

IRIS Special:

Legal Aspects of Video on Demand

“The term ‘video on demand’ (for which we shall use the acronym VoD) covers a wide range of technologies, all of which allow the selection and rental – or remote purchase in dematerialised form – of video content for immediate or later viewing on various types of device (computer, television, telephone, portable player) for a limited or unlimited period.

*VoD services are growing rapidly, in line with the rise of digital transmission in Europe.”**

Whenever a “new” audiovisual service becomes established, questions are inevitably asked about what legal norms govern it and whether those norms take sufficient account of all legitimate needs and interests. As far as video-on-demand (VoD) is concerned, it is clear that the “Television without Frontiers” Directive (89/552/EEC, last amended by Directive 97/36/EC) does not apply. This follows from the principle of sector-specific regulation, which until now has clearly distinguished between television and on-demand audiovisual media services. However, the Audiovisual Media Services Directive (2007/65/EC), which was adopted on 11 December 2007, will fill the regulatory vacuum in which on-demand services have been left by the “Television without Frontiers” Directive. The new media-specific legal framework adopts a technology-neutral approach, which subjects all audiovisual media services to a common set of core rules (particularly concerning advertising). The EU legislator hopes that the new rules will avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area (Recital 7 of the new Directive).

These rules are supplemented by provisions that are not media-specific but concern VoD as well as other audiovisual media services. These particularly include media-related provisions of copyright law, consumer protection law, competition law, criminal law and in addition of course, the right to freedom of information, which is usually enshrined in national constitutions.

Along with the difficulties of extracting from these different texts the rules that apply to on-demand services such as VoD – a task which is surely not insurmountable – the real challenge is actually to apply these provisions and, where the results of this process are unsatisfactory, to adapt the legal framework accordingly. VoD services are technically very complex, can be offered on a global scale and are carried by numerous different players, both established and recent. The number of different types of VoD service is also increasing on a daily basis. Analysis of “VoD law”, i.e. all provisions applicable to all VoD services, is not only important, but absolutely imperative for the further development of this booming market.

* Video on Demand in Europe, a report edited by NPA Conseil for the Direction du développement des médias (DDM - France) and the European Audiovisual Observatory, 2007, p. 11.

Providers of VoD services particularly need information on copyright law, since the material they offer is generally (at the very least) protected by copyright. What rights need to be protected, how and in which geographical areas this can be achieved, what is the role of exploitation windows for the different media, who are the potential negotiating parties, do contractual standards already exist, etc. – all these questions are crucial for possible business partners, including film producers and VoD providers.

In addition, however, the legal framework must be considered particularly in terms of the relationships between competitors. This concerns not just competition between different services (e.g. television and VoD) which use the same content, but also competition between VoD providers for the various geographical markets. As it was for P2P technology, the music industry is at the forefront of the development of on-demand services and has already experimented with various business models and contractual solutions. Some of them have since been “legally dissected”. EC competition law has played an important role in this process, along with the aforementioned copyright provisions. Although there are technical and legal differences between music download and VoD services, they also have a great deal in common. It is therefore important to ask whether the experiences of the music industry may be useful to the film sector. Even where this is not the case, however, relevant information concerning the music industry can facilitate a better understanding of the legal issues that have to be overcome for VoD services.

Another aspect that definitely needs examining is the relationship between the VoD industry and its customers. As consumers, recipients of VoD services will benefit in future from the advertising provisions of the Audiovisual Media Services Directive. They are already protected in some ways by EC law, including the provisions on consumer information contained in the E-Commerce Directive (2000/31/EC). However, the most fascinating and perhaps most difficult question relating to VoD customers is largely new territory. It concerns their dual role as consumers and producers – VoD services such as MySpace or YouTube enable them to be both at the same time. How does the law deal with this combination of roles or “prosumers”? Is it necessary to completely review various rules that oblige service providers to protect service recipients?

These and many other **issues were the subject of a workshop** organised in June 2007 by the European Audiovisual Observatory (“Observatory”) and its two partner institutions, the Institute of European Media Law (EMR) and the Institute for Information Law (IViR). The workshop served as a material-gathering exercise for the enclosed publication, *IRIS Special: Legal Aspects of Video on Demand*. This IRIS Special also supplements the economic data and analysis provided by the Observatory in early 2007 in its extensive publication “Video on Demand in Europe”, which is quoted at the beginning of this editorial.

The close links between economic and legal aspects of VoD have not only led to the Observatory publishing two reports that complement each other well; the interaction between these aspects also formed the basis of the selection and organisation of the themes of this IRIS Special. This is apparent in the EMR’s **workshop report**, which follows the order of the workshop programme. The report begins with a description of the different business models and their respective interpretations of the term “VoD”. On the one hand, it describes traditional business models in which on-demand services offer a wide selection of popular cinema and TV films at times to suit the user. On the other hand, video portals, which tend to take the form of film-sharing sites, also play an important role. The legal framework provided by EC law is then described, before the author discusses individual issues connected with copyright, competition and (in its broadest sense) consumer law, as outlined above and covered in detail in various presentations at the workshop and in this IRIS Special.

As far as possible, national regulations in France, the United Kingdom and Germany were given particular emphasis at the workshop. This choice reflected the economic importance of the VoD sector in those countries and provided an opportunity to mention various approaches and practical experiences. Accordingly, the **contributions of various participants** which follow the workshop report mainly focus on these three countries. Most of the articles are the written versions of presentations given at the workshop. One article written after the workshop explains the position of public service broadcasters, while another was added by the Observatory in order to include some important court rulings and copyright-related developments in France.

Many VoD experts have been involved in the production of this IRIS Special as workshop participants, hosts, organisers and, particularly, authors. We are grateful to Dr Caroline Cichon (Bird & Bird, Munich), Olivier Cottet-Puinel (SACD), Mark Cranwell (ATVOD Board Member/BT Retail Legal), Dr Natali Helberger (IViR), Dr Pascal Kamina Ph.D. (lawyer, Paris), Philippe Kern (KEA European Affairs), Dr Michael Kühn (ProSiebenSat.1 Media AG), Cornelia Kutterer (BEUC), Nicola Lamprecht-Weißborn (EMR), Dr André Lange (European Audiovisual Observatory), Tilman Makatsch (T-Mobile/T-Home), Gerald Miersch (EU Commission, DG Competition), Bertrand Moullier (Narval Media), Jonathan Porter (Ofcom), Lorenzo Pupillo (Telecom Italia), Alexander Scheuer (EMR), Sebastian Schweda (EMR), Ted Shapiro (MPA), Erik Valgaeren (Law Firm Stibbe, Brussels), Prof. Dr Nico van Eijk (IViR), Dr Stefan Ventroni (Poll Strasser Ventroni Feyock law office, Munich), Neil Watson (British Film Council), Gregor Wichert (ZDF) and our colleagues Francisco Cabrera and Michelle Ganter, who were involved in the workshop and in this IRIS Special in many different ways.

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