

Discovery Communications Europe Ltd,
Discovery House,
Chiswick Park Building 2
566 Chiswick High Road
London
W4 5YB

24th October 2009

Response to Ofcom consultation on VOD regulation and the co-regulatory code

Dear Sir,

Discovery Networks UK

Discovery Networks in the UK has 13 media brands which it sends out via 22 network feeds to more than 130 million cumulative subscribers, received in 85% of UK homes. The Discovery Channel has been the number one factual channel throughout its 20 year history in the UK. It has a 47 percent share of the pay-tv factual market and is funded by a combination of carriage fee and advertising revenue.

Discovery Networks wishes to contribute to the Ofcom consultation on the proposal for a co-regulatory code for Video On Demand.

A Co-Regulatory Approach

Given that the AVMS Directive demands either a regulatory or co-regulatory regime governing VOD, Discovery prefers a co-regulatory approach. We therefore support the move towards industry-led co-regulation. However, we do have some residual concerns about how the system would work in practice.

Successful implementation is contingent upon recognition by all concerned that co-regulation is the best way to ensure an enabling regime is in place which will help a nascent industry grow, whilst protecting viewers and ensuring certain standards are maintained. We consider any control – co-regulatory or otherwise- which threatens the development of this sector of the industry to be counter-productive.

We therefore support the SCBG submission to Ofcom on this issue (see appendix 1) and would like to add our own comments to that submission in this paper.

Editorial Responsibility

There has been much debate on the issue of who holds editorial responsibility for content in the VOD domain. Discovery still has concerns about the proposed system, which takes as its default principle that editorial responsibility lies with the content provider.

We do not feel that it is sufficient to suggest that a content provider ensure in its contractual arrangements with platforms for an indemnity against any fines which may occur as a result of breaches outwith the content provider's control, such as pin protection failure on the platform. This approach does not deal with the potential reputational damage which could ensue. Discovery is keen to see additional text in the

draft code which recognises this situation and suggests ways of limiting possible reputational damage for content providers.

UK Content on EU platforms

There is no discussion in the code about what the situation is for VOD content provided by broadcasters licensed in the UK to platforms in other Member States. It is unclear if the AVMS Country of Origin rules apply.

Discovery has two concerns in this area. Firstly, there is no mention in the consultation of how the co-regulatory body will charge for notification of these services. Will it consider each language stream to be a different service? This could result in considerable expense to UK broadcasters who provide content to other EU platforms and could even prevent them from getting involved in new services, thus having a serious negative effect on the development of innovative VOD offerings. It is our opinion that the projected fee of £2000-2500 per notifiable service is excessive. If it is multiplied by each language in which content is provided it could become prohibitive.

Secondly, there is the possibility of a double jeopardy scenario, whereby the local co-regulator considers the content provider to be under its jurisdiction. As yet it is unclear what approach other Member States will take on this issue. It is imperative that there is consistency and content providers do not find themselves subject to two sets of rules in what is already an extremely complicated situation.

Conclusion

Discovery Networks believes that before the proposed code can be put into place there should be considerably more discussion of possible scenarios which sit outside the established norm – UK broadcasters providing VOD content under their editorial control to UK platforms. Only in this way can we ensure that the process to co-regulation in this area is a smooth one. Discovery Networks is happy to contribute further to this process on this issue it has raised.

Yours Faithfully,

Kerry Neilson
VP Public Policy and Government Relations

Appendix1 SCBG Position Paper

The Satellite and Cable Broadcasters' Group

The SCBG is the trade association for digital programme providers who are independent of one of the main terrestrial broadcasters. Its members are responsible for over 100 channels in the UK. Many member companies are pan-European broadcasters, producing and commissioning content for different national markets.

According to recent Deloitte research, SCBG members made a total economic contribution to the UK economy in 2007 of over £2.2 billion and invested a total of £1.2 billion in programming, employing nearly 25 000 people in skilled jobs.

SCBG member channels provide citizens and consumers with programmes and services for a diverse range of audiences across a wide range of genres and audiences, including entertainment, factual, educational, history, music, nature, art and science. Our member companies make and show programmes for children and young people, and for ethnic minorities in their own languages. SCBG members' channels can be found on all of the UK's major digital pay and free-to-air platforms, which are now available in nearly 90% of UK homes.

For a full list of members and more details about the SCBG please go to

www.scbg.org.uk

Summary

- In most respects, SCBG supports the approach Ofcom proposes for the implementation of the new regulatory framework for VOD;
- SCBG believes that the application of the scope criteria – particularly the definition of “TV like” content – needs to be very tightly focused to prevent over-regulating new forms of broadband content;
- SCBG wishes to see greater flexibility in how breaches of the new guidelines are contextualised and published, so that content providers are not unfairly represented in cases where platform or aggregator failures were to blame;
- SCBG is concerned that the proposed flat-fee structure for ATVOD may be inappropriate for a sector characterised by large-scale VOD services at one end, and small, online experimental services at the other;
- SCBG is also concerned to ensure that the notification regime is as simple as possible, allowing for multiple notifications from a single content provider who may be operating a range of branded VOD services;
- SCBG is supportive of the proposal to designate the ASA as the co-regulator in respect of VOD advertising.

Responses

Question 1

Is the draft Scope Guidance set out above appropriate? If you do not agree that the draft Scope Guidance is appropriate, please explain why and suggest alternative wording where appropriate.

