

BROADCAST LICENSING FOR IPTV IN THE UK**KEMP LITTLE PRACTICE NOTE****CONTENTS**

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BROADCAST LICENSING FOR IPTV IN THE UK
KEMP LITTLE LLP PRACTICE NOTE

A. INTRODUCTION

1. **Purpose.** The aim of this practice note is to address the broadcast licensing regime applicable to IPTV services in the UK.. The note assumes an IPTV service in the UK which is intended for watching by the viewer in the UK on a conventional television by means of a set-top-box (the “IPTV Service”). The IPTV Service will consist of “linear” (or “push”) content, such as streamed versions of conventional television channels (broadcast according to a schedule), and also “non-linear” (or “pull”) content, such as video-on-demand (where the viewer decides what to watch from a menu, and the content is then transmitted to them at a time of their choosing).
2. **What this note covers..** This note addresses the licences that may be required in the UK under the Communications Act 2003 (the “C Act”) before a service provider can begin to offer broadcast services. It has been prepared as at mid 2007
3. **What this note does not cover.** This note does not deal with:
 - the applicable content regulations – these are covered in a separate practice note which we have authored jointly with Practical Law Company (“PLC”)¹.
 - the general authorisation regime applicable to providers of communications networks or services,
 - the provisions of the various Wireless Telegraphy Acts (which would apply where radio spectrum is used);
 - IP rights licensing or management; or
 - consumer or other generally applicable areas of regulatory protection, or financial services or other sector specific regulation.
4. **Structure of this Practice Note.** This practice note sets out as Section B an executive summary. The overall policy background (which is that the internet should not be regulated) is described at Section C and then, at Section D, this note explains the relevant legislative context. Section E contains a more detailed summary of the relevant law and regulation.
5. **Not Legal Advice.** This practice note is a general description of the issues only, and does not constitute legal advice.

¹ *Audio-Visual Media Services Directive*, produced with *PLCIPIT & Communications*, which discusses the forthcoming EC Directive updating the *Television Without Frontiers Directive*. See http://www.kemplittle.com/PDFs/Press_PLCAudioVisualMediaSvsDirective_May07.pdf

B. EXECUTIVE SUMMARY

6. **“Push” Services.** For the reasons explained below (paragraphs 29-33) it seems likely that a “Push” service intended for reception by the viewer in a similar manner to conventional television will require a Television Licensable Content Services (TLCS) licence. Each “push” channel will require a separate licence.
7. **The appropriate licensee.** Only the person (or company) who has general control over which programmes and other services and facilities are comprised in the “push” IPTV Service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service) will require a licence (paragraph 36 below). This means that in practice it may often be possible for a service provider to provide an IPTV Service to customers without itself having a TLCS licence, because the channel broadcasters themselves will be responsible for this.
8. **“Pull” Services.** No TLCS licence is required for genuine “pull”, or “on demand” services (paragraph 32).

C. POLICY CONTEXT: NO REGULATION OF THE INTERNET

9. **HMG Policy Statement.** A good start point for considering the policy context is the answer to an MP’s question of the Secretary of State in the House of Commons in December 2002 when introducing the C Bill:

“Mr. John Bercow (Buckingham): Will the Secretary of State tell the House *what explains the differential treatment of electronic networks and services in part 2 of the Bill from that of broadcasters in part 3?* ...

Tessa Jowell: In relation to the hon. Gentleman’s ... question ..., *we do not intend to regulate the internet, but ... we intend broadcasting to be subject to a tough content regulatory regime*”.²

This reflected the policy of the White Paper, “A New Future for Communications” of December 2000.

