰.

¹ 2007/65/EC

² Subsection 3 of the current proposed Regulations as set out in paragraph 4.20 of the Ofcom consultation.

³ PriceWaterhouseCoopers Global Entertainment and Media Outlook: 2008-2012

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ BPI, 2007

⁸ PriceWaterhouseCoopers Global Entertainment and Media Outlook: 2008-2012

⁹ Digital Britain, Interim Report page 36

¹⁰ PPA analysis of the Periodicals and Journals Industry based on Annual Business Inquiry

2. Services Subject to Regulation ("Scope")

PPA welcomed the Government's stated approach of defining narrowly the video-on-demand ("VOD") services that are covered by AVMS.

Ideally PPA would like to have seen Recital 21 of AVMS (which excludes electronic versions of magazines and newspapers from its scope) reproduced in the Regulations transposing AVMS into English and Welsh law (the "**Proposed Regulations**").¹¹

PPA notes that Ofcom does not have ownership of the Proposed Regulations but Ofcom has invited "views and comments on the issues raised in this document". PPA would like to put on record its concerns about the Proposed Regulations. In particular, the method by which they are to be implemented under the European Communities Act 1972¹² means that the legal requirements as to scope are fixed. The Proposed Regulations, once transposed, cannot confer a power to legislate - meaning that the regulator cannot create its own set of binding rules.

As such, whilst PPA welcomes the proposed guidance (the "**Scope Guidance**") on the definition of what constitutes an "on-demand programme service" ("ODPS") - which will be covered by the new regulatory regime created by AVMS - the guidance does not have the impact upon and give certainty to the Proposed Regulations once implemented (as the Scope Guidance is non-binding).

Subsection (3) of the Scope Guidance is key. It states:

"The programmes referred to in subsections (1) and (2) are those whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services." [emphasis added].

The other tests in the Proposed Regulations (set out in footnote 11 below) as to whether an AV service is ODPS appear to be relatively easily satisfied - the key is what constitutes a "programme" (or in the words of the Scope Guidance, whether the service is "television-like").

The Scope Guidance attempts to clarify "television-like", but ultimately it would be for Ofcom to decide (not the delegated co-regulators) based on the Proposed Guidance (as implemented), including subsection (3).

¹¹ A service is an "on-demand programme service" if, and in so far as—

- (a) its principal purpose is the provision of programmes of a kind falling within subsection (3);
- (b) it is provided for video on-demand access;
- (c) it is under a person's editorial responsibility;
- (d) it is made available by that person for use by members of the public; and
- (e) its provider is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive

(2) "Video on-demand access" is access where the user is able—

- (a) to make individual selections of programmes of a kind falling within subsection (3) from a range of such programmes (or of such programmes along with other kinds of programmes) offered to users;
- (b) to receive such programmes by means of an electronic communications network (whether the programmes are so received before or after the user has selected which programmes to view); and
- (c) to view the programmes selected at a point in time of the user's choosing.

(3) The programmes referred to in subsections (1) and (2) are those whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services.

¹² Section 2(2) European Communities Act 1972

Many Magazines offer short AV clips, for example to illustrate news stories. These are not "television-like" as they are ancillary features and tend to be shorter in length than a typical television programme.

In addition, many Magazines offer content aimed at niche interest groups and markets and the AV content offered ancillary to this activity is not "television-like" but may include audio and video material. The subject matter of a Magazine may not necessarily be featured regularly on linear television services (or may feature regularly on television but only form a small part of longer television programme). It remains very difficult for non-broadcast media owners to understand when their ancillary services will be caught by the new AVMS Regulations and this seems to be an unsatisfactory position in which to put the media. It is in the interests of all that there should be certainty - so as to avoid catching content which is not required to be caught by AVMS through lack of thought or inadvertent drafting issues.

One of the difficulties is that there is no mention of the "length" of "programmes" in subsection (3) of the Proposed Regulations - only "form and content". Paragraph 4.81 of the current consultation (which does not actually form part of the Scope Guidance) unhelpfully states:

"In the majority of cases, our assessment was that the online services featuring clips were not ODPS, because the clips were typically part of a proposition which we assessed as fundamentally intended to promote the linear channel, rather than as a content destination in its own right. However, we also concluded that a service featuring clips could not be ruled out of scope solely by virtue of the fact that the service provided access to such short form content."

