

THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

CONSULTATION ON PROPOSALS FOR IMPLEMENTATION IN THE UNITED KINGDOM

Submission by Ingenious Media

1. Ingenious Media is the UK's leading media investment and advisory company. Founded in 1998, the company now employs over 150 people across five businesses. The company has raised a total of more than £5 billion to invest in film, TV, games, music, live events and other media and entertainment assets. It is the largest independent investor in the UK media market with over 5,000 clients.
2. In responding to the government's consultation document on proposals to implement the AVMS Directive, we begin by observing that there is very little by way of a contextual economic narrative in this presentation of the issues. We recognize, of course, that the regulatory objectives here are restricted and specific. However an understanding of this context is vital if these or any other proposals on video-on-demand (VOD) and other new distribution platforms are to be appraised, as they should be, from a commercial as well as a regulatory perspective. An understanding of this "narrative" is particularly important to considering the role of product placement in funding future programme making, which is the main focus of our submission.
3. Dramatic shifts are taking place in the way that creative and media content is consumed and paid for. The main features of the landscape are that:
 - "old" media companies are struggling to transform themselves away from reliance on outdated delivery systems (selling units of physical product);
 - new delivery mechanisms, *eg* mobile phone downloads, are generating a multiplicity of pricing models which, however, are rarely profitable in the short to medium term;
 - digital delivery mechanisms, primarily via broadband and 3G mobile, have enabled consumers to access content, particularly music, by file-sharing, without paying for it;
 - digital delivery has facilitated consumer "piracy" on a mass scale and, though a very different phenomenon, also facilitates criminal counterfeiting; and
 - a cultural attitude has been fostered that content is "free".

4. In focusing more precisely on the subject matter of the consultation document, the following additional points should be noted:
- the fastest growing area of P2P piracy is TV content;
 - all new business models for online and mobile distribution of audiovisual content are embryonic and experimental: the analytics are largely untested;
 - few of these models are generating sustained revenues, and even fewer are generating significant profits;
 - although interactive and converged new media platforms generally incur significantly lower production costs than “older” models, and the marginal costs of distribution are minimal, few if any of them are yet profitable;
 - new distribution channels such as social networking sites are attractive to advertisers, but there is little meaningful data or experience to draw from;
 - internet advertising spend is the critical factor for many of these new channels, including VOD channels; new content media are all fighting for a share of this cake; and finally
 - the most likely sources of significant revenue in the new interactive media are sponsorship deals and product placements by advertisers, not consumer payments.¹
4. This perspective should more fully inform the thinking behind the consultation document. Any re-regulation of television and related media markets should have the objective, amongst other things, of not choking off the development of new business models in a converging marketplace.
5. The document is written for the most part from the perspective of consumer protection. We do not deny the importance of guaranteeing continuing high levels of consumer protection in a changing media environment. However we believe that commercial realities should be given more prominence in the overall presentation of the issues. The dominant characteristics of those markets to which the consultation applies are: *market fragmentation* and *revenue fragmentation*.
6. As investors, our interest in most of the substantive questions raised by the AVMS Directive and the associated consultation document is largely *indirect*. We do not generally ourselves produce or distribute content on these platforms. However we do form partnerships with, and/or invest in production and distribution companies that may be so affected.

¹ The first series of *Kate Modern* for example, a show developed by Bebo, was financed entirely from product placements by Microsoft, Procter & Gamble, Warner Music, Paramount and Orange, amongst others.

7. As investors we are concerned about current finance and investment trends in the commercial TV market. TV production will increasingly need to access new sources of funding as broadcasters reduce their own investment in production – due partly to declining advertising revenue, a trend which is unlikely to be reversed, and partly to new rights models which prevent them from retaining full ownership of rights bundles.
8. Like most investors in TV production and distribution, we have a keen interest in the fortunes of the independent production sector – a sector which the government has created through its own regulatory interventions. As with most media businesses, attracting sustainable investment is a challenge. Appropriately regulated product placement offers the prospect of contributing just one, probably modest, but valuable new source of funding to the funding mix, and for that reason should not be stifled.
9. We are not as clear as we would like to be about the precise scope of the proposed application of the Directive. We note (on page 9 of the consultation document) that:

“as a matter of policy, the Government aims to draw into the scope of UK regulation a narrow range of services falling within the scope of the AVMS Directive, rather than extending regulation to a wide range of audiovisual services”.