10. **Control of Broadcasting Quality: The White Paper.** Chapter 5 of the White Paper proposed a three tier system of regulating the quality of broadcasting – a basic level of obligation, competition law and additional requirements for public service broadcasters and radio. Paragraph 5.5 of the White Paper summarised the three tiers as follows:

“Our aim is to make the current system of broadcasting regulation clear and consistent by identifying three tiers of regulation. Each tier of obligation requires a different type of regulation. We will make sure that there is a more level playing field within each tier, so the framework is fair and flexible. A basic level of obligations will continue to apply to all broadcasters, including the impartiality and accuracy of news, ensuring fairness and the protection of privacy, preventing harmful content

² Official Report, HC, col. 784, 3 December 2002. Emphasis added.

and giving access to programming for those with disabilities; and all broadcasters will continue to be subject to the Competition Act regime For public service broadcasters, and for commercial terrestrial radio, there will continue to be additional requirements. While the level of public service sought from different broadcasters will, as now, vary between them, we want to achieve greater fairness in their regulation. At the same time we want to increase the extent to which they can regulate themselves in line with general public duties. Of course, these tiers are in addition to the basic laws of the land on, for example, obscenity and defamation.”

11. **Broadcast Material on the Internet and via Telephony – Paragraph 5.9 of the White Paper.** After setting out this three tier system of regulation, paragraph 5.9 stated that:

“In addition to these main three tiers of regulation for broadcasters, of course, there is a further basic tier of regulation which governs broadcast material on the Internet and via telephony. In effect, this is a ‘tier zero’ below the three tiers for broadcasters. Aside from basic laws and the current good practices of self-regulation, which will of course continue, we would expect to see public service broadcasters applying the same high standards and high quality in their services on the Internet and via telephony as they do on their traditional broadcast businesses. The BBC’s high quality and distinctive Online service, which enjoys page impressions of around 200 million a month, is an excellent example”.

12. **The OFCOM broadcasting code.** It is also worth noting the OFCOM broadcasting code (the “Code”³) which came into effect on 25 July 2005. This details the various content rules that apply to broadcasting services and it says (in the forward) that:

“audio-visual content through the internet – a medium unregulated by Ofcom – is increasing”.

D. THE LEGISLATIVE CONTEXT: RELEVANT PRE-C ACT, EU AND COPYRIGHT LAW

Pre-C Act: UK Telecommunications and Broadcasting Law

13. **Before the C Act: How We Got to Where We Are.** “Broadcasting” has not been and is not defined under UK communications law; rather, it has been characterised more by what it was not than what it was. This has come about against the backdrop of the Telecommunications Act 1984 (the “T Act”) and the Broadcasting Acts 1990 (the “B Act 1990”) and 1996 (the “B Act 1996”) and in the context of the restrictions on BT and other national operators against delivering certain kinds of entertainment services to the home.
14. **The ‘Broadcast Entertainment Restrictions’.** Technological advances made it possible by the early 1990s for BT, for example, to supply video and other services to their subscribers via their networks on demand - where the user selected a service and accessed it at a time and place of his choosing. Even though delivered over telephone networks rather than over the air, these on demand services were not subject to the restrictions that precluded telecommunications operators from providing entertainment

³ Available at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/ofcom-broadcasting-code.pdf>

services⁴. In the policy debate about lifting these restrictions, for example in the 1998 Policy Paper 'Broadband Britain'⁵, they were described as the 'broadcast entertainment restrictions', as distinct from (unrestricted) 'on demand entertainment services'. So the conventional shorthand developed of describing services delivered (by whatever means) simultaneously to two or more places as 'broadcast' – effectively, licensable under the B Acts and restricted under the T Act - as distinct from delivery 'on demand'-permitted under the T Act licensing regime and not caught by the B Acts.

15. **Section 13 B Act 1990 and ISPs.** A problem remained however for Internet Service Providers (ISPs). This was because S.13 B Act 1990, in setting out the prohibition on providing unlicensed licensable television services, covered the supply by a UK business of still or moving images⁶ within the definition of "television programme service". Technically, therefore, most ISPs in the UK committed an offence before the C Act came into effect. Since proceedings could not be taken under S.13 without the leave of the UK Director of Public Prosecution⁷ and it was Government policy not to regulate the Internet, there were (as far as we have been able to ascertain) no prosecutions brought against ISPs.

