

To: DG Information Society
European Commission
Rue de la Loi 100
Brussels

Sent by email to avpolicy@cec.eu.int

26 August 2005

**RESPONSE TO THE COMMISSION'S ISSUES PAPERS FOR THE
LIVERPOOL AUDIOVISUAL CONFERENCE**

Dear Sir/Madam,

Introduction

Yahoo! Europe¹ is pleased to respond to the theme papers issued recently by the European Commission. We agree with Commissioner Reding that the issues under consideration are of fundamental importance to the future health of the European AV and information society industries.

Given the significance of the first issue paper ("Rules applicable to Audiovisual Content Services") to providers of online content, we have focused mainly on it.

Rules applicable to Audiovisual Content Services

We are not convinced of the need for an extension of the current TVWF Directive to cover any element of the online sector. The current regulatory framework for AV and information society services, namely the TVWF Directive and the e-Commerce Directive, has not long been in place in Member States, but appears to be working well.

Moreover, even if the current regime were not to be functioning well, the extension of broadcast regulations intended for a 1980s environment of a spectrum-scarce, few channel, analogue environment in which viewers had little choice and no control over the programmes they were served up, would appear to offer an inappropriate template for future regulation. In the 1980s barriers to entry into the AV broadcast market were extremely high. This resulted in only a handful of channels in each Member State enjoying very high, passive, audiences and arguably having an impact on citizens' thinking. The environment today bears no resemblance to that of the 1980s, with a

¹ Yahoo! Europe comprises Yahoo!UK Ltd, Yahoo! France SAS, Yahoo! Media SL (Spanish company), Yahoo! (Deutschland) GmbH, and Yahoo! Italia SRL. Yahoo! Europe is a subsidiary of Yahoo! Inc., a leading provider of comprehensive online products and services to consumers and businesses worldwide and is the No. 1 Internet brand globally. Yahoo!'s global network includes 25 World properties, in 13 languages.

multitude of satellite, cable, analogue, and digital terrestrial channels. The control the consumer exerts, like his/her sophistication in the consumption of AV content, has increased just as the impact of any particular programme or channel has decreased. The trend is continuing apace.

The online environment is still more fragmented, with literally millions of content-based websites and applications, from numerous countries, to choose from. There is no concern over spectrum and barriers to entry are extremely low. The consumer uses numerous tools and services to control what s/he views (and often interacts with) online. The 1980s broadcasting regulation simply does not fit this new and very different environment.

Furthermore, the environment of 2010 (the likely earliest date Member States would have implemented any new legal instrument in this area) will be farther away still. By 2010, the linear/non-linear split² - already out of date conceptually due to existing technologies such as personal video recorders (PVRs) which allow users to record, pause and time-slip “linear” programmes, and skip advertising breaks - will have no credibility. Consumers will be choosing on an a-la-carte basis from a wide variety of services, linear, on-demand, live streaming, archived, time slipped and so on, to make up their own viewing “schedules”. The increasing degree of control consumers exert over content is empowering them and making prescriptive regulation redundant.

If anything, rather than looking to extend out-of-date broadcast regulation to the online sector, the Commission could consider not pursuing the TVWF altogether and extending the provisions of the e-Commerce Directive to cover the “traditional” AV sector,. In a converging world where consumers’ degree of control and choice has increased immeasurably, de-regulation, not increased sector-specific regulation, is the way to ensure the economic health of the EU AV industry, while ensuring an adequate level of protection for citizens. This is particularly true when viewed through the prism of the competitiveness and economic goals of the Lisbon Agenda and the i2010 programme.

There is a perception in some quarters that the online environment is currently not sufficiently regulated; that it is a virtual “Wild West”. In fact, it is quite heavily regulated by a number of specific instruments, such as the e-Commerce Directive and the Information Society Copyright Directive, as well as a plethora of EU and Member State’s horizontal, generally applicable laws. Where a specific public policy need has arisen, such as in the area of combating child pornography, self-regulation has been successfully developed, to complement existing criminal law, in cooperation with Member State governments. The value of such collaborative initiatives has been recognised by Member States and the European Commission on numerous occasions. Indeed, self-regulation is one of the bedrocks of the Commission’s Safer Internet Action Plan³.

