

Welcome

Welcome to the first edition of MH Media Update, our regular newsletter including a selection of industry focussed newsworthy topics.

This issue includes an update on the progress on the Audiovisual Media Services Directive, a look at YouTube's spat with Viacom and a review of the deconstruction of copyright by Mr Justice Blackburne in the recent "Whiter Shade of Pale" case.

As we go to press we have also seen OFCOM's announcements of reviews into the pay-TV sector arising from the Sky-Virgin Media battle and the use of premium rate telecoms services in television programmes, (which we covered in our recent Spring MH Update). We will no doubt comment on these further as the reviews unfold.

It is always good to receive feedback and we would welcome any that you may have. We are also aware that feedback takes time and as a gesture of our appreciation following each edition we will have a draw for a bottle of Bollinger, so it is worth feeding back!

The first response drawn from the hat on 1 May will receive the Bollinger.

You can feedback to: lorraine.thomas@marriottharrison.co.uk

We look forward to hearing from you.



Draft Audiovisual Media Services Directive – Light touch or more red tape?

On 9 March 2007, the European Commission published its consolidated draft of the highly controversial Audiovisual Media Services Directive (AVMS Directive). The proposed AVMS Directive has been making headlines mainly because it will, in its current form, extend some television regulation to on-demand content and audiovisual material made available on the internet or via mobile technology. The European Commission, on the other hand, views the AVMS Directive as a substantial deregulation of audiovisual rules and points to significant changes proposed to the rules on advertising, particularly regarding product placement, which will affect all commercial broadcasters.

The AVMS Directive will replace the Television Without Frontiers Directive (TVWF Directive). The TVWF Directive established a single European market for television services across the EU by allowing television services established and licensed in one EU country to be broadcast throughout the EU. It set out minimum standards for advertising and protection of minors and established quotas for European and independent productions broadcast by national broadcasters. When the TVWF Directive was enacted, analogue satellite TV was cutting edge technology and very few people were talking about on-demand services let alone TV on mobiles or IPTV. The TVWF Directive therefore applied only to linear or scheduled television, not to on-demand content.

Regulating the Internet and On-Demand Services

An audiovisual media service provider will only need to comply with the rules of the member state in which it is established. This was the fundamental principle of the TVWF Directive and allowed the UK in particular to become a hub for broadcasters throughout Europe. The proposed AVMS Directive will introduce significant changes allowing other member states to impose further regulations. The AVMS Directive will apply to linear and non-linear services and regardless of the technology used

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but will not apply to services if the audiovisual content is merely ancillary to, and not the principal purpose of the services or if the services are primarily non-economic. Electronic versions of newspapers and audio transmissions (such as radio) are excluded from the AVMS Directive.

The proposal does not therefore *require* member states to impose regulations on non-linear services which are currently regulated by the Ecommerce Directive, general laws including copyright, decency and defamation and self-regulatory schemes. However the proposed AVMS Directive will apply "minimum standards" rules to non-linear services and this is at the heart of the controversy. These rules will deal with:

- protection of minors
- prohibition of incitement to hatred
- identification of the media service provider
- prohibition of surreptitious advertising
- rules on product placement and sponsoring
- some qualitative restrictions on advertising (e.g. for alcohol or those aimed at children).

Revised Rules for Advertising

Under the proposed AVMS Directive, all audiovisual advertising, whatever medium is used to deliver it, would be subject to the same rules as traditional television broadcasting. This includes obligations to identify the advertiser and restrictions on adverts for alcohol, surreptitious adverts and adverts aimed at children.

The proposed AVMS Directive will remove the current three hour limit for advertising each day although the 12 minute per hour limit will stay. The specific restrictions



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on when adverts can be inserted in programmes will be lifted. New forms of advertising such as split-screen, virtual advertising, mini-spots and interactive advertising would also be permitted. Significantly however new, more restrictive rules are proposed for films, news and children's programmes which include a restriction on interruptions more than once every 30 minutes.

Product placement is regulated under the TVWF Directive as "surreptitious advertising". The proposed rules will permit product placement (other than in news, current affairs and children's programmes) subject to certain rules, including that it is clearly identified at the beginning and end of the programme.

What next?

The European Parliament adopted the draft AVMS Directive in December 2006. The next step will be for the Council of Ministers to consider the proposals and the German Presidency of the EU has stated it intends to finalise the AVMS Directive by June 2007. If the Council approves the Directive, it will become law and the UK government will have two years to bring it into force in the UK.

Kirsty Foy

Deconstructing Copyright

With its recent decision in the "Whiter Shade of Pale" case, once again, the High Court has shown that it is not afraid to deconstruct a copyright work where its creation is the product of the input of a number of authors. For forty years, the distinctive "Pale" organ theme has been a familiar part of the contemporary musical landscape. In that time, however, Matthew Fisher, the "author" of the organ passages had received no recognition as co-writer of the song nor had he received any royalties.

