Seminar in Hong Kong hosted by the Hong Kong Broadcasting Authority and the Office of the Telecommunications Authority on Monday 29 August 2005 "Regulation in a convergent environment"

"Content regulation in the multiplatform multichannel digital age"

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In my presentation this morning I made the point that the regulation of the communications industries is very culturally embedded – that is to say, country- and culture-specific. If this is true of communications regulation in general, it is absolutely true of content regulation. The Communications Act 2003 requires Ofcom to regulate broadcast content in relation to and taking proper note of "community standards". Sexually explicit content on television that is acceptable in many continental European countries is often not acceptable in the UK. Conversely, the strict political impartiality obligations placed on British broadcasters are not always present in the regulatory regimes of other continental European countries.

I will therefore talk about content regulation in this new, often bewildering age of digital abundance from the point of view of the UK and will make no attempt to draw parallels for other countries. But I am sure that we all share some of the same concerns.

Old media

Before I come to electronic content, let me very briefly paint in the broader context of UK content regulation by covering a couple of examples of the old media - print and the theatre.

In the UK, the print media and the live theatre were for many many years regulated – that is to say licensed and content regulated - by a combination of church and state. In Shakespeare's time, only two theatre companies were licensed and their patrons, who were close to Queen Elizabeth, kept a regulatory eye on the content of plays. The theatre company in which Shakespeare was a shareholder and for which he wrote and acted was called the Lord Chamberlain's Men when the Globe Theatre opened in 1599, close to where we at Ofcom regulate broadcasting today. When I was growing up in England in the 1950s, a latter-day Lord Chamberlain was still regulating plays in the live theatre for inappropriate content. Female nudity, for example, was allowed on stage as long as no one actually moved.

Today, the live theatre and print media are only regulated by the general law, for example libel and the Obscene Publications Act. In addition, the print

media are self-regulated by the Press Complaints Commission, with no sectoral regulation of the press by Ofcom or anyone else. Films, videos, DVDs and digital games are classified by the BBFC, the British Board of Film Classification, an independent non-governmental body. Their main aim in classification is to protect children from actual or potential harm. BBFC will refuse to classify material which it believes to be in breach of the criminal law.

Labelling is key

Classification, or to use another word rating, will I believe be an important part of the future regulatory picture that I am trying to paint this afternoon. One of the fundamental beliefs of the Ofcom Content Board is that content providers in the digital age have a responsibility, above all, to label material properly. This allows the consumer to make his or her decision to view content with a reasonable understanding of what the content is likely to contain. Labelling can obviously contain ratings or classifications to help citizens self-regulate their own consumption of electronic media and protect their children from harmful content. These can also be linked to filtering, blocking and parental control systems, to which I will return.

Broadcast media

After that very quick glimpse of old media regulation, let me move to broadcast media. Television and radio in the UK today are licensed and content regulated in ways that are a bit reminiscent of the past treatment of print and the theatre. Ofcom, for example, licenses all broadcasters and does have rights to stop retransmission of programmes found to be in serious breach of the Ofcom Broadcasting Code. Ofcom has no rights or role prior to first transmission. Complaints to Ofcom before first transmission are politely noted. Complaints to Ofcom after transmission are properly considered and where appropriate acted upon.

So why are broadcast media in the UK licensed and content regulated by external agencies?

I think there are three main reasons:

- monopolies, or rather the ending of monopolies
- spectrum scarcity
- intrusiveness into the home

Historically, from the 1920s the right to broadcast in the UK was considered a privilege. The use of public airwaves should not be abused. Lord Reith's vision of the BBC in 1925 as a public service broadcaster was posited on the

idea (which lasted until the 1950s) that only the BBC should be allowed to broadcast – ie a monopoly.

The BBC regulated itself entirely on content matters until the formation of the Broadcasting Complaints Commission (BCC) in the 1980s under Prime Minister Thatcher. Mrs Thatcher felt that the BBC's standards on taste and decency were dropping and the BBC needed an external scrutineer.

Commercial television was eventually allowed in the UK in the 1950s but as a second monopoly, funded not by public money/the licence fee but by advertising. The body that ran the commercial television monopoly, the ITA (Independent Television Authority), started out as a combined broadcaster and self-regulator – like the BBC. For example, the ITA's offspring, the IBA (Independent Broadcasting Authority) could still in the 1980s intervene before transmission in what could be broadcast by commercial television companies. Ofcom, the ITA's great grandchild, can only get involved post transmission, as I have already pointed out. As Tim Suter, the head of Content and Standards within Ofcom, has pointed out to me, you could argue that external sectoral content regulation of broadcasting is a recent and passing phenomenon in the UK, and we could gradually be returning to greater reliance on self-regulation.

