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Dear Matt

Ofcom Review of music in radio Formats: 22 January 2015 (the "Consultation")

You have asked me to outline my views on the discretion available to Ofcom in relation to the definition of music in Formats (as such term is used in local licences issued under the 1990 Broadcasting Act ("**ILR licences**")) and in relation to changes of Formats under section 106 of that Act.

General duties

Ofcom's general duties in relation to ILR licences are familiar but most relevantly include

- furthering the interests of consumers in relevant markets, where appropriate by promoting competition (section 3(1)(b) Communications Act 2003)
- being required to secure the availability of a wide range of television and radio services which (taken as a whole) are both of high quality and appeal to a variety of tastes and interests (section 3(2)(c) Communications Act 2003).

Section 3(4) of the 2003 Act says that in performing their duties, Ofcom must have regard to one or more factors which appear relevant to Ofcom, including the opinions of consumers in relevant markets, the desirability of promoting competition in relevant markets, and encouraging investment and innovation.

Ofcom is given considerable latitude by section 3(7) of the 2003 Act to resolve any conflict between any general duties.

Specific duties

Ofcom has a duty under section 85 of the 1990 Broadcasting Act to secure the provision within the United Kingdom of a range and diversity of local services (as defined). This section can be interpreted so as not to require range and diversity within each particular local area. Furthermore I do not read that duty as overriding Ofcom's general duties in section 3 of the 2003 Act, which, as the section including those duties was passed later, under the doctrine of implied repeal would override section 85 where a conflict arises.

In relation to specific ILR licences, Ofcom's duty in relation to the Format is (under section 106(1) of the 1990 act) to include such licence conditions as appear to Ofcom appropriate for securing that the character of the licensed service, as proposed by the licence holder when making his application, is maintained during the period for which the licence is in force. Section 106(1A) and following sections then deal with changes to that Format.

Format change procedure

Ofcom may consent to the change if any one of the conditions in section 106(1A) are satisfied. As Ofcom point out, in order to agree to Format changes, they must determine under section 106(1A)(a) whether substantial alteration to the Format is proposed. If not, they may consent to the change. If it is, then (save under sub-section 106(1A)(e)) a public consultation is required as the change would take place under one or more of the other sub-sections.

Ofcom have discretion under section 106(1A) to determine whether the proposed change would

- "substantially alter" the Format
- narrow the range of programmes available on ILR to persons living in the area
- be conducive to fair and effective competition in the area
- be supported by evidence of significant local demand or support for the proposed change.

Ofcom say they do not have the discretion to have a Format of "broad music" in all licences (I do not consider here the alternative suggestion of removing music requirements altogether).

I believe that there are three possible ways in which Ofcom could liberalise further towards this end, as follows:

Option 1: Music genres are non-legislated concepts

What constitutes a genre, what delimits e.g. "Rock" or "Dance" (for example) and the degree to which any such terms must or must not overlap are not set out in primary legislation. (There is of course the definition of "pop music" in section 85(6) of the 1990 Act but that is not relevant here). Ofcom has latitude to increase the scope of these genre definitions based on reasonable evidence in a move towards a "broad music" Format.

If a station's Format includes, say, the term "Rock" the legislation must reasonably be interpreted to contemplate that such a definition is open to change, otherwise stations would be playing the very same music tracks at the end of the licence period as at the beginning.

There is no assumption in the 1990 Act or 2003 Act that music genres in Formats are mutually exclusive to any particular degree.

Where a licence applicant promises in their application to play music of a particular genre, it is therefore in my view open to Ofcom, indeed arguably required, to interpret the genre in a flexible manner over time, responding to changed music supply, the competitive landscape, listener taste and any other factors Ofcom reasonably sees fit. Such an approach would be consistent with Ofcom's general duties under section 3 of the 2003 Act. This approach could allow Ofcom to widen genre definitions to enable ILR licences, say to compete effectively with services such as Spotify that are under no regulatory obligations.

If genres are increasingly blurred such that it is in fact inaccurate to draw neat or historical distinctions between them it would be reasonable for Ofcom to conclude that range and diversity is still being adequately served by these widened genres, even where there is overlap between them. It would also be reasonable of Ofcom to take into account the licensees' own determinations of what constituted particular genres.

As Ofcom itself states in paragraph 2.2 of the consultation document Ofcom has a duty to secure range and diversity of local services (as defined) within the United Kingdom. That does not *per se* preclude music genre overlap within individual licensed areas.

So if Ofcom concluded that a Format now means or includes the widened genre definitions I suggest above, Ofcom could consent to what would be a non-substantial departure under section 106(1A)(a) of the 1990 Act without a public consultation.

Option 2: Predictions of behaviour

Even if Ofcom does not accept Option 1 above, the legislation requires a "range and diversity". Multiple licensees all playing similar widened genres does not necessarily mean that outputs will in fact converge on the same territory. Assuming for a moment all Formats were changed to "broad music", it would be reasonable of Ofcom to permit this if there were reasonable evidence that in fact licensees would not all converge on the same or similar playlists but, for example, would seek to differentiate themselves from each other.

Option 3: changes based on competitive landscape

In my view Ofcom could change Formats to "broad music" for ILR in any case where they reasonably considered that to do so was conducive to the maintenance of fair and effective competition under section 106(1A)(c) of the 1990 Act. This would require a public consultation. Again, if ILR stations were facing a competitive threat of a particular degree from unregulated competitors, it would be permitted under law to take that competition into account in allowing ILR stations to respond to it. The duties under section 3 of the 2003 Act would, as I say, supersede the duties under section 85 of the 1990 Act (and arguably under section 106 (although I say "arguably" because it was amended in 2010 by the Digital Economy Act)), so that, for example, if unregulated competition might reasonably be considered to be a long-term threat to the availability of a wide range of services (section 3(2)(c) 2003 Act) the Format change could be made if it were a way to restore or maintain that competition.

If you have any questions or would like me to clarify any aspect of this, please let me know. This letter is addressed to RadioCentre only.

Yours sincerely

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Daniel Sandelson