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‘TV-like’: aesthetics, quality and genre in the regulation of video-on-demand services

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From 2010 to 2015, video-on-demand services in the UK were regulated by the Authority for Television on Demand (ATVOD), under an agreement with the statutory regulator Ofcom and applying the pan-European standards introduced through the 2007 EU Audiovisual Media Services Directive. A key question for the regulators and for service providers was whether any given service fell within the ‘scope’ of the law – that is, which services met the legal definition of an on-demand audiovisual media service. This is a study of how Ofcom exercised its role as the final arbiter of that definition, through a close examination of its 15 decisions in appeals against initial determinations by ATVOD. The use of the legal test for ‘comparability’ with conventional television services, and the regulatory focus on ‘TV-like’ on-demand services, has demonstrated the significance of production and aesthetics as a determinant of regulation. In particular, production decisions regarding titles, credits, and duration, as well as a range of issues of perceived quality (audio, video, voiceover, editing, and the like), have been taken into account. It is contended that Ofcom has relied on focus group research, rather than on wider insights from television studies research, in assessing these factors, and that the underlying Directive may have been flawed in its concepts and definitions.

Introduction

The Audiovisual Media Services Directive (adopted in 2007)¹ provides for two regulatory schemes for audiovisual services in European Union member states. The first is a revised version of that required by the 1989 Television Without Frontiers Directive, and applies to ‘linear’ or ‘television’ services. The second is a new development, and goes above and beyond the very minimal regulatory control of ‘information society services’ (online content in general) under EU law. This second category is ‘on-demand audiovisual media services’, or what lawmakers called ‘non-linear’ services in earlier drafts.

In the UK, Ofcom is the statutory regulator for broadcasting, telecommunications and postal services. From 2010 to 2015, it designated a co-regulatory body (the Authority for Television on Demand, ATVOD) as the regulator of on-demand services. ATVOD’s initial task was to consider whether a service falls within the ‘scope’ of the law. If this was the case, the service provider was obliged to ‘notify’ the regulator and pay a fee. Failure to do so was met initially with a Scope Determination, which could be appealed to Ofcom. Ofcom could confirm the decision, substitute its own decision (i.e. find that the service was not within the scope of the law), or refer the matter back to ATVOD for further consideration. Ultimately, non-compliance with the regulatory system was and continues a criminal offence. The matter of scope has, alongside more strategic and censorious considerations disclosed in the consideration of adult
services (discussed in detail in Petley 2014), been the dominant theme of VOD regulation in the UK.

From January 2016, Ofcom carries out all of these functions itself. Although ATVOD is no more, a close study of how Ofcom exercised its role as the final arbiter of scope in responding to appeals against ATVOD decisions will demonstrate the importance of legal definitions and of the methods used to apply them to the content industries. I highlight how Ofcom made use of a ‘comparability’ test in the legislation, read in the light of an important interpretative provision in EU law, in determining whether a service falls within the scope of the regulatory system. This reading of Ofcom’s decisions will demonstrate the significance of production and aesthetics as a determinant of regulation. I also offer a critique of Ofcom’s use of focus group research (Essential Research 2012), and the assumptions made about the nature of television. Throughout, how scholarly writing in television studies could inform different interpretations of the Directive, or point towards flaws in the drafting of the Directive itself (which is being reviewed by the European Commission), is a key concern.

The focus of this article will be the decisions made by Ofcom during this period, specifically the 15 decisions (of 19 in total) where the scope of the regulatory system was in question. However, in order to understand these decisions, a brief explanation of the overarching legal context is appropriate. National legislation and the day-to-day work of regulatory bodies reflect the two-track approach of the Directive, as noted above. Directives, in the EU legal order, are binding on member states but require ‘transposition’ into domestic law by suitable means. In the UK, the Directive was transposed by amending the Communications Act 2003. The key provision is new section 368A(1), which includes a stipulation that the regime applies to services where the ‘principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services’. (This is one of five cumulative criteria, all drawn from the Directive with some slight rewording; others include there being editorial responsibility and the service falling under UK jurisdiction).