This is indicative of some of the issues that are likely to emerge when the AVMS Regulations are implemented into law - and which are not satisfactorily addressed in the Scope Guidance.

The Scope Guidance provides some comfort, but ultimately the decision as to whether a service is in scope is dependant upon the Proposed Regulations (as implemented).

As a result of these concerns PPA remains of the view that its members' content may be found to be in scope when it ought not to be considered in scope. .

Draft Scope Guidance – the definition of VOD services

Please note that references to clauses when discussing Scope Guidance below are references as set out in the Scope Guidance in Annex 6 of the Ofcom consultation document (not the references in the Scope Guidance laid out in Section 4 of the consultation document).

Question 1:

a) Is the draft Scope Guidance set out above appropriate?

The draft Scope Guidance set out in the Ofcom consultation document is useful. In its response to the Department for Culture, Media and Sport consultation in October 2008 PPA highlighted the need to ensure that the scope of services that are subject to regulation are clearly defined, so that all those not within that definition are clearly outside the scope.

PPA is glad to see that electronic versions of newspapers and magazines are stated in the Scope Guidance to be outside the scope of the Regulations - despite the caveat excluding ODPS services offered by newspapers and magazines.¹³

However, PPA has some concerns and comments.

b) If you do not agree that the draft Scope Guidance is appropriate, please explain why and suggest alternative wording where appropriate.

There are some sections of the Scope Guidance that PPA believes could be more clearly drafted.

Section 2.6 of the Scope Guidance is not clear¹⁴. It should be amended to make it clear that where an on-demand programme is included as an *ancillary* element of the broader offering, that on-demand service is *not the principal purpose* and so it will *fall outside the scope* of the Regulations.

So it could state:

"2.6 Where relevant on-demand programmes are included as an ancillary (even if integral) element of the broader non video on demand offering they are not considered a distinct on-demand programme service and fall outside the scope of the Regulations. For example, where video is used to provide additional material relevant to a text-based story."

Many magazines offer AV/VOD to accompany text based services. As stated above, these are usually shorter in length than on demand TV programmes and are not the principal purpose of the service. The Scope Guidelines should therefore be amended to clarify the situation.

Section 2.17¹⁵ should be amended to more definitively exclude content where clips are not extracts from longer programmes. Text Magazine reporting (and other features that may include VOD as ancillary services) often includes AV clips, but PPA was consistently led to believe that such short clips would not be within scope of the new Regulations.

Notification of VOD services – proposed allocation of functions

Question 2

a) Is the proposed allocation of functions relating to set out in paragraphs 4.87 to 4.91 appropriate?

A small minority of PPA members **may** be offering some VOD services that may be caught by the new Regulations implementing AVMS. However, neither the Proposed Regulations nor the Scope

¹³ Section 3.2(d) of the Scope Guidance (as laid out in Annex 6).

¹⁴ "2.5 Where relevant on-demand programmes form part of a broader consumer offering, it may be the case that those programmes comprise an on-demand programme service in their own right. For example, where a service provider offers a movie and television programme download service as part of its broader, non-audiovisual online retailing activities, then such a service may be considered to be a distinct on-demand programme service which falls within the scope of the Regulations.

2.6 This will not be the case if the relevant on-demand programmes are included as an integral and ancillary element of the broader offering, for example, where video is used to provide additional material relevant to a text-based news story."

¹⁵ "2.17 Examples of 'programmes' that are not 'TV-like' might include informational videos directed at a particular group of people, such as an undertaking's employee training videos available online, and short extracts from longer programmes, to the extent that such extracts are not such a significant part of the programme as to be considered to be a programme in their own right.

Guidance is finalised and so it is not possible to know with real certainty whether certain services are in scope or not.