EU Telecommunications and Broadcasting Directives

16. **The 2002 EU Directives.** The 2002 EU telecoms directives address transmission and do not deal with broadcasting or content. In particular, recital 5 of the Framework Directive⁸, after stating:

"the convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework"⁹

states that:

⁴ The legal basis for the 'broadcast entertainment restriction' and unrestricted 'on-demand' services under the old law was relatively complex. Schedule 3, paragraph 3(b) of a typical T Act Licence licensed the provision of any telecommunication service by means of Applicable System except "conveyances of Messages for the delivery of one or more of the services specified in paragraphs (a) to (c) of section 72(2) of the [B Act 1990] **for simultaneous reception in two or more dwelling-houses**' (emphasis added). S. 72(2) B Act 1990 (as amended by the B Act 1996) in turn referred to the categories of broadcasting services regulated by that Act, including any 'television broadcasting service' and any 'licensable programme service'. The key criterion was simultaneous reception in two or more dwelling-houses. This criterion was not met in the case of on-demand services and was met for broadcast programmes.

⁵ "Broadband Britain", published jointly by the DTI and DCMS in April 1998.

⁶ Ss. 2(5) and 2(6) B Act 1990.

⁷ S.13(4) B Act 1990.

⁸ Directive 2002/21/EC of 7 March 2002, OJ L 108/33 (the Framework Directive).

⁹ In addition to the Framework Directive, Directive 2002/20 of 7 March 2002, OJ L 108/21 (the Authorisation Directive); Directive 2002/20 of 7 March 2002, OJ L 108/7 (the Access Directive); Directive 2002/20 of 7 March 2002, OJ L 108/51 (the Universal Service Directive); and Directive 97/66/EC of 15 December 1997, 1998 OJ L 24/1 (the Telecoms Data Protection Directive).

“It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services and is therefore without prejudice to measures taken at a Community or national level in respect of such services in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Council Directive 89/552 of 3 October 1989¹⁰ on the coordination of certain provisions laid down by law, regulation and administrative action in Member States concerning the pursuit of television broadcasting activities. The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection”¹¹.

17. **Council Directive 89/552: the Television without Frontiers Directive.** “Television broadcasting” is however defined by Article 1(a) of Directive 89/552 as:

“the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of ***television programmes intended for reception by the public***. It includes the communication of programmes between undertakings with a view to their being relayed to the public. ***It does not include communication services*** providing items of information or other messages ***on individual demand*** such as telecopying, electronic data banks and other similar services”¹².

“Television” and “programmes” are not themselves defined, but the essential elements of television broadcasting under the directive are that it:

- is technology neutral (‘by wire ... over the air ... by satellite’);
- includes relay (‘communication between undertakings’);
- is intended for simultaneous reception (‘intended for reception by the public’); and
- does not include on demand services (‘messages on individual demand’).

The directive, which is specifically referred to in the C Act¹³, is of course on the point of being substantially revised so as to introduce, for the first time, content regulation on all audio-visual media services. As explained above (para 2) the proposed new directive is outside the scope of this practice note and we have produced a separate note on it jointly with PLC.

UK Copyright Law: A Contrasting Approach to Broadcasting/Internet Issues

18. **UK Copyright Law as Distinct from UK Broadcasting Law.** As will be seen below, the drafters of the C Act, in implementing what might be called the ‘Internet no/broadcasting yes’ policy approach to communications regulation, had to graft new

¹⁰ 1989 OJ L 298/23, as amended by Directive 97/36/EU of 30 June 1997, OJ L 202/60.

¹¹ Emphasis added.

¹² Emphasis added.

¹³ See E.36 below.

legislation on to the pre-existing edifice of the B Act 1990 and B Act 1996. UK copyright law provides a different approach, from the start point of treating “broadcast” as a work in which copyright subsists; and “broadcasting” as a restricted act.

19. **The Copyright and Related Rights Regulations 2003¹⁴ (the “CRRR 2003”).** The changes to UK copyright law made by CRRR 2003 came into force on 31 October 2003 and implemented the EU Information Society Copyright Directive¹⁵ by amending the UK’s primary legislation, the Copyright, Designs and Patents Act 1988 (the “CDPA”).
20. **“Broadcast” - the Work.** Copyright subsists in broadcasts by virtue of S.1(1)(b) CDPA. “Broadcast” is defined at S.6 CDPA. Regulation 4, CRRR 2003 replaced the definition of “broadcast” at S.6 as follows:

"(1) In this Part a "broadcast" means an electronic transmission of visual images, sounds or other information which –
(a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
(b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public,
and which is not excepted by subsection (1A); and references to broadcasting shall be construed accordingly.