EU Directives are always prefaced with a series of ‘recitals’, setting out the legal basis of the Directive and explaining its purposes and key concepts. Recital 24 of the Directive has been considered at length in scope determinations and appeals, and must therefore be set out here in full. It glosses the definition of on-demand services through the concept of regulated on-demand services being ‘television-like’:

> It is characteristic of on-demand audiovisual media services that they are "television-like", i.e. that they compete for the same audience as television broadcasts, and 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. In the light of this and in order to prevent disparities as regards free movement and competition, the notion of "programme" should be interpreted in a dynamic way taking into account developments in television broadcasting.

**Audiovisual production and the comparability test**

Initially, it is useful to unpack the Directive’s concept that ‘television-like’ services have a particular identity. In particular, with the growth in the number and range of
channels in ‘television’ itself, is it difficult to identify the distinctive features of television for the purposes of assessing whether other services are what the regulatory bodies abbreviate as ‘TV-like’?

This question arises because it was already clear in the earlier wave of cable and satellite (linear) expansion that while some new channels used the ‘programming forms and scheduling strategies’ of the established broadcasters, other channels (such as rolling news and home shopping channels) took new and sometimes radically different approaches (Allen and Hill 2004: 163). This meant, for example, that the viewer of a purely linear service would already be exposed to a range of forms. Even something as simple as addressing to camera conveys a very different meaning in dramatic cinema as compared with advertising or news (Butler 2012: 118).

Indeed, even if there are clear forms associated with (linear) television, those forms can be combined with more recent developments in other sectors, even if the end result is then broadcast on television. For example, the TV programme DiggNation (a spin-off of the Digg website) was described as ‘a text of both television and participatory culture’, drawing from TV tropes of direct address, front-lighting, autocues and title sequences, and participatory forms of low production values and no initial title sequence (Bennett 2011: 388). These features of participatory culture resemble Christian’s definition of the ‘digital aesthetic’ as including ‘the exhaustive use of the close-up’ and ‘the use of direct address and subjective camera, styles based in webcams and YouTube’ (Christian 2011: 118; see also Dovey 2011: 146); this may also be linked to the ongoing debate on the impact of digital technology on film aesthetics (e.g. Fussfeld Cohen 2014: 48).

With this uncertainty in mind, it should also be noted that the consideration of what can broadly be termed production features is novel for a scholar of regulation. It is, of course, not a feature of the regulation of television (or indeed radio) in the UK. A service can be made up of the most incoherent of editing, use substandard equipment and ignore established forms such as title sequences. Nonetheless, if it is broadcast as a linear service on cable, satellite or the Internet, it is regulated in the same fashion as other programmes distributed in that fashion. Indeed, the European institutions specifically rejected language relating to ‘professional’ status (as a means to define the scope of regulation) when considering the Directive (Craufurd Smith 2007: 268-270). Furthermore, the core concept of ‘television’ as the services regulated by the Directive and its predecessor is of audiovisual media services ‘provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule’ – excluding the possibility of taking the nature of or the means of access to the service into account when determining whether to regulate it.

Therefore, there is an inherent uncertainty in the legal test that a service be ‘TV-like’ in order to be within the scope of on-demand regulation. We will proceed by reviewing Ofcom’s published on-demand scope decisions. This will allow the assumptions made by the regulator about what is ‘TV-like’ (and indeed what is ‘television’ itself) to be ascertained and scrutinised more closely.

‘TV-like’ in the regulatory decisions on comparability

Ofcom has translated the regulatory tests into what has become an established practice – of looking at the ‘principal purpose’ component of the definition, and then
proceeding to ‘comparability’ if necessary (because it is only if both components are satisfied that the service is within the scope of the law). It also takes a ‘step back’ for a broad assessment, with particular reference to recital 24. Ofcom’s broad approach to principal purpose is found in the decision in Sun TV (2011) (regarding videos on the website of the said newspaper; see further the comprehensive analysis in Katsirea 2015), although the first significant comparability analysis comes in the later decision in Viva TV (2012). At a very early stage, a direct read-across from what is broadcast on television was rejected, in the decisions on Demand Adult (2011) and Climax (2011). On-demand providers had contented that because they provided material that would not be lawful to show on UK television, comparability was impossible (Petley 2014: 294-6).

The analytical approach now taken by Ofcom is best understood by referring to its later decisions (i.e. applying the key tests to new factual scenarios). A representative example is Everton TV (2013). Ofcom considered the relevance of the ‘complete narrative’ of some clips, “‘TV-like’ elements such as branded opening and closing sequences’ and production values ‘consistent with linear television sports reports, including professional camerawork and internal editing’ (paragraph 94). However, it noted contrary evidence including the absence of ‘linking elements such as a studio based introduction’ or ‘reflections from commentators to provide an over arching narrative’ (paragraph 96).