The Commission proposals appear to be based on two assumptions.

² It should also be noted that a definition of an “information society service” already exists (Directive 98/34/EC as amended by Directive 98/48/EC). The proposed distinction between linear and non-linear services is not consistent with this definition.

³ We believe that there is a very useful role for the EU and the Member States to play in supporting and promoting market-based solutions that address specific public policy objectives.

We would take issue with both assumptions.

1. the best way to promote European content and European Broadcasting is to regulate all content providers with the same, outdated regulations, in the hope that it will “level the playing field”;
2. IP TV is just like broadcast TV except it is online.

The notion of “levelling the playing field” has a superficial attraction. However, it is a solution to a problem which in reality does not exist.

In its most infant, rudimentary form IP TV may indeed exhibit characteristics consumers find indistinguishable from traditional TV services, for example, the re-transmission of broadcast channels via the Internet. If the short-term concern is to ensure identical services are subject to identical regulation, then a small change to the definitions in Article 1(a) of the TVWF Directive is all that is needed to “level the playing field”. However we do not believe that the regulation of the sector should be driven by short term policy objectives.

The same cannot be said for the rest of IP TV in all its diversity and richness. The pace of development means that, in a very short time, IP TV will bear no resemblance to today’s broadcast world. As we have already mentioned, many experts⁴ have offered a view of what the audiovisual world will look like in 10 or 15 years’ time and numerous companies are working on the creation of just such services. None of them expect the new paradigm to remotely resemble today’s limited environment. It will be a world of on-demand, streamed, live, pre-recorded and citizen-created services mixed into a melange of interactive information, education and entertainment. At the centre will be the consumer (not the broadcaster), controlling his/her choice of content, the timing, format and so on, and also having the ability to restrict access to certain content for themselves and other family members. Already, Internet users have access to a host of filtering, parental control and other tools enabling them to decide what is appropriate viewing for them and their families. It is not unreasonable to expect similar market-driven solutions to be provided for IP TV.

The Commission’s paper attempts to address this issue by advocating a tiered regulatory approach. The basic tier, applicable to all, would comprise some basic rules concerning the protection of human dignity and minors, the right of reply and some masthead/identification requirements. While Yahoo! Europe naturally subscribes to the upholding of such fundamental rights, we are surprised that the Commission appears to want to create an additional layer of regulation on top of laws and regulation already in existence. The protection of human dignity, for example, is a fundamental tenet in many Member States’ constitutions and basic laws. It is also enshrined in the European Convention on Human Rights, and various Council of Europe and United Nations charters and declarations, to which all EU Member States have committed themselves. The protection of minors receives similar treatment in national, EU and international laws and conventions. We do not believe it necessary to duplicate such laws.

⁴ See for example, the OECD workshop presentations

As regards a prescribed right of reply regime, Member States have their own traditions and have approached the right in different ways. There appears to be good access to a right of reply in offline media in all Member States. For the online world, those Member States, such as France, which feel the need to regulate, have already done so. Others realise that the right of reply online is available to anyone almost instantly, and at little or no cost, by utilising the unique democratic nature of the interactivity provided by the Internet. The creation of a competing website or a reply posted to a bulletin board or chat room takes a matter of minutes. We do not believe the interests of EU citizens are best served by unnecessary and duplicative regulation at EU level when the existing mechanisms are working well.

Conclusion

In conclusion, we respectfully ask the Commission to re-think its strategy for the regulation of the AV industry in the 21st century. We do not believe that the 1980s broadcast regulation is an appropriate starting point. The converging environment is developing quickly and the current regulatory regime is coping with most issues adequately. The few short-term issues raised by convergence - such as identical services transmitted across different platforms - can be addressed by small amendment to the current Directive without a fundamental shake-up of the regulatory environment.

Should you wish to discuss the above further, please do not hesitate to contact my colleague, Andrew Cecil, Yahoo! Europe's representative in Brussels, on acecil@fr.yahoo-inc.com or tel + 33 1 70 91 20 95.

Yours faithfully,

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