(1A) Excepted from the definition of "broadcast" is any internet transmission unless it is –

(a) a transmission taking place simultaneously on the internet and by other means,

(b) a concurrent transmission of a live event, or

(c) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.¹⁶

An Internet transmission is therefore generally excluded from the definition of broadcast as a copyright protected work unless it is characterised:

- by simultaneity of transmission,
- by concurrency where the transmission is a live event or
- as part of a scheduled programme service.

The ‘Internet’ itself is not defined, although it is technology neutral (including wire and wireless).

21. **“Broadcasting” – the Restricted Act.** Regulation 6, CRRR 2003 introduced a new S. 20 of the CDPA by implementing into UK copyright law the UK’s flavour of the

¹⁴ SI 2003 No. 2498.

¹⁵ Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167/10).

¹⁶ New language shown emphasised.

communication to the public right at Article 3 of the Information Society Copyright Directive¹⁷. S.20 CDA provides as follows:

“(1) The communication to the public of the work is an act restricted by the copyright in -

- (a) a literary, dramatic, musical or artistic work,
- (b) a sound recording or film, or
- (c) a broadcast.

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include -

- (a) the broadcasting of the work;
- (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.”

Although “broadcasting”, the restricted act, is not itself expressly defined in S.20, it is clear from S.20(2)(b) that on demand transmission – making available at a time and a place that an individual chooses – is used in contra distinction to and so does not constitute broadcasting.

22. **UK Copyright Law – Summary.** To summarise therefore, the copyright law provisions on broadcasts and broadcasting – which came into effect just a few months after the C Act - show a simpler drafting solution in the intellectual property context to implementing the ‘Internet no/broadcasting yes’ policy approach of HMG. First, they exclude Internet transmissions (without the attributes of reception simultaneity, live event concurrency or scheduled programme service) from the definition of ‘broadcast’, the copyright work; and secondly, they distinguish on demand availability from broadcasting in relation to the new communication to the public copyright restricted act.

E. CURRENT UK LAW

23. **Introduction.** This section briefly considers the repeal of the T Act licensing regime and Part 2 of the C Act before focusing on the provisions of Part 3 of the C Act that are relevant.

Telecommunications

24. **Repeal of the T Act Licensing Regime.** On 25 July 2003¹⁸ and in implementation of the 2002 EU framework¹⁹, the licensing regime established under the T Act was

¹⁷ Article 3 provided for a new communication to the public rights as the exclusive right for authors “to authorise or prohibit any communication to the public of their works, **by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them**; [and]... the exclusive right to authorise or prohibit the making available to the public, **by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them** [of certain types of copyright works]” (emphasis added).

¹⁸ The Communications Act 2003 (Commencement No. 1) Order 2003 (SI 2003/1900).

repealed and the T Act licences revoked²⁰. The licensing regime has now been replaced by a general authorisation regime with General Conditions²¹ of entitlement applicable to all and specific conditions applicable to individual persons.

25. **The New Regime: C Act, Part 2 - ECNs, ECS' and "a content service"**. The new C Act regime²² applies in relation to an "electronic communications network" ("ECN") and an "electronic communications services" ("ECS"). ECNs are defined by reference to transmission²³ and the definition of ECS expressly excludes "a content service"²⁴. "A content service" is defined at S.32(7) C Act to include a service consisting of the "provision of material" as signals for conveyance by an ECN and/or "the exercise of editorial control" over the content of signals so conveyed. The IPTV Service would therefore fall within the definition of "a content service" and so, as such, outside the definition of ECN and ECS and the regulatory regime at Part 2 of the C Act.

Broadcasting²⁵

26. **Introduction.** Unlike the drafter of the new copyright rules that came into effect in October 2003²⁶, the draftsman of the new broadcasting rules in the C Act did not start with a blank sheet of paper when it came to writing up the 'Internet no/broadcasting yes' policy approach of HMG²⁷. The rules as a result are less simple and drafted in a more complicated way.