PPA is doing its best to inform members of the forthcoming changes, but for the reasons above - and the fact that this is the first time that (editorial) VOD services have been regulated - PPA does not believe that it is proportionate to require ODPS providers to be given a strict deadline of 31 January 2010 (especially if they are on the borderline of being considered ODPS) to notify the co-regulator.

Magazine websites grow and develop organically - responding to consumer needs - and so many Magazines could theoretically expand their VOD offering so as to be considered ODPS (whether before or after 19 December 2009). There has to be a longer period of grace allowing providers to take advice and become familiar with the new regime.

PPA welcomes the decision-making provisions in borderline cases, whereby Ofcom can exercise its power to decide whether a service is or is not in scope if:

1. a service provider, unhappy with the decision of the co-regulator in relation to scope refers the matter to Ofcom; or
2. the co-regulator itself, following an initial investigation (if it deemed a case to be borderline in terms of scope), refers the case to Ofcom.

In both cases, the referral to Ofcom would be for formal consideration and decision as to whether a particular service is in scope or not. This appeals system provides some element of protection for service providers. However, PPA feels that some informal guidance at an earlier stage should be possible.

b) If you do not agree that the proposed allocation of functions relating to notification is appropriate, please explain why and suggest an alternative, where appropriate.

As ATVOD states in its proposal

"Failure to notify will be investigated as a potential breach of the Regulations and may result in sanctions proceedings as provided for by the Regulations. There will need to be procedures in place which allow, particularly in the early days, for those on-demand programme service providers who consider that their service falls out with [sic] scope to make representations about the apparent failure to comply."

Due to the fact that: this current consultation closes less than two months before AVMS must be implemented into UK law; the Proposed Regulations are not finalised (and therefore yet to be laid before Parliament); the Scope Guidance is not finalised; the process for notification is yet to be published (or consulted upon); and ATVOD is yet to appoint a CEO, Chairman etc - there ought to be a longer grace period than the one (31 January 2010) set out in the consultation **and** there must be a procedure whereby representations can be made to ATVOD when scope is challenged by a media services provider.

3. The regulation of video on demand editorial content

Question 4

a) Do stakeholders agree with Ofcom's proposal that, subject to the necessary progress being made over the consultation period, it would be appropriate for Ofcom to designate co-regulatory functions to ATVOD on 19 December 2009, or thereafter, when all relevant aspects of the ATVOD Proposal have been agreed, in relation to the regulation of VOD editorial content?

PPA is a strong supporter of self-regulation. Our members have experience of self-regulation as they are subject to both the Committee of Advertising Practice (CAP) Code and the Press Complaints Commission Code (PCC). We also believe that co-regulation is to be favoured over direct regulation.

PPA does not have any experience of working with ATVOD, but we do not have any objections in principle to ATVOD being designated as the co-regulator - provided that it is transparent; is representative; has a prescribed set of powers; acts proportionately; is accountable; is consistent; is open to new membership as the VOD market develops; is independent; and its powers are only exercised in cases where action is necessary.

PPA does, however, have some reservations and observations.

In paragraph 5.20 of the consultation, it mentions that ATVOD:

"would be free to operate a voluntary self-regulatory code for those VOD service providers who wished to abide by such a code."

PPA would not want any such theoretically voluntary Code operated by ATVOD to become *de facto* mandatory. The VOD content on PPA member's websites is already subject to the PCC Code (which goes beyond the rules in AVMS) and PPA members already pay toward the PCC system through the Press Standards Board of Finance. The PCC system works well. There should be no double regulation and no double taxation.

The VOD Editorial Steering Group ("**VESG**") - an industry body - is mentioned several times in the consultation. PPA notes that the VESG is made up primarily of traditional broadcasters (that offer VOD services); bodies representing film interests; and platform providers.¹⁶ As the VOD market develops, there are likely to be other media parties that have not traditionally offered VOD entering the market. Their interests have not necessarily been represented to date and must be represented in future.

