

When is a YouTube Channel an on-demand programme service that needs notifying to Ofcom?

In June 2017 Ofcom issued an adjudication, finding that a YouTube channel operated by P110 Limited offering a variety of content, including music videos, was an on-demand programme service (ODPS).¹ As such, it should be notified to Ofcom under section 368A of the Communications Act 2003 and Rule 1 of Ofcom's related Rules and Guidance.² Ofcom found that the channel's principal purpose was the provision of audio-visual material, and that the material was "TV-like". Further, the material was clearly available to the public "on demand", and P110, whose head office was in the UK, had editorial responsibility for it.

ODPS criteria

Under section 368A of the 2003 Act, an ODPS is subject to notification and regulation by Ofcom if it meets all of the following criteria:

- (a) its principal purpose is the provision of TV-like programmes;
- (b) it is accessed on demand;
- (c) there is a person who has editorial responsibility for it;
- (d) it is made available by that person for use by members of the public; and
- (e) that person is under the jurisdiction of the UK for the purposes of the Audio-visual Media Services Directive.³

Accordingly, each of the following types of online service is likely to be considered an ODPS:

- a "catch-up service" for a broadcast television;
- a television-programme archive service;
- an on-demand movie service, where there is a provider exercising "editorial responsibility" over the content; and
- an on-demand music video service.

P110 background

The channel at www.youtube.com/user/P110HD was a YouTube channel that described itself as offering users a "range of platforms" within the channel, including freestyles, live performances, documentaries and high-quality music videos. The service was freely available on the internet and appeared to be operated by P110.

Following a complaint, Ofcom undertook an assessment of the channel under the ODPS rules. On an initial assessment, Ofcom considered that it potentially raised an issue because it appeared to meet the statutory criteria for an ODPS, but had not been notified to Ofcom, as the appropriate regulatory authority, as required by the 2003 Act. Rule 1 provides that:

¹ Ofcom's *Broadcast and On Demand Bulletin*, Issue 330 (5 June 2017). See the adjudication on *Rule 1: Notification of intention to provide an On Demand Programme Service – P110 Limited* (www.youtube.com/user/P110HD).

² Ofcom's *Rules and Guidance: statutory rules and non-binding guidance for providers of on-demand programme services*.

³ 2010/13/EU.

“A person must not provide an ODPS unless, before beginning to provide it, that person has given a notification to Ofcom of the person’s intention to provide that service. A notification must be sent to Ofcom in such manner, and including such information, as Ofcom may require.”

Ofcom wrote to P110 explaining the statutory obligation to notify provision of an ODPS, and setting out the statutory criteria for an ODPS. P110 contacted Ofcom seeking clarity on Ofcom’s letter, but did not provide any further response.

Ofcom adjudication

Ofcom assessed P110’s YouTube channel, taking the ODPS criteria in turn.

Principal purpose

In line with the approach set out in its Sun Video decision on appeal from ATVOD, Ofcom looked first at the website as a whole to determine whether there was a service with audio-visual material as its principal purpose. It also took a step back and, having regard to the Directive, considered whether the material was likely to compete for the same audience as linear television broadcasts (i.e. whether the audio-visual material was “TV-like”). More broadly, Ofcom considered whether the nature of the material and means of access to it would lead users reasonably to expect regulatory protection within the scope of the Directive.

Ofcom found that the principal purpose of P110’s YouTube channel was indeed the provision of audio-visual material. Overall, the channel seemed to present a significant video offering, as YouTube estimated that there were 2,286 videos on the channel.

P110 organised audio-visual content using the YouTube playlist function, grouping music videos into categories, such as chart-style compilations (e.g. “Best of P110: 2012” and “#HoodsHottest”). Once a preferred music video or playlist had been selected by the user, the video would be shown and subsequent music videos would play unless stopped, all interspersed with short advert “breaks”.

The channel also incorporated certain “stock” features, Ofcom said, which were part of the standard YouTube channel layout. Those included links to other YouTube channels under “Features” and “Related Channels” headings on the landing page. The listing of these links appeared to be an ancillary element of the service provided by P110, rather than its principal purpose, however, and Ofcom did not consider material accessible through links to other YouTube channels to be part of the service.

Another stock feature of the standard YouTube channel layout is the “Discussion” tab, which allows users to comment on the channel’s output and to communicate with the service provider. Many of the posts by users were directly related to content available on P110 YouTube, and this section of the channel seemed to enable further interaction with the audio-visual material, rather than forming a separate and distinct consumer offering.

So Ofcom decided that the channel was, in itself, a service with the principal purpose of providing audio-visual material. This was consistent with the audience expectations of a YouTube channel, it said.

