

Peter Johnson
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By email: contact@atvod.co.uk

Friday 1 April 2011

Dear Peter

Re: Consultation on Proposals for regulatory fees for On-Demand Programme Services for the period 1 April 2011 to 31 March 2012 ("Consultation")

The Professional Publishers Association ("PPA") is the UK industry body that represents consumer magazine and business media publishers – in digital and print. PPA's position is that short video clips on magazine publishers' websites are not "television-like" and as such are not caught by the Audiovisual Media Services Regulations 2009 and 2010 (the "Regulations").

However, despite the additional protection afforded by a Recital in the Audiovisual Media Services Directive (the "Directive") excluding electronic versions of magazines and newspapers, ATVOD seems to think that short video clips on magazine publishers' websites can be "television-like". This goes against the intention of the Directive, which was supposed to catch audiovisual services the form and content of which are comparable to form and content of programmes on traditional broadcast television – and which, for example, compete for the same audiences as television.

PPA is concerned that the intention of the Directive is being ignored and ATVOD is interpreting the Regulations in an unreasonable manner. Should Ofcom, which is currently considering a number of appeals against ATVOD decisions, not interpret s. 368A of the Communications Act 2003 (the "Act") in a sensible way, PPA would like to point out the likely damage to PPA members (and the wider UK audiovisual industry) caused by ATVOD's proposed year two fees.

Introduction

The Consultation states that any fees must be "justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is imposed."¹ It is PPA's submission that none of the proposals in Part 2 of section 4 of the Consultation – including the flat fee and fees based on service provider turnover - satisfy this test.

¹ Paragraph 1.2



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The proposed fees are fundamentally unfair in that: (a) the flat fee discriminates against small and medium sized video on demand providers (and is already in year one the highest fee charged in any EU Member State); and (b) the turnover based fee is calculated on the entire turnover of a company, not just the turnover relating to regulated services (ie the “on demand programme services” (“ODPS”) as defined by the Act).

Under the proposals all but the very smallest commercial operators and not-for-profit organisations will be required to pay significant and damaging fees – even if the commercial operators are not making any money from the ODPS.

From the feedback PPA has received, publishers appear to be making very little, if any, revenue from the short video clips on their websites. In many cases the ATVOD fees will be more than the money made from the video on demand (VOD) services, making them uneconomic to operate. One publisher said that they would simply stop offering VOD if their services are caught by ATVOD regulation and they were required to pay anything other than a very small fee.

As such, the proposed fees will act as a barrier to the development and launch of video on demand services, to the detriment of businesses and consumers alike.

Flat Fees

The year one flat fee of £2,900 for each ODPS is already one of the highest in Europe and PPA believes it is disproportionate, unjustified and damaging.² Regardless of the very limited concessionary rates outlined in part 1 of section 4 of the Consultation (which cover only very small operators or not-for-profit organisations), the flat fee of £3,968 *will* damage digital businesses.

The next highest fee in Europe that PPA is aware of is Finland at €800 per year *per company* (not per service).³ And in some Member States no fee is payable at all.

The current regime is putting UK digital businesses at a competitive disadvantage to EU competitors.

Fees Based on ODPS Provider Revenue

The revenue based fees proposed in option B are fundamentally unfair as they are based on the entire turnover of a company that may just happen to offer VOD as one small part of their diversified media business.

Should Ofcom not overturn ATVOD’s recent decision that a PPA member’s website satisfied the test for ODPS (a decision that PPA fundamentally disagrees with), this could mean that a publisher offering a small number of very short clips on a website could be forced to pay a fee based on revenue from, eg: printed magazines (cover price and advertising revenue); websites that are not ODPS; events and exhibitions; apps for tablets; and other branded activities.

It is PPA’s submission that the only way to have a “justifiable and proportionate” system is to base fees on turnover relating to ODPS, for it is only ODPS that is regulated by ATVOD.

² Please also see PPA’s response dated 5 May 2010 to the Ofcom consultation “Proposals for the setting of regulatory fees for video on demand services for the period up to 31 March 2011”.

³ The next highest fee PPA is aware of is Italy at €300 for a 12 year period; and then the Netherlands at circa €200.

Why not have fees based on actual ODPS revenue?

PPA understands that the only argument against fees based on ODPS revenue is that it will not generate enough money to fund ATVOD's year two costs. So essentially digital businesses are being unfairly penalised because Ofcom designated ATVOD as the co-regulator when, it seems, it may have been better for Ofcom to administer the content rules derived from the Directive (and implemented into the Act).

The advertising rules derived from the Directive are already effectively administered by the Advertising Standards Authority⁴. So Ofcom would only have to administer the content rules and maintain a database of those notifying under the Act. It should be noted that the Act allows Ofcom (and ATVOD) to take a light touch approach⁵ (as was previously promised by the government), including to notification. Having looked at the 'news' section of the ATVOD website it seems that ATVOD has only made one adjudication⁶ since it was designated over a year ago, so the task does not appear too onerous.

Looking at ATVOD's year two estimated costs of £417.620⁷, if Ofcom was to administer the ATVOD rules a large proportion of those costs could be saved - meaning a "justifiable and proportionate" fee could be charged to ODPS providers (based on revenue derived from operating the regulated ODPS). This in turn would enable digital businesses to flourish without having to pay an unjustified tax to ATVOD, a tax which provides no additional consumer benefit.

Conclusion

There is already cross-industry concern and opposition to the level of fees charged by ATVOD. The proposals in the current Consultation do nothing to address the deeply unfair and damaging fees.

PPA would strongly urge ATVOD and Ofcom to reconsider the proposed year two fees and charge operators based on the revenue they derive from operating ODPS. If ODPS services become uneconomic, they will cease to be offered by anyone other than traditional broadcasters. This would be in no one's interests and does not accord with the government's stated aim of encouraging innovative digital businesses.

In any event, the proposed cap of £25,000 should be lowered significantly, and such lowered cap should apply regardless of whether a flat fee or a fee based on revenue is levied.

Yours sincerely



James Evans
Head of Legal

⁴ With the rules included as an annex to the Committee of Advertising Practice Code.

⁵ The Better Regulation Executive's five principles of better regulation – including that regulatory activity should be transparent; accountable; proportionate; consistent; targeted (only at cases where action is needed) – are enshrined in the Act.

⁶ Frankie Boyle Tramadol Nights ("likely to offend but will not seriously harm kids")

⁷ Including £306,940 on staff and board member remuneration and £27,620 on rent and office running costs.