



**Audiovisual Media Services Directive
Consultation on Proposals for Implementation in the UK**

**Submission from Bebo
10 November 2008**

I. Introduction

- As a company that prides itself on taking an innovative approach to new media and online video, Bebo, along with its parent company AOL¹, has been following the passage of the Audiovisual Media Services (AVMS) Directive closely to understand how its implementation will affect the regulation of online services in the UK.
- We welcome the fact that on a number of public occasions recently government and Ofcom representatives have stated that they do not believe that Bebo will be covered by the Directive – an interpretation of the Directive in relation to our service which matches our own – as well as the stated intention in the consultation document that ‘as a matter of policy, the Government aims to draw into scope of UK regulation a narrow range of services falling within the scope of the AVMS Directive, rather than extending to a wide range of audiovisual services’².
- However, given the difficulties in defining AVMS VoD services in a rapidly evolving online market, where video (both professional and user-generated) is becoming a more prominent part of many services, we believe that it is important that the definitions of VoD are clarified to be as tight as possible, so that the intentions of government are accurately reflected in UK legislation. If definitions are not sufficiently water-tight, there is a risk that many current and future services that feature TV-like video, but which are not pure VoD, would be unintentionally brought into scope. It is with the aim of assisting in this clarification process that we submit this response.

II. About Bebo

¹ Since May 2008, Bebo has been part of AOL’s People Networks division. Since the acquisition, Bebo and AOL’s safety and policy representatives have been working closely to understand our respective approaches to the child protection challenges that the Internet presents and get the best of each service where it makes sense.

² Page 9 of UK consultation document

- Bebo is one of the world's most popular social networking sites. It was founded in 2005 as an online community where users could post pictures, write blogs and send messages to one another. Today, Bebo has evolved to become a global Social Media Network³ combining community, self-expression and entertainment to enable its users to consume, create, discover and share content through the Bebo website. Since May 2008, Bebo has been part of AOL's People Networks division.
- Bebo has a membership of more than 45 million⁴ individuals worldwide with its primary membership currently coming from six major English-speaking countries: the UK, Ireland, Australia, New Zealand, the US and Canada. Bebo also recently launched local language sites in France, Germany, the Netherlands, Italy, Spain and Poland. The service is geared towards an audience aged under 30⁵, with the core of 16-24 year olds spending 1.54 billion minutes on the site per month.
- Bebo allows users to find and communicate with friends as well as discover experience and share user-generated content including video, music, books and other forms of entertainment. Users can create profiles and interact with friends' profiles, send messages to other users, join groups, become fans of bands, use third party applications, upload and share photos and videos.
- These 'traditional' social networking activities form the backbone of the service and make up the primary activities that users engage with when on the site – the average Bebo user spends almost 27 minutes on the site each day, and the vast majority of that time is spent communicating and interacting with friends, and consuming user-generated content⁶.
- However, to supplement these user interactive activities Bebo offers users access to a line-up of high quality programmes and entertainment from professional broadcasters, independent producers and other rights owners, and gives users a simple set of tools to create their online media collection and communicate their tastes to everyone in their network:

³ By 'social media network', we mean a 'many-to-many' platform that allows users to publish and access a range of content and applications. While the network has the ability to host or embed professionally created content, including content that may at one time be shown on traditional television platforms, the platform is primarily used to upload and access content and applications that have been created by private individuals. Where professional content is uploaded it remains the responsibility of the professional partner who has uploaded it, and so the social media network is merely the host and not the provider.

⁴ Internal figure

⁵ Our Terms of Service stipulate that users must be 13 years of age to register and use the service.

⁶ Internal figures

- In October 2007, Bebo launched its Open Media platform, allowing professional media companies to upload their content onto Bebo for users to access for free. Open Media partners must abide by our Terms of Service⁷ (which make clear that partners are wholly responsible for the content they upload onto their Open Media Channel) and our content standards (see below).