We agree that the draft Scope Guidance is appropriate, subject to two issues. Firstly, we predict that the question of exactly what content falls within the boundary of “TV like” will be tested vigorously during the first few months of the new regulatory regime. Although we agree with the need to apply notions of “TV like” programming in a dynamic way, we would note that – as the consultation document explains – the primary concern of the Directive is to create a level playing field between traditional linear broadcast television and emerging on-demand services.

The vast majority of services captured by the new regulatory regime will be offering “TV like” content, and in fact, the vast majority will be offering genuine TV content. SCBG members will certainly be active in providing “catch-up” services of their linear schedules, and offering rich libraries of previously broadcast material, like many other broadcasters will. However, many new online content services offered by SCBG members will be experimenting with new forms of video that may share some characteristics and stylistic features akin to television, but which innovate in form and content.

Clearly, these issues will need to be worked through as the new regime is introduced, but we would recommend that the new regulatory body (and Ofcom in its backstop position) should proceed with a bias against regulating nascent services offering content similar to – but not actually – that which would be found on a linear TV channel. In other words, there would need to be exceptional reasons to bring into scope services that are offering content not previously shown (or intended for broadcast) on a linear television channel. Indeed, recital 17 of the Directive reinforces this intention, in explaining that a service should be regarded as “TV like” if “the nature and the means of access to the

service would lead the user reasonably to expect regulatory protection within the scope of this Directive.”

Secondly, although we understand why the new regulations attach full regulatory responsibility to the organisation with editorial control over a VOD service, we note that there may be some failures which are due to circumstances beyond the control of a content provider. The failure of a VOD platform’s PIN protection system would be one obvious example.

Although the ultimate regulatory burden will rest with the organisation with editorial responsibility, we suggest that there should be some means of explaining the circumstances of a breach when it is published. Given that this new regulatory system is supposed to offer consumers greater protection and better information to make informed choices about different VOD services, in the event that editorial responsibility is deemed to be exercised by the broadcaster, there will be instances whereby some failure may be due to circumstances beyond the broadcasters control e.g. the failure of a platforms pin operation system. It would be unfair for a content provider to appear to consumers as negligent in its responsibilities if breaches in its name are beyond its reasonable control.

Questions 2 and 3

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

Do you wish to suggest alternative approaches to either of both the Scope Guidance; and/or the proposed allocation of functions relating to notification?

We agree with the proposed allocation of functions (but please note relevant comments in our other responses).

Questions 4 and 5

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

Do you wish to suggest alternative approaches to Ofcom’s proposal to designate ATVOD as the co-regulatory body for VOD editorial content, and if so what are these?

We agree with the proposal to designate ATVOD as the co-regulatory body, and note the work currently underway to reshape ATVOD for the requirements of its new role. We wish to raise a question about the fee structure envisaged for the new body (and the related notification process) – although we acknowledge that this does not specifically relate to the designation of ATVOD.

Ofcom’s impact assessment assumes a flat fee of around £2,000 per service, based on an estimated budget for ATVOD of around £320,000 per annum, and a base of around 150 regulated services. We are unsure if a flat fee is an equitable way of funding ATVOD. Many VOD services are in their infancy, and their business models are still unclear. £2,000 may be inconsequential to those organisations offering large VOD

services with well-established advertising or subscription models, but to a smaller organisation providing a limited or experimental service, it could be prohibitively high. We would welcome discussion about some alternative options.

We are also unclear about how the notification process will operate – is notification only required once in a service's lifetime, or on an annual basis? What about services which occasionally move into to scope of the regulations, and move out shortly afterwards? We also note the idea that services on different platforms with the same brand that offer largely the same content would be captured by one notification, but we are unclear whether multiple variants of a core “umbrella” brand (such as MTV Base, Discovery Realtime or LIVING2) would require multiple notifications.

Since this new framework imposes new financial and administrative burdens on the industry, we would welcome greater clarity about how this will work in practice.

To summarise, specific areas on which we would welcome engagement from ATVOD would include:

- The notification process;
- The fee structure;
- Governance arrangements (including representation on boards and subcommittees);
- Enforcement procedures and sanctions.

Questions 6 and 7

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? If you do not agree that it would be appropriate for Ofcom to designate the ASA as the coregulator for VOD advertising, please explain why?

Do you wish to suggest alternative approaches to Ofcom's proposal to designate the ASA as the co-regulatory body for VOD advertising, and if so what are these?

We agree that the ASA should be designated as the co-regulator for VOD advertising. Such an approach continues the “one stop shop” model that has worked well since its introduction in 2004.

Question 8

Do our proposals, as outlined in Sections 4, 5 and 6 concerning: draft Scope Guidance; delegation of functions relating to notification; and the implementation of a new coregulatory regime for VOD editorial content and VOD advertising have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity? Do you agree with our proposal to retain the Access Duty in relation to VOD? Are there any other possible equality impacts that we have not considered?

We agree with Ofcom's analysis of these issues, and have no objection to Ofcom retaining the Access Duty in relation to VOD. We would, however, welcome a discussion about how Ofcom intends to apply this Duty to VOD services. Different approaches will obviously create different resource implications. This applies equally to the issue of promoting European Works, which although not referenced in the consultation paper, is an issue of real concern to SCBG members.