It can be seen that reaching a decision on regulation includes identifying factors like credits and quality, followed by a decision on what makes the factor in question TV-like, and finally an application of this to the specific service under review. We will therefore proceed by looking these points in more detail, across four categories: titles and credits, quality, duration and branding. Distribution (which is considered less frequently) is covered in brief.

**Titles and credits**

In January 2013, Ofcom published two decisions in respect of the BBC’s presence on YouTube. One concerned Top Gear and the other was a service, labelled as BBC Food, drawing from a range of BBC programmes. It overturned ATVOD’s initial ruling that these services were within the scope of regulation.

In these decisions, the lack of traditional start-of-programme titles and end-of-programme credits is noted. (The reason for the lack of such features is clearly that the material is typically taken from the middle of a previously broadcast programme). Ofcom therefore finds that credits are one aspect of TV-like production:

> It accordingly contained the kind of camera work, sound and internal editing as would be expected in a clip of material produced as part of a longer programme for BBC linear television. Nevertheless, in terms of form, Ofcom finds it significant that other production elements associated with linear formats, such as opening and closing credits were not present. (*BBC Food*, paragraphs 46-7; see also *BBC Top Gear* paragraphs 45-46).

Similarly, Ofcom has noted the presence of brief opening and closing credits (*Channel Flip*, paragraph 60), the use of library music as part of opening sequences (*Business Channel*, paragraph 38) and the presentation of participant / character
names (*Daisy Rock*, paragraph 59) as factors in other decisions. It also drew attention to the presence (*Demand Adult*, p. 6; *Climax*, p. 8) or absence (*UCSC*, paragraph 57) of production credits.

These assumptions must be questioned. While titles are clearly capable of being studied as to their ‘expressive function’ (Jacobs 2011), and can be parsed for insights into authorial assumptions and promises (Kociemba 2006) and how new audiences are addressed (Gray 2010: 73), programme-makers have a range of options open to them. There can be variation over time, as considered in Eastman and Neal-Lunsford’s explanation of development in credits and interstitials as part of the deliberate diminishing of ‘actual and perceived time between programmes’ in the 1990s (Eastman and Neal-Lunsford 1995). There is also variation from country to country. The importance of the ‘changeover’ at, for instance, the top of an hour means that US services can assemble programmes and interstitials in a distinctive fashion (Ellis 2011: 59). When US programmes are exported, fades (instead of end credits) are introduced in some markets, and the pattern of advertising breaks is different (in particular breaks immediately before or after credits) (Bielby & Harrington 2008: 137).

Butler has observed changes in the use of credits, including (i) departures from what he considers a conventional US form (teaser, theme/credits, break, programme, end, break, theme/credits), (ii) truncated or absent theme tunes, and (iii) additional post-credits dialogue (2012: 296). Controversially, final credits and associated music can be supplemented with a voiceover and a split-screen for upcoming programmes (Davison 2014: 196; Ellis 2011: 61). Arguments on changing practices are particularly important, as they make it difficult for regulators to argue with plausibility that, for example, the absence of a theme tune is characteristic of non-TV-like services. One can note that credits do for television what tuning up does for a concert and an anthem does for a sports game (Gray 2010: 74-5) or characterise longer credits as the ‘audiovisual equivalent of hardback binding on a book’ (Ellis 2011: 61), while also realising that just as concert, sporting and publishing practices can evolve, so can television production. Ofcom gave partial and belated recognition to this point in its 2015 *Mistress R’eal* decision, where it noted that although credits were absent from the videos in question, this also described some comparable programmes in the same genre (adult content) on a linear (broadcast) service (paragraph 41). (The question of genre is addressed in more detail below0.

**Quality**

The quotation from Ofcom’s BBC decisions in section 3.2, above, also notes the relevance of production quality. It is clear that high quality is a factor, for the regulator, in favour of determining that a service is TV-like and thus sufficiently comparable to meet the regulatory test. However, an obvious counter-argument is that television producers can of course draw from a wide range of production options for features such as lighting (e.g. saturated colour, clean (no shadow) lighting, deliberate ‘flatness’) (Lury 2005: 39-40). One reason can be signalling (whether it be gravity or parody) (see e.g. Bignell 2013: 96 on shots, graphics and connotations); another is to appeal to different audiences, such as children.