- Bebo commissions a limited number of original new media audiovisual content series. *KateModern*, which ran throughout 2007, was the UK's first interactive web series, received more than 60 million views over the course of its run, and was highly innovative in the degree to which users were able to influence the plot and interact with its characters. Bebo also partnered with Sony Pictures Television International in September 2007 to develop another interactive series, *Sofia's Diary*; partnered with Endemol to create *The Gap Year*; and most recently, worked with Universal Music to produce *The Secret World of Sam King*.

- Bebo is committed to exploring innovative entertainment formats, and believes that it is important to work with established and new players in the UK media world to create new content that young people want to engage with. However, we acknowledge that these original productions will remain a small but exciting part of the Bebo, and that the primary purpose of the service will continue to be social networking.

- Bebo believes that content standards are as important in new forms of professionally produced entertainment as they are in more traditional formats. As such, Bebo has a Commercial Content Standards policy to ensure that professionally produced content on the site is in line with Bebo's brand, user demographic and commitment to safer social networking, as well as applicable national laws and regulations. The policy also takes recognised rating systems⁸, and industry self-regulatory codes of conduct⁹ into consideration. The standards, which we are currently rolling out, outline to our partners (including Open Media and original production partners) the type of content that is prohibited from appearing on Bebo; content that needs to be age-restricted¹⁰; and content that requires a guidance label¹¹. Bebo will provide its partners with the ability to label and

⁷ <http://www.bebo.com/OpenMediaTerms.jsp>

⁸ For example, PEGI system for computer games, the BBFC guidelines, and the Internet Content Rating Association labels

⁹ In particular the Broadband Stakeholder Group guidelines on content labeling – www.audiovisualcontent.org

¹⁰ Content that requires age-restricting covers content that is clearly aimed at a mature teen or adult audience; would likely get high age rating if it were a movie or a game; or that, because of its adult nature, would only be expected to appear on TV late at night.

¹¹ Content that requires a guidance label is content that is potentially harmful or upsetting to younger users; that would attract a young teen (13-15) age rating if it were a movie or game; or that you might expect to get a warning about if it was on TV, such as 'this programme contains scenes of a sexual nature'.

manage their content so as to be age appropriate through age-restriction technology. While partners are ultimately responsible for ensuring that their content complies with the Bebo's stringent standards, Bebo will be working in partnership to ensure they are well understood.

- While we agree with government and Ofcom representatives that Bebo is not an AVMS VoD, we do acknowledge that there are more generic public policy concerns about online video content. It is important to emphasize that AOL/Bebo are very active in addressing these issues both through our own internal policies, and by working in multi-stakeholder groups, such as the UK Council for Child Internet Safety as well as many other initiatives around the world¹².

III. Scope - On-demand audiovisual media services

2. Do the proposed definitions to be included in the Communications Act capture all the relevant elements of the definition of an on-demand audiovisual media service in the AVMS Directive?

- The proposed definitions go a considerable way towards defining which services should be included and excluded by the Directive. However, given the importance of clarity for business, and in light of the government's stated intention that VoD services be defined in a way that is conservative and water-tight, we believe that a number of additional definitions would be beneficial.

The need to better define "Service"

- One of the key Articles in the Directive states that a service will only qualify as a VoD where the 'principal purpose of the service is the provision of programmes'. Identifying what exactly comprises the service that is being assessed for potential regulation, and how much of that service needs to be dedicated to VoD in order for it to be an AVMS, is crucial in determining who is and who isn't covered by AVMS. We believe that 'service' needs to be more tightly defined to ensure that the scope is only narrowly extended, as the government intends.
- The Directive does define an audiovisual 'service' 'as in Articles 49 and 50 of the Treaty', but we believe more detail in the UK legislation would be useful. We believe that clarity can be achieved by making it clear that when the co-regulator is assessing services for regulation, it defines 'service' in the same way as services define themselves in their own legal terms (for

¹²AOL and Bebo are members of the US Internet Safety Technical Task Force to investigate the role technology could play in the protection of children and young people on the internet. See <http://cyber.law.harvard.edu/research/isttf/documents>. Bebo is a member of the EU Social Networking Task Force. AOL and Bebo are signatories to the Broadband Stakeholder Group Good Practice Principles on Audiovisual Content Information - <http://www.audiovisualcontent.org/>, which promotes the provision of clear information about professionally-generated content that may be harmful or offensive.