Similarly, ATVOD's current membership is small and mainly made up of traditional broadcasters and platform providers.¹⁷

By way of example, in paragraph 5.24 of the consultation, ATVOD proposes that a flat notification fee is charged to providers of ODPS for the first 15 months of operation.¹⁸

¹⁶ VESG membership: ATVOD; BBC Worldwide; the British Board of Film Classification; the Broadband Stakeholder Group; BT; BSkyB; Channel 4; Five; ITV; Filmflex Movies; Microsoft; Mobile Broadband Group; Motion Pictures' Association; Playboy TV; Satellite and Cable Broadcasters' Group; Virgin Media; and Warner Brothers.

¹⁷ <http://atvod.co.uk/our-members>

¹⁸ Paragraph 5.27 of the consultation states that the notification fee is likely to be in the region of between £2,000 and £2,500. Paragraphs 4.3.2 - 4.3.4 of the ATVOD proposal in Annex 7 are also relevant.

This clearly prejudices smaller VOD operators and those who may be caught by poor scope definition but offer minimal VOD services. If a traditional television broadcaster offering on-demand, catch up services, with hours and hours of content only has to pay the same as, for example, an SME magazine publisher that happens to offer some AV content that just passes the threshold test to be considered a provider of ODPS - the system is inherently unfair. While £2500 may be a relatively modest sum for large businesses, it will have a disproportionate impact on smaller businesses.

It is mentioned in paragraph 5.31 a) of the consultation that ATVOD intends to restructure its board to ensure that independent members are in the majority, which will ensure ATVOD is viewed as sufficiently independent of industry. But of the industry representatives on the board (stated to be a maximum of four) or industry representatives on any possible ATVOD committees, there needs to be a good cross-section of industry representatives. It should not just be reserved to the traditional largest VOD providers who (if the idea of a flat-fee is removed) pay the most toward the co-regulatory system or have the biggest market share.

PPA welcomes the proposal for there to be a continuing role for an Independent Complaints Adjudicator ("ICA") (where requested) to review decisions made by ATVOD on appeal about whether content complies with the Regulations.¹⁹ However, this would need to be kept under review to consider whether a more robust appeals mechanism becomes necessary - or if there is to be a further appeals mechanism to challenge the decision of the ICA (especially if there are to be financial penalties).

PPA notes that "The cost for the consideration of the complaint falls upon the service provider, in the current ATVOD structure."²⁰ This needs to be reconsidered. If providers of ODPS are paying a notification fee, the cost for the consideration of the complaint should be borne by the system (ie out of the income received from the notification fee). Otherwise complaints could be made by competitors, knowing that regardless of the merits of any complaint, the cost of the complaint will have to be funded by their competitor. This could lead to spurious complaints and costs being incurred by a service provider operating within the new rules.

b) If you do not agree that it would be appropriate for Ofcom to designate ATVOD as the co-regulator for VOD editorial content, please explain why?

Please see the above comments under question 4 a).

4. The regulation of video on demand advertising

Question 6

a) Do stakeholders agree with Ofcom's proposal that it would be appropriate for Ofcom to designate co-regulatory functions to the ASA on 19 December 2009, in relation to the regulation of VOD advertising?

PPA members have long been familiar with the CAP Code as administered by the ASA. PPA supports the retention of the one-stop shop for advertising regulation under the ASA banner - and therefore supports the consultation proposals for the ASA to become the designated co-regulator for advertisements included in ODPS.

¹⁹ Paragraph 3.3.7 of the ATVOD proposal (Annex 7).

²⁰ Paragraph 3.7.3 vi) of the ATVOD proposal.

PPA believes that the Regulations implementing AVMS must be interpreted so that the AVMS requirements apply only to those advertisements included in a VOD service that are viewed as a direct result of the viewer selecting an ODPS. Ofcom agrees in its letter dated 7 August 2009 to the ASA that "we see no objection in principle to interpreting sub-section (7) of section 240F²¹ to mean that the requirements apply only to those advertisements included in a VOD service that are triggered by the viewer selecting a programme to watch."²² This also appears to be the interpretation preferred by the Department for Culture, Media and Sport.²³

James Evans

PPA

26 October 2009

²¹ Which have now been superseded.

²² Ofcom letter to ASA dated 7 August 2009 (under "Scope")

²³ Ibid