Without needing to consider any on-demand services, a spectrum ranging from high to low (technical) quality has been observed in respect of television, and deserves
further attention. For example, low quality video has been argued – even before the growth in on-demand services - to ‘signify authenticity and an indexical reproduction of the real world’ (Dovey 2004: 557). Liveness may be conveyed by framing and (poor) audio quality (Butler 2010: 15). As compared with film, it was argued in 2005 that dramatic images on television ‘tend to be less complex and less rich in detail’, but still provoking an intense relationship between the viewer and the scene (Lury 2005: 15); it is not surprising, then, that it has been argued that the fidelity of the image can be used to denote ‘not-quite-television’ (Bignell 2013: 187).

Little if any of these approaches can be identified in Ofcom’s approach to quality. In discussion of sexually explicit services, it points to whether the audio is of professional quality and whether sets are professionally lit (UCSC, paragraph 60; Mistress R’eal, paragraph 45; Frankie & Friends, paragraph 67). In the Frankie & Friends decision, the use of sets is highlighted as a factor against regulation (paragraph 66); in others, Ofcom highlights how entire videos take place in a single location (UCSC, paragraph 60) or with a continuous shot. In the Channel Flip decision, Ofcom noted the use of a single camera, simple graphics and short monologues to camera (Channel Flip, paragraphs 58 and 64) in ultimately finding that the service was not TV-like. On the other hand, the Business Channel’s use of cutaways, library music, and a structure (introduction, piece to camera, voiceover, interview, conclusion) were part of Ofcom’s reasoning in finding the service TV-like (Business Channel, paragraphs 37-8).

Ofcom is also concerned with fictional form. In its first cases on sexually explicit services, it highlighted how the use of a dramatic conceit in videos contributed to a service being TV-like (Demand Adult, pages 6-7; Climax, page 8). In later decisions, it continues to be exercised about the presence (Frankie & Friends, paragraph 64; Daisy Rock, paragraphs 61-2) or absence (Mistress R’eal, paragraph 43; UCSC, paragraph 60) of a narrative conceit. In the two cases where the ‘narrative’ is allegedly absent, Ofcom also notes that the dialogue appears unscripted.

This structural and textual analysis of on-demand videos is not uninteresting. However, its purpose is purportedly to determine whether the service is comparable to television. Does it rely on an accurate picture of what ‘television’ is? Television programme makers can and do turn to ‘low-quality’ material for various reasons, including audience appeal and cost. In the genre of ‘reality TV’, for example, amateur recordings and surveillance footage have long been used (Fetveit 2004: 547; Davies 2011: 219; Wiggins 2014: 398) – albeit integrated into a programme; ‘soft-core reality video’ bridges gaps between mainstream and pornographic television forms (Mayer 2008: 98). Now that recordings and footage of various types can also be made available in an on-demand fashion, could the existence of the reality TV genre, or related genres, affect how the line is drawn between TV-like and non-TV like when on-demand audiovisual media services are being considered for regulation? Moreover, some services (e.g. Current TV, launched in the US in 2005) broadcast videos originally uploaded to the Web (Jenkins 2006: 240), leading Uricchio to describe television as ‘flirting ever more intently’ with user-generated content (2011: 32). Changes in the quality of YouTube clips (Hirschorn 2008), or the use of tropes and clichés from television on amateur videos uploaded to the Web (van Doorn 2010: 420-423), or even the contention that successful Internet video is not necessarily
about broadcast and cinema-era concepts of authorship and craftsmanship (Muller 2009: 131), highlight the instability of the on-demand category, too.

The research commissioned by Ofcom, and cited in its decisions, contains findings consistent with a sceptical approach to the quality of web video (Essential Research 2012: 37), with obvious consequences for what is deemed to be ‘TV-like’. Yet, the exposure of younger users in particular to YouTube videos is argued elsewhere to be affecting the expectation of how ‘visual stories’ look, compared with those whose primary experience is that of television and cinema (Butler 2012: 138). As such, if Ofcom intends to rely on the Essential Research findings for the proposition that web video is of lower quality, and continue to argue that quality is relevant to determining regulatory jurisdiction (through what I contend is an incomplete concept of what makes for television), it must surely be prepared to revisit that research on a regular basis.

