[GB] Everton TV is not an On Demand Programme Service

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On 26 June 2013, Ofcom (UK's audiovisual regulatory body) decided that the Everton TV section of Everton Football Club's website was not an on demand programme service (ODPS). Everton had appealed ATVOD's decision to Ofcom, after ATVOD (UK's VoD co-regulatory body) had determined on 11 April 2012 that the Everton TV section constituted an ODPS.

When determining whether a particular website or section of a website is an ODPS, two core criteria had to be fulfilled pursuant to section 368A of the Communications Act, namely:

- The principal purpose is to provide audiovisual material.

- Whether the form and content of the programmes comprising that service is comparable with the form and content of programmes normally included in linear (traditional) broadcast television service.

ATVOD's determination was that the Everton TV's principal purpose was to provide audiovisual material to its audience. ATVOD considered Everton TV was a distinct brand and it provided a service in its own right. Furthermore, Everton met the second part of the criteria whereby the form and content of the material on the site was comparable to traditional TV.

However, Ofcom disagreed relying on two benchmark decisions, Sun Video and Viva TV. These decisions indicate factors determining whether the principal purpose was to provide audiovisual material and that such content was comparable to normal TV output. Such factors included whether the TV site have its own homepage, the presentation/style of material and whether on an overall assessment, the audiovisual material could be said to be integrated into and ancillary to another service. This analysis is consistent with the guide recitals such as recital 22 as contained in the EU Audiovisual Media Services Directive which is enacted in the UK via the Act.

Ofcom considered Everton's material was incidental to the purpose of providing a website/fanzine (a colloquial term to describe a journal dedicated to fans of a particular activity) for Everton supporters. Ofcom acknowledged that the material was at face value audiovisual material, but on their interpretation of the facts the

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content was ancillary to the wider functions offered by the overall Everton website. Ofcom examined more of Everton TV's output than ATVOD, and whilst acknowledging that it came close to having its principal purpose as providing audiovisual material the cumulative effect of Everton's material was considered incidental to a wider purpose.

Ofcom considered the second part of the test namely whether the site was comparable in form and content to conventional TV. Consideration, for instance, was given to Recital 24 of the Directive:- "It is characteristic of an on demand audiovisual service that they are "television like" i.e that they compete for the same audience as television broadcasts....". According to Ofcom, Everton TVs material had no consistent style nor format as compared to established TV programmes such as the BBC's "Match of the Day" and "Football Focus". Everton's material lacked the coherence and consistency of say MUTV (Manchester United Television) who had programmes using presenters and formats akin to a conventional TV presentation.

Ofcom made clear that subject matter and size of audience was not relevant, also factors determining principal purpose and comparability with linear TV were not exhaustive or determinative. "However, Ofcom considered that audiovisual material could evolve from something incidental to another purpose ie not being an ODPS to becoming an ODPS in which case a fee would be due to ATVOD".

Decision of Ofcom, Everton TV, 26 June 2013

http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Everton-TV.pdf

ATVOD's notice of determination, Everton TV, 11 April 2012

http://www.atvod.co.uk/regulated-services/scope-determinations/everton-tv

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