Field Code Changed

example their Terms of Service), where the functions and properties that collectively represent 'the service' are be outlined.

- In addition, we believe it would also be beneficial to make clear that this service should be assessed as a whole (i.e. sub-sections of that service should not be considered in isolation from other sub-sections) and in its own right (i.e. it should not be considered alongside other distinct services that may be owned by a common company). Clarity around assessing a service as a whole would go a considerable way toward helping to determine whether or not VoD is the principle purpose of a service.

3. Are there any services which you think should fall within the scope of regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might exclude?

- No.

4. Are there any services which you think should fall outside the scope of regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might include?

- Yes: many services currently on the market, and many more in the near future, that feature TV-like video, but which we do not believe are pure VOD. As such, we believe the additional definitions, as above, are necessary.

5. Is the concept of "general control" appropriate for determining the person or organisation subject to regulation in respect of a particular video-on-demand service?

- We broadly support the notion of 'general control' as outlined in the consultation, as 'the person with general control over which programmes and other services or facilities are included in the service, whether or not he has control of the content of individual programmes or of the broadcasting distribution of the service'.
- We also believe that notion of 'selection', as expressed in the EU text – "the exercise of effective control over [...] the selection of the programmes' – should be incorporated into the UK definition of editorial responsibility.
- We believe it would also be useful to refer to the e-Commerce Directive when describing 'general control'. In the same way as the e-Commerce Directive makes it clear that Information Society Services have no liability for content when they 'do not select or modify the information', so it would be useful to clarify under AVMS that 'general control' does not apply to a company performing a platform role, where it may host, but have no editorial control over content. This would clear up, for example, potential confusion over the words

‘organisation’ and ‘presentation’, which are also used variously in both the EU text and the UK consultation:

- ‘effective control over [a programme’s] organisation [...] in a catalogue” (Article 1C, EU text)
 - the person who ‘controls the way in which an on-demand programme service is presented or organised’. (p13 UK consultation)
-
- The terms ‘organisation’ and ‘presentation’ are used to describe editorial responsibility-related activities (for example selecting a programme for inclusion in a service, deciding how and where to place/schedule that programme and how to describe or introduce that programme to the user). It would be helpful to distinguish this level of editorial control from uniform technical features associated with a platform, e.g. position of a video player on a page or space for content provider to provide supplementary information about the content. We believe that these capabilities do not denote editorial control and therefore liability is not attributable to the platform provider as per the exemptions outlined in the e-Commerce Directive, that addresses ‘manipulations of a technical nature’ (recital 43).
 - Although a company under these circumstances, where it acts as a platform/host not a content owner, has no prior responsibility for content uploaded to its platform, once it has been notified and established that the content breaches its terms of service, it should act expeditiously to remove it

6. If the provider of an ‘aggregated’ video-on-demand service has control over some elements of another video-on-demand service to which it provides access, to what extent and in what circumstances should the regulatory responsibility for that other service remain with its original provider and to what extent and in what circumstances should it transfer to the provider of the ‘aggregated’ service?

- We believe it is important to address the question of where editorial responsibility lies when the platform owner and the content provider are separate entities, i.e. where one company (a content owner/provider) uploads its VOD content onto a third parties’ platform (an information society service, as defined in the e-Commerce Directive).
- We suggest that a good starting point is to consider a number of instances /scenarios along a spectrum from an aggregator, platform provider to a pure VOD service (which is covered in the previous sections) and to consider the granularity of attendant responsibilities and liabilities.