The duopoly in British broadcasting weakened in the 1980s with the arrival of Channel 4 and cable television followed by satellite television. The IBA became the external regulator of these new channels.

But more people now wanted to broadcast than there was spectrum available. Spectrum scarcity became, alongside the ending of the duopoly, another driver of external regulation. Someone, for example, has to decide who is to be licensed when there is spectrum scarcity. Competing new channels may not be trusted to self-regulate in the ways that monopolies could be trusted. It is interestingly ironic that the arrival of competition in broadcasting ("my channel can be more shocking than your channel") leads directly to the call for external sectoral regulation. In telecoms, the arrival of competition leads to the reduction in external regulation – the opposite!

Let me now turn to the third reason for external content regulation - intrusiveness. Politicians and public opinion quickly realised the power of first radio and then television to influence, harm and offend people in their own homes. Broadcast media are seen as uniquely intrusive into the home. This was the driver behind Mrs Thatcher's creation of the BCC in the 1980s and the start of external regulation of the BBC.

I believe that today, when monopolies of broadcasting are a distant memory and spectrum scarcity is gradually reducing with the switch from analogue to digital, the intrusiveness reason – influence, harm and offence – has become

the dominant reason to go on regulating broadcast content. Intrusiveness into the home will also be the dominant driver for extending regulation, if it happens, to the internet (another intrusive medium in the home). In the UK, 58% of households with at least one child under the age of 18 have a television in the child's bedroom. 9% of UK households with at least one child under the age of 18 have internet access in the child's bedroom.

New electronic media

Whilst Ofcom has clear statutory duties over broadcast content, it would appear to have no statutory powers over content distributed via the internet or 3G mobile phones. This effectively means that television and radio broadcast over cable, satellite and terrestrial platforms, or private IP (Internet Protocol) networks running for example over ADSL, are regulated by Ofcom. Video streaming and audio streaming over the Internet are not regulated by Ofcom.

Sections 232 and 233, 247 and 248 of the Communications Act 2003 set out the definitions of television and radio that drive Ofcom's external sectoral content regulation. The definitions are not technology-specific and that is why I just said that Ofcom "would appear to have no statutory powers over content distributed via the internet or 3G mobile phones".

Television in Section 232 of the Communications Act is defined as "a service that is to be made available for reception to members of the public", "consists (wholly or mainly) of television programmes or electronic programme guides". That would seem possibly to capture video streaming, especially as broadband penetration and speeds accelerate. However, in Section 233, television is defined as "not…a two-way service". Video streaming over the Internet would normally be seen as a part of a two-way service. However, there is an open question in the future as to whether mobile television via 3G may end up being classified as a type of broadcast television. Ofcom technologists tell me that, for example, the mobile television standard DVB-H could be defined as broadcast television.

Spending a few moments on the statutory definitions is important. They bring to the fore one important point. The regulation of communications should aspire to be technology and platform neutral, as set out in the European Directives on telecommunications regulation. Yet in practice, achieving technology neutrality can be very difficult to do.

Television Without Frontiers TWF

This brings me neatly to the revision of the European Television Without Frontiers Directive that is currently beginning to be debated.

The current TWF Directive is confined to TV broadcasting defined as "the initial transmission by wire or over the air, including by satellite…of television programmes intended for reception by the public."

TWF was born of the desire for the European Union to have a single market in television broadcasting and one that could compete with the USA which has by far the biggest share of world trade in television and feature films. TWF has both cultural and economic objectives. TWF does not currently deal at all with radio, just television.

On-demand services (eg point to point services such as video on demand) are specifically excluded from the TWF Directive and are covered by the E-Commerce Directive, the Recommendation on the Protection of Minors and the general law.

The Commission believes that the scope of the TWF Directive is not technologically neutral. TV services which are made available by non-broadcast means are regulated differently to identical services that are broadcast. This is the nub of the matter that faces us all in the new content space. In the UK TV broadcasters are required to be accurate, fair, impartial, not cause harm and offence, not invade privacy without justification – all the socalled Tier One negative content rules and principles set out in the Ofcom Broadcasting Code. And these are all things which our research tells us that British people want from their broadcasting.

But something that could look very like one-way TV broadcasting but is delivered over the two-way public internet need not follow these rules. We at Ofcom are able to regulate broadcasters' programme output on air following complaints about unfairness but have no statutory powers as far as their linked websites are concerned.

Audiovisual content on the Internet

Given this regulatory asymmetry, what is to be done.