**Duration**

There is no stipulated length of a programme contained in an on-demand audiovisual media service. However, it does seem that length matters. According to the 2012 Essential Research focus group-led study, ‘participants tended to mention three elements that defined a programme in their eyes. Its length was perhaps the most important element, and something that immediately sprung to mind’ (2012: 28).

Ofcom has taken this into account, to some extent. In its decisions on BBC YouTube services, Ofcom noted and relied upon the duration of the individual clips on the YouTube channels in question, and compared them with the length of the source programmes (Top Gear and various food programmes):

Ofcom notes that the duration of the items was short … In the context of some genres (e.g. cartoons or adult entertainment), this duration may be typical. However we do not consider the duration of the items on the Service to be closely comparable to programmes of the motoring or general magazine genre normally found in television programme services. (*BBC Top Gear*, paragraph 41).

Ofcom notes that the duration of the items was short, and in particular shorter than programmes typically within the relevant genre on linear television (*BBC Food*, paragraph 39).

Ofcom also noted with approval the findings of the 2012 study (which had included Top Gear clips in its material), explaining in its decisions that while users ‘found the quality and content of the clips to be very much reminiscent of linear television programmes, they distinguished services where the length and volume (i.e. quantum) of material was different’ (*BBC Food*, paragraph 57; *BBC Top Gear*, paragraph 56). In the Channel Flip decision (frequently cited as a precedent in subsequent cases), Ofcom agreed with the study participants that duration was ‘particularly important’ in this case; it highlighted the short duration of the 3-4 minute clips that made up the bulk of the service, as compared with the typical duration of programmes within the genre (comedy and light entertainment) (paragraph 59). In a later decision, without further reference to the 2012 research, Ofcom highlighted the short duration of most of the videos on the Everton TV website (the majority being under five minutes in
duration), arguing that these works ‘would have been more likely to form parts of sports report or highlights programming rather than being programmes in themselves’ (Everton TV, paragraph 95). Moreover, Ofcom also dismissed an argument that the YouTube playlist function (where a series of clips can be watched in sequence) changed the analysis of length, because the result was a disjointed presentation (BBC Top Gear, paragraph 47; BBC Food, paragraph 41).

However, in an earlier appeal decision in Viva TV, the arguments of the service provider regarding the length of music videos as a reason not to find the service in scope were unsuccessful (paragraphs 56 and 59). This reflected a point noted in earlier Ofcom documentation, that music videos could not be excluded because they were already the core programmes of music TV (linear) channels. In short, because a music channel may be made up of wall-to-wall videos, each video can be conceived of as a programme. As such, an on-demand service made of music videos contains similar programmes to a music television channel. (A path not taken was the idea that what appears on a schedule (e.g. a three-hour block of chart hits) could be characterised as a better fit for ‘programme’ than an individual video, although this might founder on the narrative coherence argument, as with the ‘disjointed playlist’ argument in the BBC cases).

Finally, the position of sexually explicit material must be considered, because it also highlights the significance of genre in the treatment of duration. Notably, the earlier Ofcom decisions regarding this sector did not see discussion of duration as a factor. It was only in later decisions that this emerged as an issue – usually at the instigation of the service provider. For instance, one provider cited the Essential Research findings in support of its argument that its use of short videos (averaging under eight minutes) was a factor against being found within scope (Urban Chick Supremacy Cell, paragraph 18). However, Ofcom responded by quoting a statement originally made in parentheses in Channel Flip (‘short form content may be more likely to be typical in some genres, such as children’s programming and adult content programming’) in support of its finding that the shorter duration of videos was indeed TV-like in the adult genre (UCSC, paragraphs 55-6). Similar arguments are found in a 2015 decision (Daisy Rock). Even within the genre, though, Ofcom acknowledged in its most recent decision that particular videos were ‘relatively brief even in the context of adult content’ (Mistress R’éal, paragraph 40).