We applaud this approach as stated. However we would also observe that the “principal purpose” test set out in Article 1(a) of the Directive is likely to be problematic in its implementation, for example with regard to which VOD providers are caught and which not, because the business models of media services providers are changing so quickly.
10. There is a danger, as the process of convergence intensifies, that regulatory anomalies and inconsistencies will emerge. We note (on page 10 of the document) that:

“the definitions in the AVMS Directive are platform-neutral – that is, they apply to all audiovisual media services delivered by any form of electronic communications network. Therefore they include services which are delivered over the internet and on mobile devices as well as those delivered over conventional television networks.”
11. This is clear in principle, but may not be so in practice. There is a potential, or actual, divergence of policy objectives here – between the objectives of narrow application on the one hand, and platform neutrality on the other. Is “Bebo Television” caught or not? If one considers the “principal purpose” test in relation to the operations of Bebo, which is a social networking site (its “principal purpose”), then irrespective of the definitions cited above one would infer that *Kate Modern*, and its successors and imitators, are *not* caught by the proposed new regulation in spite of the fact that these programmes are certainly “television-like” and funded entirely by sponsorship and product placement.

12. It is not absolutely clear to us whether programmes like *Kate Modern*, made by media services providers for whom the making of such programmes on a non-scheduled basis is not their “principal purpose”, are caught by the proposed regulation or not. We believe that they should *not* be caught for the reasons given above – their funding is highly precarious and the business models on which they rest are mostly untested. Either way, more clarity is needed.
13. This brings us to the main point of our submission. As we noted in paragraph 3 above, the principal characteristics of the relevant markets are *market fragmentation* and *revenue fragmentation*. In these circumstances product placement, although now relatively inconsequential from a financial point of view, particularly as a contributor to “old” media revenues as noted in the consultation document, *could* be a significant source of revenues in the future for content creators and producers across a variety of platforms, though especially internet-based platforms.

14. Against this background we therefore do **not agree** (page 52 of the consultation document) that

“it is right to continue so far as possible to prohibit product placement on television in the United Kingdom....and that the UK’s rules in this area should apply equally to television and video-on-demand”.

We **do agree** that certain genres of programming – specifically news programming and the making of programmes for children – should be subject, *by way of exception*, to an absolute prohibition. In relation to all other genres, including “light entertainment” but crucially also drama programming, which should be explicitly defined, therefore, as a species of “cinematographic work”, producers should be left to determine for themselves whether to use product placement or not, and if so to what extent. Viewers should be treated like adults. Any programme which is clumsily and excessively stuffed with product placements is likely to be disdained by the average intelligent viewer. This should be the relevant test, and is the test that has long been successfully applied in the film industry².

15. We reject the argument that a blanket prohibition on product placement is necessary to restore “trust” in audiences following recent abuses of premium rate telephone charging by broadcasters. This is to bundle up a number of different issues in an unhelpful way. These telephone charging scandals were the result of greed, poor management and non-transparent broadcasting practice. Viewers were comprehensively misled; their purses were tapped on the basis of information provided by broadcasters that was essentially misleading. Product placement (and sponsorship arrangements more generally), should not be open to any such charge provided they are flagged openly to the viewer.

² The James Bond movie *Die Another Day* was so full of product placement that it was referred to by one commentator as *Buy Another Day*. The producers have learnt from this lesson in making subsequent films whilst continuing to draw revenues from such placements.

16. We therefore favour option 2 (page 50 of the consultation document) subject to the views expressed above about legislating by genre exception. Viewers should be alerted to the fact of product placement in the credits for the programmes concerned. We express no view as to how precisely, and to what amount of detail, this should be achieved: these matters should be agreed by government in consultation with the relevant trade bodies.