There are really three options – do nothing; roll out sectoral content regulation on to the internet; or roll back sectoral broadcast regulation to allow for equivalence of treatment with internet broadcasting as it comes of age.

Let me analyse these options, speaking personally as an Ofcom board member but NOT representing the definitive Ofcom view. The reason for this is that Ofcom has not yet given its view on these matters. Much research, evidence gathering and thinking will go on before Ofcom formulates a view, triggered by the forthcoming debate on revisions to the TWF directive. Let me try and give you a flavour of how Ofcom might think about these things.

Do nothing

This must clearly be an attraction for Ofcom. As I noted this morning, one of Ofcom's key regulatory principles is "bias against intervention". Ofcom does not seek to extend its powers. Indeed in its first two years it has demonstrated its desire to move towards more self- and co-regulation because, philosophically, this appears to us generally more appropriate in the digital multichannel age. For example, we no longer regulate the content of television and radio adverts – that is now done under a co-regulatory arrangement by the Advertising Standards Authority (ASA). The ASA today regulates all forms of advertising from print to billboards to broadcasting and the internet – now that is true convergence and platform neutrality.

I sometimes when speaking to audiences in the UK about content regulation assert that there are two regulators in your living room – Ofcom and Offswitch.

In reality, the option of "do nothing" – in the sense of take no action and provide no guidance - is not likely to be serious given legitimate citizen and consumer concerns and our statutory duties to "further their interests".

But a modified "do nothing" strategy is one which will undoubtedly be explored further in the debate ahead. This would start from the basis of ensuring that illegal audiovisual content – content which breaches the law – is blocked by internet service providers (ISPs) in the UK. At the moment this happens with illegal child abuse sites thanks to the very determined efforts of the Internet Watch Foundation (IWF). British Telecom runs a Cleanfeed service. This blocks websites identified by the Internet Watch Foundation which itself works closely with the police. Already, the proportion of material reported to the IWF found to be illegal which is hosted in the UK has fallen from 18% in 1996 to less than 1% for the past several years.

But there are issues to resolve. Not all ISPs use Cleanfeed. UK ISPs want to be seen as no more than common carriers/content carriers and therefore believe they should not be held responsible for the content they distribute. As a result, some ISPs tend to be shy about promoting the use of Cleanfeed. There is a strong historical/cultural association of the internet with no censorship and no content regulation – the wild west of content in the digital world.

Personally, I cannot understand why ISPs in the UK, a democratic country run under the rule of law, should not encourage and be seen to encourage the blocking of sites containing content which is clearly in breach of UK law, and which their customers may find offensive. The original rules of "common carriage", dating from English transport/freight policy in the 17th Century, and

taken over into US telecoms regulation, require the carrier to carry all material at regulated prices but only material that is within the law. Since more and more ISPs are willing to have illegal child abuse sites blocked, then they have accepted one basic principle about being a common carrier – you are not required to carry illegal content once that illegal content has been notified to you.

There is one other issue – the blocking of sites in the UK is done purely for child abuse cases because that is the remit of the Internet Watch Foundation. Blocking does not yet extend to other illegal sites.

Illegal content has two dimensions – content which it is illegal to create or publish/host (for example, incitement to racial hatred) and content which it is illegal to create or publish/host and which additionally it is illegal simply to access/view/download (for instance child abuse images).

"Modified do nothing" would take as its starting point the principle that all websites, wherever hosted in the world but deemed illegal to view under UK law, should be blocked in the UK.

The real problem then arises with sites which are grossly offensive but not illegal. These can be subdivided into material which is harmful and material which is "simply" offensive. These two types of material – harmful and offensive - are very effectively handled by the type of code-based content regulation of broadcasters we do at Ofcom. Under the modified do nothing option, there would be strong encouragement to self-regulation and blocking for harmful sites, and the use of labelling, classification, filtering and parental control systems for offensive sites. Attempts to do this so far in the UK internet space have not been especially successful.

One could imagine moving towards a situation whereby a body like the Internet Watch Foundation could be given the responsibility to identify material that was harmful but not illegal. Then content providers and ISPs in the UK could be invited to block access to such material, not on legal grounds but on the basis of corporate social responsibility towards their customers. This might be a non-statutory, self-regulatory approach that would be relatively quick and cheap to establish and could operate sensitively and flexibly. Such action could stop any growing demands for the introduction of external statutory regulation.

So the modified do nothing strategy would enforce the blocking of illegal material beyond just child abuse sites; would encourage a self-regulatory approach to material that was legal but harmful; would encourage classification/filtering systems for material that was legal but offensive; and would use the general law (as it stands, or with necessary revisions) to stop

other problems such as phishing, hacking and other fraudulent uses of the technology.