Therefore, it can be observed that the relevant question (as Ofcom sees it) is relative rather than absolute length, i.e. the relationship between TV and on-demand programme length in the genre in question. This may require more careful consideration of various genres, particularly as the work of Essential Research did not really touch on this point. While music videos and entertainment programmes may be useful in illustrating the point in part (and perhaps sports services, to a lesser extent), some areas will be more difficult. For example, film shorts are an established genre, although primarily in home and online film communities rather than cinemas in recent years (Klinger 2006: 192-3). (Websites and competitions even specialise in films that are no longer than 60 seconds in duration). But films on TV are more likely to have cinema-style running times. In addition, typical programme length on linear TV services varies between services (e.g. ITV and BBC) and between jurisdictions or markets (Ellis 2004: 277). Audiovisual Web content can include material that is short for aesthetic reasons rather than because of technological limitations alone – sitting
alongside tweets and browser-based games (Dawson 2011: 214); some short content on the Web is of course derived from television or film (Grainge 2011: 11). Moreover, the importance of short content on linear services is recognised in respect of services such as the Disney Channel (Gillan 2014: 157). Once more, Ofcom faces a risk (relying upon the limited research it commissioned and its own media studies-influenced glosses and assumptions (on genre)) as well as an opportunity to make greater use of a wider range of research and to use it more rigorously.

Branding

The Essential Research work also identifies ‘where the content originated’ as a factor, which demonstrates the importance of recognisable TV ‘brands’ in the on-demand sector. It is also identified as the third element that defines a programme (‘to be produced by a broadcaster they were familiar with’).

The attention paid to this feature should also be considered from a different perspective – that of how it is adopted by broadcasters for reasons not related to regulation. The distribution of content by broadcasters through services like YouTube and iTunes is one of the means by which ‘the television industry has attempted to position itself’ (Johnson 2012: 44) within emerging popular services which appeal to some users. Some broadcasters use online services (particularly the US service Hulu) in a way that plays down the ‘channel’ brand in favour of a given ‘programme’ (Gillan 2010: 3; Johnson 2012: 55), but placing and maintaining channel identification (as an on-screen ident or by other means) continues to be important for others. Major broadcasters in the UK have taken a strategy of extending brands to new digital channels (e.g. ITV2), and ensured brand visibility across various platforms (BBC, and in respect of YouTube, ITV and Channel 4) (Johnson 2010: 74, 129). In general, for the established (corporate) producers of audiovisual content, ‘more than anything else on the Internet, online access to video strikes at the beating heart of the entire entertainment business’ (Levine 2011: 138).

A radical proposal was put forward by the House of Lords Communications Committee, in its 2013 report on ‘media convergence’. It argues that ‘broadcast licences should be amended to ensure that standards similar to those set out in the Ofcom Broadcasting Code, amended for the relevant environment, would apply to any service using the same channel name or brand as a licensed broadcast service’ (2013: paragraph 51). This would create a very significant disparity between broadcaster-run on-demand services (a substantial part of those services currently regulated) and the remaining services. Curiously, the Committee describes this situation as an ‘anomaly’, although it is in legal terms the obvious outcome of the Directive. Whatever one might say about the merits of the linear/non-linear distinction, applying the very detailed rules of the Broadcasting Code (far above and beyond EU requirements) to one group of on-demand services and the light touch of the Directive to another group, merely based on the brand, would be a major revision to the Directive. Indeed, the cases discussed in this article demonstrate how on-demand services from major brands can fall outside of the regulatory system (e.g. BBC Food), while very small services with what can charitably be called lower-profile brands fall inside it (e.g. Daisy Rock).
Finally, we may also consider some points of distribution, and the influence they may have on production. The Directive requires in recital 24 that the ‘nature and the means of access’ to a service be taken into account. One example might be screen size – which can clearly inform production decisions. It may already be the case that different types of content can be more ‘suited’ to a different type of screen (Tryon 2009: 84-5). Small screens offer a difference in experience. A visceral, expensively produced blockbuster film may be better suited to a cinema screen and powerful multi-speaker wall-mounted sound system than a screen on a handheld device and a tinny, internal speaker. In television, aspect ratios in particular have been the subject of change over time, particularly as the ratio of production may not match the distribution and reception options of providers and viewers (Lury 2005: 23). Now, successive innovations in screen design make the ‘home cinema’ an option for some; many channels in the UK are available in ‘high definition’ and even 3D. On the Internet and over mobile data networks, some service providers offer high speed connections – but there are plenty of users still using slower services less well suited to audiovisual material. (Well-designed Web services will vary the quality of the video served to the user based on the detected connection quality and device, and user-set preferences).