During the course of a hearing that occupied six days of the Court's time, Mr Justice Blackburne, with the help of in-depth expert evidence, meticulously deconstructed the song examining each of its component parts in detail. His conclusion was that Mr Fisher's contribution, although in part an improvisation and adaptation, was sufficiently original and different to the original underlying piece as composed by Gary Brooker that, as a consequence in law, Mr Fisher qualified to be regarded as a joint author of the work.

This decision does not create new law – copyright arises in an original musical work and its author (or authors) will be the first owners of that copyright. Of significance, though again not innovative, is the fact that notwithstanding the passage of time, the Court was able to find for Mr Fisher even though he had not pursued the matter contemporaneously. More importantly for the music industry, in applying the term "composition" to a musical passage that is partly adaptation and improvisation of an original theme, the Court has opened the door to the possibility that any session musician contributing an improvised solo to any piece might seek to pursue a similar claim.

Clearly, Mr Fisher's contribution was substantial in that the organ passage is instantly recognisable and a significant component of the song. What the Court has not done, however, is to establish a clear guideline between such a contribution and the extemporised solo – whether or not recorded in a studio or, potentially more problematically, at a live concert that is then released as a recording years, or even decades, later.

As a consequence, those engaged in the recording process might look to the form of documentation that they employ to ensure that when buying out the performance of a musician, claims to co-authorship should also be addressed.

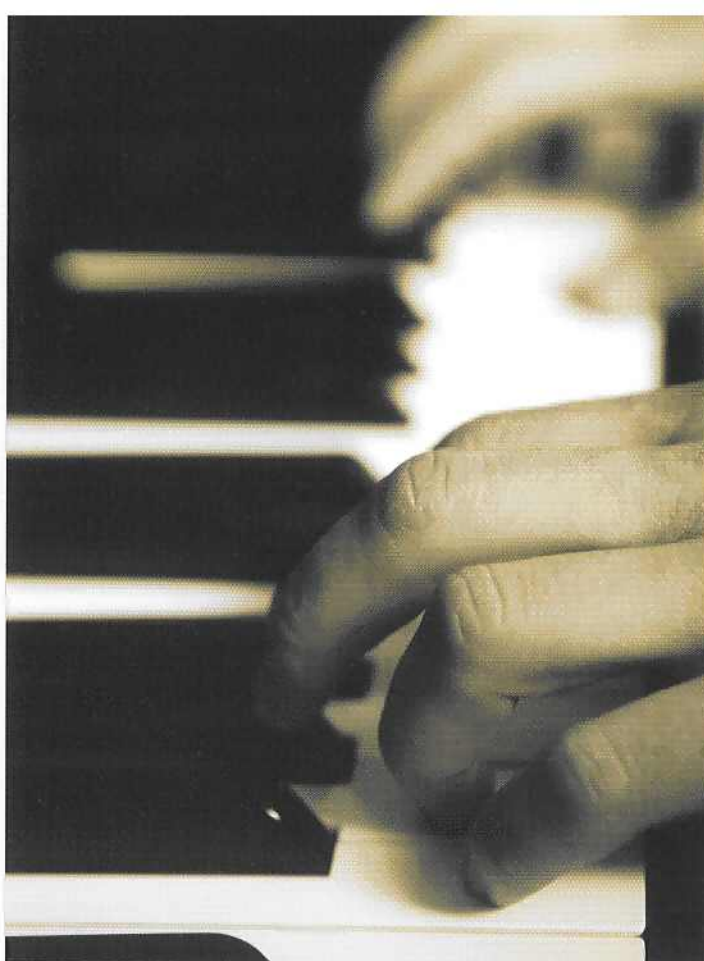
It will be interesting to see whether or not other musicians, particularly in the field of Jazz where improvisation is key, follow the lead taken by Matthew Fisher.

Tony Morris

Digital Rights Management

E-petition calling for a ban on Digital Right Management fails to win over Government

The Government has rejected a call by the anti-Digital Rights Management ("DRM") campaign group, Defective by Design, to ban the use of DRM technologies for digital content. The argument put forward by Defective by Design is that DRM removes the freedom of choice between competing products and locks users into using one particular service and/or device. The Government responded to the e-petition stating that whilst it believed that content providers should be able to protect their content using DRM, the needs and rights of consumers should also be safeguarded. To that end, the response set out the following recommendations in the recent report published by the Government called the Gower Review of Intellectual Property which it said it "welcomed" and will now be looking into implementing:



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- introducing a limited private copying exception by 2008 for format shifting for works published after the date that the law comes into effect
- ensuring that there are no accompanying levies for consumers
- making it easier for users to file notice of complaints procedures relating to DRM tools by providing an accessible interface on the Patent Office website by 2008
- the DTI investigating the possibility of providing consumer guidance on DRM systems through a labelling convention without imposing unnecessary regulatory burdens.

As to whether or not any of these recommendation are implemented remains to be seen and with the DRM debate continuing unabated throughout Europe, the Government may well be forced to take a different approach.