As to comparability with television programming, Ofcom found that the channel output predominantly consisted of music videos from urban and grime artists. These were of mixed duration, although most appeared to last between three and four minutes. The music videos included many of the established features typically seen in TV programmes in the same or similar genre. In Ofcom’s view, video content appeared generally to be of broadcast quality in terms of audio and visuals. A range of production techniques had been used, creating a more TV-like viewing experience. In particular, the

use of sets, on-location filming, lighting, graphics and a range of camera angles gave the content a professional look and feel.

Ofcom noted that Recital 24 of the Directive refers to a characteristic of TV-like services being “that they compete for the same audience as television broadcasts” and states that “the concept of ‘programme’ should be interpreted in a dynamic way taking into account developments in television broadcasting”.

Ofcom found that there are a range of TV programme services that provide rolling promotional music videos comparable in form and content with those featured on P110’s YouTube channel. Those amount to an established genre on linear television programme services and, as Ofcom said in the Viva TV Music appeal, such linear services do not typically treat individual music videos as “programmes” in their own right; instead, they provide videos on a rolling basis, sometimes linked by a theme or genre.

Ofcom noted that the channel did feature some audio-visual content that was less TV-like, such as a number of short-form trailers and promotional videos, and some videos with variable sound and picture quality, lacking features such as title sequences and credits.

In Ofcom’s view, however, the emphasis of the audio-visual offering was on TV-like content. For example, while the consumer could view a full playlist of “Documentaries and Promos” containing less TV-like material, this was comparatively limited. The less TV-like content in large part appeared to be promotional material for the complete music videos, Ofcom found.

Ofcom also considered that the nature and means of access to the channel would lead audiences reasonably to expect regulatory protection under the Directive. The site as a whole offered chart-style compilations and other collections of music videos, made available via YouTube, which is an established platform for audio-visual content accessible both online and through a range of devices with access to the internet.

On-demand access

As to whether access to the service was truly on-demand, Ofcom considered that it clearly was. Users could select and view programmes, at a time chosen by them, and receive them by means of an electronic communications network.

Editorial responsibility

As to editorial responsibility, which is defined as whether a person has general control over programmes included in the range of content offered (and over the manner in which programmes are organised in that range), Ofcom found that the material was selected and curated by P110. Further, P110 confirmed that it had editorial responsibility for the service.

Public availability

Ofcom noted that a service would not satisfy this criterion if it simply involved distribution of material to a closed group, such as a number of enrolled students sharing a recording of lectures. In Ofcom’s view, however, this did not serve to exclude material simply because it may be of niche interest. Also, there may be more than one person involved in making a service available for use by members of the public. In this sense a service will usually be “made available” by the person with editorial responsibility if they intend for the service to be available to members of the public.

Ofcom found that, in this case, the service was made available freely on the internet without restriction and, while it might be of more limited interest to those who did not listen to grime and urban music, Ofcom decided that this criterion was met.

UK jurisdiction

As to whether P110 was under the jurisdiction of the UK for the purposes of the Directive, Ofcom noted that this depended on: (a) where the head office was located; (b) where editorial and other decisions were taken; (c) the location of the workforce; and (d) certain other factors, as set out in Article 2 of the Directive.

In this case, the evidence showed that the channel provider was indeed P110, whose registered office address was at 96 High Street, Henley-in-Arden B95 5BY, England. Further, P110 had confirmed that editorial decisions were taken in the UK.

Conclusion

Following Ofcom's provision to P110 of its Preliminary View, P110 agreed that its service was an ODPS, and subsequently notified the service to Ofcom. Accordingly, Ofcom was satisfied that the matter was resolved.

Comment

This was a fairly straightforward decision for Ofcom, which did not need to take any further action. Where a provider is found to be in breach, however, Ofcom can use its powers under the 2003 Act to issue statutory enforcement notifications. The requirements specified in such an enforcement notification can include requirements to do one or more of the following:

- (a) to cease providing (or to restrict access to) a specified programme (or programmes of a specified description);
- (b) to provide additional information to users of the service before the user selects a specified programme for viewing;
- (c) to publish a correction in the form, place, and at the time specified by Ofcom; and
- (d) to publish a statement of Ofcom's findings in the form, place, and at the time specified by Ofcom.

Ofcom can also consider breaches of the Rules for the imposition of sanctions, including financial penalties. Under current legislation, the amount of a fine imposed on an ODPS provider can be up to 5% of the provider's applicable qualifying revenue or £250,000 (whichever is greater). In this case, given that P110 took swift action to agree with Ofcom and to notify the regulator of its ODPS status, Ofcom did not need to take any further action.

A service will, however, fall outside the regulatory framework if there is no person exercising editorial responsibility, such as where purely user-generated content (or a catalogue of UGC programmes) is posted to a public website for sharing and exchange, without prior moderation or restriction on what can be posted. In their infancy, sharing sites like YouTube only hosted user-generated content without taking any editorial responsibility over how the content was presented. But there are now numerous services like P110's YouTube channel that fall squarely within the ODPS criteria, requiring notification.

Lisa Logan, Partner, Simkins LLP