¹⁹ See para 11 above.

²⁰ S.147 C Act.

²¹ S.45 C Act, as notified pursuant to S. 48(1) C Act. The General Conditions are on OFCOM's website at http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf.

²² C Act, Part 2, Chapter 1, Ss. 31 to 151.

²³ S.32(1) C Act.

²⁴ S.32(2) C Act.

²⁵ This note does not consider: (i) audio/radio broadcasting; or (ii) licensing of TV reception.

²⁶ See Section D above.

²⁷ Broadly, The B Act 1990 regulated "television programme services" provided from within the UK by anyone other than the BBC or the Welsh Authority (effectively, Channels 3, 4 and 5 and satellite TV). The B Act 1990 was amended by the B Act 1996 to regulate *inter alia* digital terrestrial TV as "multiplex services". The 1990 regime also covered independent radio services, extended by the B Act 1996 to digital terrestrial sound broadcasting. The main building block definitions in place under the B Act 1990/B Act 1996 that the C Act draftsman inherited were:

- "**television programme service**", defined (at S.2(4) B Act 1990) in turn to mean:
 - a "**television broadcasting service**" - this is defined (at S.2(5) B Act 1990) as a service consisting of the broadcasting of television programmes for general reception in all or part of the UK. It included a **domestic satellite service** but excluded **multiplex services**, teletext and services whose visual images were wholly or mainly non-representational. 'Broadcasting' and 'television' were not defined;
 - a "**non-domestic satellite service**" - defined at S.43(2) B Act 1990;
 - a "**licensable programme service**" - defined at S.46(1) B Act 1990; or
 - a "**digital programme service**" - defined at S.1(4) B Act 1996.
- "**multiplex services**", effectively digital terrestrial TV - defined at S.1(1) B Act 1996

27. **Broadcasting Regulation under Part 3 of the C Act: S.211.** The start point of the analysis of broadcasting regulation under the C Act is S.211, which provides for certain types of services provided otherwise than by the BBC or the Welsh Authority to be regulated by OFCOM²⁸. These services²⁹ are:
- “**television broadcasting services**” provided from places in the UK with a view to their being broadcast otherwise than only from a satellite;
 - “**television licensable content services**” provided by persons under the jurisdiction of the UK for the purposes of the Television without Frontiers Directive³⁰;
 - “**digital television programme services**” and “**digital additional television services**” provided by persons under the jurisdiction of the UK for the purposes of that Directive;
 - “**restricted television services**” that are provided from places in the UK; and
 - “**additional television services**” and “**television multiplex services**” that are provided from places in the UK.
28. **S.13 B Act 1990: The Prohibition on Providing Unlicensed Television Services.** S.13 B Act, as amended by the C Act³¹, states that providing a “relevant regulated television service” without a licence is an offence. “Relevant regulated television service” is defined by reference to the list above.
29. “**television licensable content services**” and **S.232 C Act.** By S.232(1) “television licensable content service” means:
- “(1) ... (subject to section 233) any service falling within subsection (2) in so far as it is provided with a view to its availability for reception by members of the public being secured by one or both of the following means-
- (a) the broadcasting of the service (whether by the person providing it or by another) from a satellite; or
 - (b) the distribution of the service (whether by that person or by another) by any means involving the use of an electronic communications network.
- (2) A service falls within this subsection if it-
- (a) is provided (whether in digital or in analogue form) as a service that is to be made available for reception by members of the public; and
 - (b) consists of television programmes or electronic programme guides, or both.”

-
- “**additional services**” – including use of spare capacity on analogue signals (defined at S.48(1) B Act 1990); and
 - “**digital additional services**” – the same thing for digital signals (defined at S.24(1) B Act 1996).

²⁸S.211(1) C Act.

²⁹ The list here is a conflation of Ss.211(2) and (3) C Act.

³⁰ See para 17 above.

³¹ S.360(3) C Act and C Act, Schedule 15, Part 1, paragraph 5.

Therefore, before considering the S.233 exceptions, the key ingredients of a television licensable content service are that the service:

- consists of television programmes [para 30 below] and/or electronic programme guides (“EPGs”) [para 31];
- is broadcast by satellite and/or distributed via an ECN; and
- is provided with a view to being and as a service that is to be made available for reception by members of the public [para 32].

