

# EC, Product Placement, and the Web

BY CHUCK COSSON AND ANDREW M. MAR

A variety of concerns related to local content and culture, media literacy, and perceived competition between traditional broadcasting and online video services have prompted Europe to rethink its television regulations. In particular, new rules governing product placement may call into question the ability for new media outlets to exhibit programming incorporating these non-traditional sources of revenue. The European Commission published its initial proposal for the revision of the Television Without Frontiers (TVwF) Directive on December 13, 2005.<sup>1</sup> After much consultation, the European Parliament approved an amended version in December 2006; as of February 2007, the proposal rests for decision with the European Council.

Known as the AudioVisual Media Services (AVMS) Directive, the revised Directive would extend the scope of the TVwF, and its regulation of content and advertising, to on-demand and online services as well as traditional broadcasting. Although the rules may not be finalized until the end of 2007 or early 2008, the current proposals offer insight into the European Community's direction and the potential result.

## Defining an "Audiovisual Media Service"

The text proposed by the European Council (as of December 2006)<sup>2</sup> defines an *Audiovisual Media Service* as a service under the editorial responsibility of a media service provider, which arguably includes Internet portals, and whose principal purpose is the provision of programs, such as feature length

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*Chuck Cosson is Policy Counsel and Andy Mar is Attorney, MSN Media Network, at the Microsoft Corporation. The views expressed are those of the authors and do not necessarily represent those of the company.*

films, sports events, sitcoms, documentaries, children's programs, and original drama. Regulation of such, under the AVMS, depends on whether the service is a broadcast (linear) or on-demand (nonlinear) service.

A *television broadcast* (aka a "linear" audiovisual media service) is defined as an audiovisual media service provided by a media service provider for simultaneous viewing of programs on the basis of a program schedule. An *on-demand service* (nonlinear) is defined as one enabling the viewing of programs at the moment chosen by the user and at his or her individual request from a catalog of programs selected by the media service provider. User-generated content and private websites are excluded.

Although much of the video programming available on the Internet today is streamed in an on-demand or nonlinear manner, Internet portals in the United States and elsewhere are streaming events on a live or linear basis, such as entertainment programming (e.g., AOL's Live 8 concert event) or sports events (e.g., CBS Sportsline's coverage of the NCAA Men's basketball tournament).

## The Marketplace

All of the major Internet portals, in the United States at least, currently stream a variety of video programming that is typically free to the user, supported by banner advertising on the webpage or in stream advertising before the video programming is exhibited. The Internet video programming marketplace has grown to include, among other things, full-length, first-run television programming (e.g., *Lost*, *Grey's Anatomy* on ABC.com);<sup>3</sup> directors cut, or uncensored, versions of first-run television programming (e.g., NBC's *Saturday Night Live*);<sup>4</sup> syndicated television programming originally broadcast on tele-

vision (e.g., *Arrested Development* on MSN);<sup>5</sup> and television quality content developed for initial showing on the Internet (e.g., *Gold Rush* on AOL).<sup>6</sup> This business model is slowly expanding outside the United States to Europe and Asia, as well as other markets. Among other things, this model offers growth potential for Internet services and expanded distribution for media content (e.g., a niche television program can attract larger audiences and more ad revenue by virtue of this distribution model).

## Country-of-Origin Principle

"Television Without Frontiers" was adopted to signal that European regulation was embracing a model where broadcasting services could be provided on an EU-wide basis, regardless of the home country of the broadcaster. To reduce the burdens of compliance across this internal market, the EU has adopted a country-of-origin principle, meaning that the rules of the country where the service provider is located will be applied to audiovisual services.

A key issue for the Directive is whether country-of-origin principle will be preserved and, if so, with what exceptions. The intent of the European Commission is that the principle be retained and extended to nonlinear services, but discussions in the Parliament have revealed that some prefer a less robust application that would permit Member States to enforce local rules in certain circumstances. Weakening the country-of-origin principle unduly could cause Internet services in particular (which, because of the very interconnected nature of the Internet, cannot as easily as traditional television broadcasters respect geographic boundaries) to face a panoply of potentially conflicting local regulations, slowing—if not effectively prohibiting—development and growth of the streaming Internet

video marketplace in the EU.