The result is a situation where correlating size and being ‘TV-like’ is a fruitless, circular exercise. In particular, can these matters be reliably identified (in determining whether a service is TV-like), when it is so difficult to identify the distinctive nature and means of access to television and to on-demand services to begin with? In particular, the degree to which user expectations are affected by actions taken by service providers is unknown but potentially significant. Such actions could include the similarity between YouTube and the ‘DVR-mediated television experience’ (Uricchio 2009: 33), Virgin Media’s allocation of a channel number in its electronic programme guide to YouTube (Broadcast 2013a) (which is in truth no more than a link to its customised YouTube app/interface), and the integration of linear and VOD searches on Samsung devices (Broadcast 2013b).

VOD service providers originally based on a model of distributing films and previously broadcast TV programmes are also becoming first publishers of new content, as Netflix famously did in respect of House of Cards (Campbell 2013); its competitor Amazon Prime Video (formerly LoveFilm) does similar. Google’s YouTube funded ‘Original Channels’ between 2011 and 2013 (through paying an advance in place of later advertising revenues) (Grandoni 2012), which were, in the most part, run by broadcasters and independent producers. (Recall that YouTube uses the language of ‘channel’ to describe a group of on-demand videos uploaded by a user). Meanwhile, the BBC began to show certain programmes through its on-demand iPlayer service before linear transmission (BBC Ariel 2014), and also moved the BBC Three service from a linear channel to an online-only service in 2016 (Foster 2015).

As in the case of ‘pure’ production elements, the complex influences on the distribution of audiovisual content challenge both the discrete nature of ‘television’ and the possibility of identifying ‘TV-like’ on-demand services at any given point of time. The problem for regulatory bodies is the legal requirement to regulate TV-like services must be obeyed, and the nature and means of access cannot be ignored, even at a time of innovation and realignment within the relevant industries.
Proposing a way forward

The above discussion, in part 3, points towards a fundamental problem with the notion of the programme, and its relationship with the concept of TV-like. The multiplicity of versions of a film on DVD and other platforms causes instability in the definition of a single ‘text’ (Klinger 2006: 72). ‘Video is not necessarily a discrete practice - it depends upon other technologies and is interwoven into other modes of representation such as film and television’ (Strangelove 2010: 172). Bignell rightly argues how ‘television is a hungry medium that borrows audio-visual content from a range of other places’ (Bignell 2013: 14). In turn, few of the difficulties experienced in applying the Directive to on-demand services would come as a surprise to the scholar of technological change; ‘new technologies do not simply take over from earlier technologies, but, increasingly, they build on a previous technology’s work of collection or agglomeration’ (Straw 2007: 11).

The shift in the rhetoric of the media industries from programme to content (Caldwell 2004: 49) and continued variety in scheduling practices (Gillan 2014: 86) undermines the discrete and identifiable notion of a programme. Ofcom recognised this in part through its caution in Viva TV against ATVOD’s consideration of the ‘dramatic conceit’ of a music video, on the grounds that the genre does not require it (Viva TV, paragraphs 57-58). (This itself may change; music videos today have a ‘natural home’ online (Edmond 2014: 305) and there is a great deal of variety, not least in what drives viral success (Edmond 2014: 315)). But how does one prove a genre-based argument to a regulatory body? The Directive provides, in defining ‘programme’, that ‘examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama’ (article 1(b)). Is a sitcom defined by its comedy, or by the formal analysis of its camera positioning and catchy title sequence? Does documentary not include a very wide range of approaches in production, across a spectrum of quality if one can even be defined? If formal analysis is appropriate, are focus groups such as those carried out by Essential Research (with a group of 92 people across 14 groups and 8 interviews) the most appropriate method?