We assume that the transmission requirement - where distribution via an ECN is sufficient – will clearly be met in the case of an IPTV service. Each of the other key ingredients is now considered.

30. **“television programme” and S.405.** For the first time in UK broadcasting law, “television programme” is now defined³² as:

“any programme³³ (with or without sounds) which (a) is produced wholly or partly to be seen on television; and (b) consists of moving or still images or of legible text or of a combination of those things;”

This new definition itself contains a number of notable characteristics.

First, the inclusion of still images and legible text extends the definition in terms of content – static web pages would be within the definition if “produced ... to be seen on television”.

Secondly, it is not clear what is meant by “on television”, a new expression in UK broadcasting legislation that is not defined. The definition is important for an IPTV Service as any service consisting of programmes not produced to be seen “on television” will fall outside the definition of television licensable content service.

“Television” is defined for example in the ITU Radio Regulations as “a form of telecommunication for the transmission of transient images of fixed or moving objects”. “On television”, on a common sense interpretation, means something different and evokes over and above transmission both the receiving terminal and also something about the television watching experience. The current plain English meaning still probably denotes ‘watching television in the usual way’.

However, that meaning could be argued to be technology non-neutral which would conflict with the technology neutrality policy objective which the draftsman has been at pains to implement in the legislation as the TV, PC and mobile and broadcasting/Internet/telecoms converge.

Reconciling the plain English meaning with technology advances can be achieved on the basis that the interpretation of ‘on television’ will change as usage changes over

³² S.405 C Act. “Programme” was (and remains) defined at S.202 B Act 1990 as “[including] an advertisement and, in relation to any service, [including] any item included in that service”.

³³ Effectively, retaining the B Act 1990 definition of “programme” – see para 26 above.

time in response to technological change and customer preferences. It would however have the disadvantage of lack of clarity at any particular point in time.

Thirdly, it is not clear what is meant by “produced wholly or partly to be seen” on television. The words imply that a judgement must be made as to the intention of the person producing the programme. Who makes that judgement? Is it objective (whether a reasonable producer would be taken to have produced the programme wholly or partly to be seen on television) or subjective (what was in the mind of the producer concerned)?

A robust, common sense view would suggest that where a service provider buys in content from third parties that is broadcast as or on television elsewhere (for example, BSkyB, ITN, Football Association Premier League (“FAPL”) content) and, through its streaming platform, delivers that content to its customers over its network then that is likely to be considered to be a “television programme” within S.232(2)(b).

This would also extend to include small clips – the B Act 1990 definition of programme refers to “any item included in that service” - there is no *de minimis* exception in relation to television programmes.

31. **EPGs.** An EPG is defined at S.232(6) C Act³⁴ as a service (a) listing and/or promoting some or all programmes³⁵ included in one or more programme services where the programme service providers are or include people other than the guide provider; and (b) facilitating at least partial access to the programme service(s) listed or promoted in the guide.

In launching its consultation on the regulation of EPGs in January 2004³⁶, OFCOM stated that:

“The potential of EPGs is likely to evolve over time as technology improves, particularly if competing providers emerge. Possible developments include EPGs that can respond to voice commands and ... EPGs linked to content providers other than television services.”

We mention EPGs here for completeness as they are outside the scope of this practice note.

32. **“available for reception by members of the public”:** S.361 C Act. The way that the drafter of the C Act has sought to implement the ‘Internet no/Broadcasting yes’ policy

³⁴ The same definition is also included at S.310(8) C Act in the context of OFCOM’s duty to regulate EPGs.

³⁵ See para 30 above

³⁶ “The regulation of Electronic Programme Guides”, OFCOM, January 2004. Available on OFCOM’s website at http://www.ofcom.org.uk/consultations/past/epg/condoc_150104.pdf?a=87101. OFCOM consulted under S.319 C Act and also proposed to regulate BSkyB under S.74 C Act (Specific Types of Access-Related Conditions). On 26 July 2004, OFCOM published its Statement on Codes on Electronic Programme Guides, which included the Code at Annex 1 – available on OFCOM’s website at <http://www.ofcom.org.uk/accessibility/rfcs/consultations/epg.rtf>.

objective has been to graft onto the basic statutory structure inherited from the B Act 1990 and B Act 1996 a new requirement of public availability for the services concerned to be subject to regulation under the C Act.