The internet is not the wild west. The internet is already regulated by the general law, just like the print media and the theatre. The music industry in the UK is now actively pursuing people found illegally pirating copyrighted music material on peer to peer file-sharing networks.

Roll out sectoral content regulation to the internet

This appears to be the option that the European Commission is likely to favour. The scope of the new TWF directive is likely to cover all audiovisual content (AVC) services “made up of moving pictures and sound” including material delivered via the internet and 3G phones, “delivered to the general public” “by electronic communications networks”. The Commission may propose that AVC services should be divided into linear and non-linear, with linear being like television broadcasting and non-linear being downloadable content, such as video on demand. The linear services on all platforms including the internet would be subject to a stricter tier of regulation along the lines of the current TWF rules, modified as necessary. The non-linear services on all platforms including the internet would be subject to a basic tier of obligations concerned with the protection of minors and human dignity, advertising rules and the right to reply (ie fairness).

Ofcom is considering its response to this but starts, I readily admit, from a residual nervousness about extending the scope of the Directive to the internet. We are suggesting the Commission approaches the task of any revision of the Directive mindful of four principles:

- Be **evidence-based**. If more protection is going to be introduced, evidence is needed that current levels of protection are inadequate.
- Produce a **net benefit**. A regulatory impact assessment must be conducted and changes introduced only if they yield a net benefit to consumers and citizens.
- Be **proportionate**. A key regulatory principle in the UK and Europe in our modern world.
- Be enforceable using **self and co-regulation** in preference to state-based sectoral enforcement.

I personally will need convincing that the distinction between linear and non-linear will be easy to draw just as I am today increasingly confused as to what should or should not be defined as broadcasting. When I listen to radio stations on the internet, does the buffering delay at the start, required by the limitations of packet switching protocols, make the radio broadcast linear or non-linear? When does buffering become downloading and therefore non-linear? If we are really serious about regulatory equivalence and technology

neutrality, might it also be difficult to justify regulating a television programme within a non-linear service differently from the very same programme within a linear service?

Roll back existing content regulation rules on broadcasters

This third policy option is already happening. If you compare the IBA's regulation of broadcasting in the 1980s in the UK with Ofcom's today, a lot of rolling back has happened. I have already mentioned the move from pre-transmission to post-transmission regulation. In 1990 I joined the Radio Authority - one of the three children of the IBA, alongside the BSC and the ITC. One of the first policy decisions Radio Authority Members made was to stop all regulation of commercial minutage volumes on commercial radio. The market has regulated minima and maxima perfectly well since. Obviously if you have a monopoly commercial radio provider, this would not happen. Commercial minutage volumes on television are, by contrast, still regulated – indeed they form part of the current Television Without Frontiers Directive.

Conclusion

I have tried to give you a flavour of the issues we face in the UK now that over 60% of homes enjoy digital multichannel television and radio, now that more homes are using broadband to access the internet than dial-up, now that revenues from mobile phones are now greater than from fixed phones.

I have restricted my remarks in the time available to content regulation in terms of what we in the UK jargon call Tier One – negative content regulation, what broadcasters should not do. I have not had time to talk about other important tiers of content regulation (eg quotas for local content production, or public service broadcasting remits). These are also under considerable pressure in the multiplatform multichannel digital age and will require great care and nurturing – perhaps we could talk about these in the questions that follow.

The world HAS changed. The regulation of two or three or four channels is fundamentally different to regulating 500. The arrival of the internet platform does introduce regulatory asymmetry. The balance has to be got right, for example, between the traditional British respect for freedom of speech, freedom of religion and the new challenges posed by websites inciting religious and racial hatred.

We may also be moving away from a world where a small group of people in society create and distribute content to the rest of us, and towards an era of much greater access to the spot in front of the camera and in front of the microphone.

The new disruptive technologies of digital convergence mean that many many more citizens are able to become content producers and publishers, just as desktop publishing software on PCs twenty years ago radically reduced the elitism in print publishing and fundamentally changed the structure of the printing industry. Think now of blogging, podcasting, peer to peer file sharing, and the recent use by newspapers and the broadcast media of pictures taken by London Underground commuters with their 3G phones during the 7th July bombing attacks.

The Church in Europe in the Middle Ages did not like the bible being published in the native language, for example Martin Luther's German, because it broke the elitist power of the clerics hiding behind the Latin language.

We are living through those seismic shifts in society again!

And again! And again!

Thank you for putting up with me twice in one day.