Categorising some (but, crucially, not all) new services as TV-like is therefore an inappropriate use of a theoretical proposition (on-demand services are not TV nor a replacement for TV but build upon the past work of TV) as a means for dividing on-demand services into categories for regulatory purposes. Doing so at a time when TV itself is still a major (and changing) sector – i.e. challenging that proposition - makes this work even more difficult again. The consideration of user responses (across the board) may also serve to distract rather than assist the regulator, even though the Directive specifically highlights in recital 24 that consumer expectations are a factor in regulation (whether a user could ‘reasonably (…) expect regulatory protection within the scope of this Directive’). While the drafters of laws might imagine that both ‘old’ and ‘new’ laws are widely understood, this can prove to be nothing but wishful thinking. This was unintentionally highlighted in earlier research commissioned by Ofcom on the regulation of on-demand services. This work found that ‘(the) vast majority of participants felt that all content which had previously been shown on TV was subject to regulation, though few spontaneously cited the TV Broadcasting Code specifically. This meant that all BBC iPlayer, ITV player, 4oD, Demand Five content was assumed to be subject to existing regulation, as were all the
examples accessed via Joost and Virgin Media’ (Essential Research 2009: 46). This research was carried out before the Directive came into force in the UK – that is, while these services were not subject to existing regulation, and therefore the vast majority misunderstood the actual legal requirements. This is a useful reminder of the limitations of focus group research for regulatory purposes, especially when the concept of television is being closely studied by those in the field of television studies using a more appropriate mixture of research methods.

Assumption made about genre are capable of being read in a number of different ways. Of course, the interest shown by the regulator in the relationship between genre and production can be recognised as a welcome acknowledgement of the complexity of televisual texts. However, the results can affect the potential uses of the new platform. There is, for instance, a long history of emerging platforms being a venue for pushing the boundaries of what is acceptable in regulatory terms. Early cable-only and pay-TV services in the United States such as HBO and Showtime presented material that was more explicit than what would then have been permitted on network television (Santo 2009: 23; Leverette 2009: 125). Even in the case of earlier on-demand projects, including the experimental Qube service in the early 1980s and Canal Play web-based version of the French movie service ‘Canal+’, sexually explicit content was the most popular (Hollins 1984 194; Augros 2008). The use of genre-based arguments in a way that leads to differential outcomes (without even considering the further impact of the approach taken to sexually explicit material, as Petley (2014) explains), could put today’s projects under surprisingly intense regulatory scrutiny.

Conclusion

The Audiovisual Media Services Directive, and its contested concept of on-demand services, reflected concerns about changes in the television and Internet sectors nearly a decade ago. Yet even while it was being debated, user behaviour and the technologies available on mass markets were changing; hybrid practices such as time-shifting through digital video recorders were emerging, undermining the linear / non-linear distinction (Craufurd Smith 2007: 250-253). The Directive was amended during its consideration by the European institutions, with the main change being the extended definition of TV-like in Recital 24. These definitions themselves contributed to an overall lack of clarity in the Directive (Pauwels and Donders 2011: 533). The European Commission itself noted, in its first review of the new Directive in 2012, that ‘the regulatory framework set by the AVMSD will have to be tested against evolving viewing and delivery patterns’ (2012: 10). A recent interpretation of the comparability provision of the AVMSD by the Court of Justice of the European Union took a particularly broad approach to its scope (Case C-374/14 New Media Online v Bundeskommunikationssenat, 21 October 2015).

In this article, I have demonstrated the conceptual difficulties presented by those unclear definitions, which also confirms the need to study those evolving patterns more carefully. Indeed, defining a regulatory category by how the targeted activities are similar to another category immediately poses questions of the relationship between those categories, and how both similarity and the ‘template’ category are to be operationalised in legal terms. Ofcom now finds itself in a position of great influence, where it itself will make determinations as to whether a service falls within the scope of the on-demand regulatory system. Its experience as an appellate body,
however, has highlighted a need for a different approach to evidence – or potentially a weakness in the Directive itself, which the European institutions might consider in their current review of its fitness for purpose.

References


Foster, Patrick (2015), ‘BBC Three to go off air and online-only, it is confirmed’, *Telegraph*, 26 November. http://www.telegraph.co.uk/news/bbc/12018408/BBC-Three-to-go-off-air-and-online-only-it-is-confirmed.html.


Levine, Robert (2011), *Free Ride: how the internet is destroying the culture business and how the culture business can fight back*, London: Bodley Head.


Ofcom Decisions:
The Directive amended the 1989 Television Without Frontiers Directive. A complete version (including all amendments) has now been consolidated as Directive 2010/13/EU.

2 The omitted decisions, of limited relevance to the present study, deal with who has editorial responsibility (e.g. whether Viacom or Virgin Media were responsible for certain on-demand services)
and the related question of jurisdiction (e.g. whether the service on the Vice website was provided by a US or UK service provider).

3 The decisions are referred to by name in the body of this article, with dates and web links to the full texts available following the references.