S.361 contains a convoluted exception for Internet services. The drafter has not written the 'Internet exception' as in the copyright legislation as an exception from regulation except where the Internet is used for a broadcasting-type service³⁷. Instead he has written it effectively as a description of a 'pull', or on-demand, service (as opposed to a 'push' or broadcast-type service). Because of its complexity, the language is set out here in full:

“(2) A service is not to be treated as available for reception by members of the public if each of the **three conditions** set out in subsections (3) to (5) is satisfied.

(3) The **first condition** is that the service is confined to the provision of a facility-
(a) for the making by users of the service of individual selections of the material to be received; and
(b) for receiving whatever is selected.

(4) The **second condition** is that it is only in response to a selection made by a user of the service that anything (whether encrypted or not)-
(a) is broadcast from a satellite or by means of a multiplex service; or
(b) is otherwise transmitted by means of an electronic communications network.

(5) The **third condition** is that the individual selections that may be made do not include any that are limited to electing to be one of the recipients of material that is or has been offered for reception on the basis-
(a) that it is material selected by the provider of the service for the purpose of being made available for broadcasting or distribution simultaneously, or virtually so, to an audience consisting of users of the service; and
(b) that it will be broadcast or distributed simultaneously, or virtually so, to every member of the audience (if any) that consists of the users of the service who have elected to receive it³⁸”.

In essence, in trying to capture what is meant by a 'pull' service, the first two conditions say that on both the supply side (S.361(3)) and the customer side (S.361(4)) the service is only a pull service. The third condition (S.310(5)) is a sort of anti-avoidance provision for services that are in reality pushed even though pulled. It states that the exception will not apply if there are any selections of content that, even though made individually by a user, are nevertheless selected by the service provider for being, and will be, broadcast/distributed simultaneously to the user audience.

So, where a service or content is streamed for simultaneous broadcast/distribution to all customers who have elected to receive it, then even if the user selects it individually, it will be publicly available within the meaning of S.361 for the purposes of S.232.

³⁷ See Section D above.

³⁸ Emphasis added.

As an illustration, where a one minute summary of yesterday's events on 'Big Brother' is made available to each subscriber individually and starting in response to his demand, that will be a genuine 'pull' and fall within the exception and so not be publicly available and not a television licensable content service. If however, 'Big Brother' is distributed live to a subscriber base, then even though users make individual selections, that content is pushed – i.e. distributed simultaneously to the subscriber base – and so is publicly available.

33. **S.232: Summary.** So, very briefly to repeat the S.232 ingredients of a “television licensable content service” before considering the S.233 exception, a “television programme” (a programme produced to be seen at least partly “on television”) and/or an EPG must be made publicly available ('pushed', not genuinely 'pulled') by satellite broadcast or ECN distribution.
34. **S.232: Ancillary Services and Two-Way Services.** Before leaving S.232, it is worth pointing out that S.232(3) provides that any services or facilities that are relevant ancillary services to the main television programme or EPG service are to be treated as part of the main service for the purposes of determining the scope of the television licensable content service concerned.

“Relevant ancillary services” include³⁹ disabled assistance, non-EPG promotion or listing services, and other non-advertising ancillary services relating to the content concerned (such as a “red button” option to view the content from a different angle). They exclude a “two-way service⁴⁰”, whose essential characteristics are set out at S.232(5). These are that the service is provided for the transmission of visual images and/or sounds both by the service provider to users and by users to other users or the service provider. This, naturally, covers ordinary phone calls, and will also extend to cover other peer to peer communications including video messaging and video conferencing⁴¹.

35. **The S.233 Exceptions.** The definition of television licensable content services can be seen as a residual category of regulated broadcasting services and S.233 operates to exclude from that definition:
- multiplex services⁴²;
 - other kinds of licensed broadcasting services⁴³;
 - two-way services⁴⁴;
 - single site services over an ECN at that site⁴⁵; and

³⁹ S.232(6) C Act.