- A platform provider as an aggregator in its purest sense under the e-Commerce Directive, might be regarded as a 'mere conduit' similar to an ISP providing it does not 'select or modify the information'. As suggested in the consultation, there are a number of actions – potentially including the selection of programmes, the organisation of the catalogue through which programmes are selected and the provision of tools to enable audiences to manage access to potentially harmful content – which could call that 'mere conduit' status into question, and potentially mean that the provider assumes some editorial responsibility.
- While it is useful to outline the actions that may result in a platform provider assuming editorial responsibility, arguably, however, the true indication of when a provider might lose 'mere conduit' status, and when it may also take on some editorial responsibility, is the contractual relationship, where one exists, between the platform and the content provider on a case by case basis. It is the contract that will outline which party has responsibility for undertaking each action.
- For example, using the 'provision of tools' as an example, a platform may provide a content provider with tools¹³ to help restrict potentially age-inappropriate materials, as part of a good faith attempt to reduce any potential harm or offence on its platform. However, it may be the case that the contract outlines that it is the content provider who is responsible for adhering to the platform's content standards, and employing the platform's tools accordingly. In this case, the editorial responsibility is likely to lie with the content provider. It seems reasonable to suggest that a platform that has offered the content provider tools to manage their content (thereby adhering to self-regulatory good practice¹⁴) should not result in the platform losing its status as a 'mere conduit' and thereby accruing editorial responsibilities in relation to the content providers' content under AVMS.

7. If an 'aggregated' video-on-demand service provides access to a video-on-demand service from outside the EU, should the provider of the 'aggregated' service have regulatory responsibility for the non-EU service? If not, what other options are there for ensuring that the UK can meet its obligations under the Directive in respect of the non-EU service?

- Yes, provided that it fulfills the demands of editorial control as above.

IV. Co-regulatory system

Rather than answering each of the consultation questions in turn, Bebo/AOL has some general comments to make regarding the co-regulatory system:

- Whether it is decided to establish the co-regulator on a membership basis or not, we believe that, given the rapidly changing market and the increasing movement towards more video in online services that the system should aim to have an element of openness. For example, in addition to administering a code for members to follow, we would also welcome the co-regulator having some role in the creation of good practice principles and in the facilitation of discussions on pertinent issues regarding VoD content.

¹³ As encouraged by the Broadband Stakeholder Group Good Practice Principles on Audiovisual Content Information

¹⁴ Again, as per Broadband Stakeholder Group Good Practice Principles on Audiovisual Content Information

- In this way, even those companies whose services sit outside scope can follow good practices and address public policy concerns where appropriate.
- We are open minded about who – be it Government, Ofcom or the co-regulator – should have the final say over interpreting the legislative definitions and determining which services are subject to regulation, although in all instances we favour industry consultation on interpretations or decisions that will have a significant impact on how the EU Directive will be interpreted in the UK. However, we do believe that a clear mechanism for challenging decisions about which services are and are not covered should be in place, so that companies can challenge decisions if necessary.

V. Advertising in on-demand audiovisual media services and Product placement

As players in the UK online advertising market, AOL and Bebo support the IAB's submission to this consultation with regards advertising and product placement. In particular we support the following aspects of the IAB's submission:

- The regulation of advertising in an on-demand audiovisual service should only be confined to advertisements which appear, or are adjacent to programmes (Option A). In other words, advertisements which appear as a result of the user accessing a particular on-demand programme.
- There should be one co-regulatory body for advertising on on-demand audiovisual services and that should be assigned to the Advertising Standards Authority (ASA).
- The Government should to take a flexible approach to product placement in the UK by allowing it in certain genres as outlined in the EU text.

For further information please contact – Rachel O'Connell – Rachel@beboinc.com or Victoria Read – Victoria@beboinc.com / 020 7291 4928