### Rules for Advertising

A number of issues under discussion relate to rules for advertising and product placement. One intent of the AVMS is to relax these rules for traditional broadcasters—e.g., removing a rule requiring a twenty-minute gap between ad slots and permitting product placement. In the texts under discussion so far, the advertising rules proposed do not apply to on-demand services.

The Commission proposal from 2005 would have created a general authorization for product placement under certain circumstances. The Council text replaces that conditional authorization with a prohibition in principle, from which each Member State will be able to derogate explicitly. A similar approach was proposed by the European Parliament's Culture committee.<sup>7</sup>

According to a recent statement from the Council, the Council continues to believe that product placement should generally be prohibited with certain narrow exceptions.<sup>8</sup> In the Council text, product placement is allowed in films, in series made for television, and in light entertainment programs, while the Parliament's text has a slightly more restrictive set of genres where product placement is permitted. Under no circumstances is product placement permitted in children's programs, news programs, documentaries, or advice programs.

Also among the product placement issues to be sorted out are whether or how the rules applied to teleshopping, whether

the rules should cover instances such as prop placement (where a commercial item is provided to the content creator for free use), and the application of the rules to acquired or archived programs.

In any event, these proposed rules, even with the reduced restrictions, still prohibit product placement activities that are permitted in the United States, particularly with respect to Internet video programming that is outside FCC jurisdiction.

In the Internet video marketplace, a number of "made for Internet" video programs are developed because of advertiser interest or support<sup>9</sup> or with a high degree of incorporated product placement.<sup>10</sup> Moreover, advertisers themselves are developing video programming for Internet and traditional media exhibition.<sup>11</sup> The uncertainty or disparity in product placement rules among media and jurisdictions (among EU Member States and the United States) will certainly influence the growth of the Internet video marketplace in the EU.

### Status and Likely Direction

In this case, the AVMS Directive must be agreed upon by both the Parliament and the Council of the European Union. The AVMS Directive would then become a binding set of guidelines that individual Member States would implement in national law.

Following discussions in Parliament in December 2006, the next step for the AVMS proposal is for the European Council to see if it can agree on a

"Common Position"—a version agreed upon by representatives of the EU Member State governments—before the end of June 2007. The final version of the AVMS Directive could be adopted in late 2007 or early 2008 and then implemented in EU Member States by 2010. 

### Endnotes

1. Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0646en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0646en01.pdf).

2. Note 14616/06, available at <http://register.consilium.europa.eu/pdf/en/06/st14/st14616.en06.pdf>.

3. See <http://dynamic.abc.go.com/streaming/landing>.

4. See Jacques Steinberg, *Censored "SNL" Sketch Jumps Bleepless onto the Internet*, N.Y. TIMES, Dec. 21, 2006.

5. See <http://arresteddevelopment.msn.com/>.

6. See <http://goldrush.aol.com/>.

7. See Final Report A6-0399/2006, 22.11.2006, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0399+0+DOC+PDF+V0/EN&language=EN>.

8. [http://www.eu2007.de/en/News/download\\_docs/Februar/0212-BJK/016Hintergrundinfo.pdf](http://www.eu2007.de/en/News/download_docs/Februar/0212-BJK/016Hintergrundinfo.pdf).

9. See Bill Carter, *The Whole World Is Watching, and Ben Silverman Is Watching Back*, N.Y. TIMES, Sept. 17, 2006.

10. See Doreen Carvajal, *Media: Advertising; Reality Shows and Comedies and the "Network" Is AOL*, N.Y. TIMES, Apr. 13, 2006.

11. See Louise Story, *Media: Advertising; Programmed to Sell*, N.Y. TIMES, Nov. 10, 2006.