⁴⁰ Itself specifically excluded from being a television licensable content service at S.233(4) C Act.

⁴¹ Specifically mentioned at paragraph 523 of the Explanatory Notes to the C Act.

⁴² S.233(1).

⁴³ S.233(2).

⁴⁴ S.233(4). See para 34 above.

- services provided for users with a business interest in the programmes concerned⁴⁶.

S.233(3) also (again in language that is not clear) excepts a service that is part of another service or one of a number of services where the purpose of the other service(s) is not wholly or mainly not public television or radio. It provides as follows:

“(3) A service is not a television licensable content service to the extent that it is provided by means of an electronic communications service if-

(a) it forms part only of a service provided by means of that electronic communications service or is one of a number of services access to which is made available by means of a service so provided; and

(b) the service of which it forms part, or by which it may be accessed, is provided for purposes that do not consist wholly or mainly in making available television programmes or radio programmes (or both) for reception by members of the public.”

Although the language of S.233(3) is not particularly clear, its key ingredients are that:

- an ECS provider supplies:
 - either a composite service which the television programmes/EPG form part of;
or
 - a facility by which the television programmes/EPG and other services can be accessed; and
- the ECS provider supplies the composite service or the access facility otherwise than wholly or mainly for making television or radio programmes publicly available.

In the language of the Explanatory Note to the C Act⁴⁷, S.233(3) excepts a service:

“that forms part another ECS or is one of a number of services that may be accessed through such a service where the purpose of the service provided by these means is not wholly or mainly to make available television and/or radio programmes for reception by members of the public.

The aim of [this provision] is, broadly, [... to] exclude[e] Internet services, such as web sites or web-casting, from OFCOM's regulatory powers [... and to] exclude not only any website material provided as part of another service (for example, a website which is accessed via an ISP which also provides its own in-house content) but also material provided from a stand alone site, whether it be text, web-cast or video images.”

Although there is no definition of ‘service’ it seems likely that this would exempt conventional internet services which are *capable* of being used for audiovisual content, but it would probably not exempt an IPTV Service which *is* in fact provided “wholly or mainly for making ... programmes publicly available”.

⁴⁵ S.233(5) and (6).

⁴⁶ S.233(7) and (8).

⁴⁷ At Paragraph 526.

36. **S.362(2): the “person ... providing the service ...”.** Finally, we draw attention to the provisions of S.362(2). S.13(1) B Act, in setting out the prohibition on unlicensed licensable services, states that it is the “person who provides a service” concerned without the required licence is guilty of an offence. Even if a service provider is involved in the redistribution over its network of (for example) for example television licensable content services or television broadcast services, it will not be acting unlawfully under that Section if it is not a “person who provides” the service.

S.362(2) C Act provides interpretation for the purposes of Part 3 of the C Act on who is to be treated as providing the service. It states that:

“(2) In the case of [a television broadcasting service and a television licensable content service] the person, and the only person, who is to be treated for the purposes of this Part as providing the service is the person with general control over which programmes and other services and facilities are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service).”

A number of points arise from this new definition (which is not mentioned in the Explanatory Notes).

First, the term “general control” is not defined. In relation to the definition at S.32(7) of a “content service” (expressly excluded from the definition of ECN at S.32(2)), the “exercise of editorial control⁴⁸” over the contents of signals by which material is conveyed over an ECN is central. By analogy, we may infer that general editorial control is at the kernel of “general control” of a Part 3 service, and this is reinforced by the words in brackets at the end of S.362(2).

Secondly, for any service, there can be only one person who is treated as “providing” it for C Act purposes. Although this is helpful, nevertheless what may appear to be one may actually be more than one service when considered from different places in the distribution chain. For example, when a service provider is redistributing FAPL goal clips on its service, is the service to be treated as the goal clips - where FAPL/BSkyB would we imagine claim to have “general control” and the service provider is limited to simply passing unmodified content through its streaming server? Or is the “service” that provided by the service provider itself, where naturally the service provider itself would have “general control”.

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⁴⁸ S.32(7)(b) C Act.