

Content regulation in an internet age

By Tim Suter

The current system of audio-visual content regulation grew out of the alignment of four factors:

- **Distribution** was limited to a linear schedule
- Consensus among broadcasters on a **core of common standards**, and a culture of responsibility in delivering them
- **Geographic limitation** as a result of terrestrial transmission – which restricted the number of players, and limited content from other, non-UK providers
- And a **consensus among audiences and policy makers** that broadcasting had some characteristics – ubiquity, persuasiveness and limited opportunities for choice or diversity – that made regulating its content necessary

These factors combined to create a powerful set of assumptions about regulation, which endured even as individual elements became weaker – when the primacy of the linear schedule was challenged by time-shifted viewing, or when new technologies permitted far greater choice and diversity of services.

And even as it became clear that a wholly different environment was developing online – with much closer affinity to the unregulated world of publishing – the consensus still just about held that broadcasting was, well, different and special.

But the government knows these assumptions cannot hold indefinitely. They are under pressure from at least four directions:

- It is not obvious why the same content – even, perhaps, accessed on the same device – should nevertheless be subject to various different regulatory systems (content viewed on broadcast is regulated by the broadcasting regulator, but if viewed on catch-up an hour later, it is regulated by a separate organisation with a different code covering a different set of standards)
- It is not obvious why some businesses should be at competitive disadvantage by being forced to observe stricter rules, say, on how they generate advertising, or the opportunities they can afford commercial partners, than other content service providers
- It is likely that, without a system that delivers clarity and certainty, inward investment into new and innovative content services will be deterred and growth endangered
- It is no longer obvious to whom the regulation should apply, in an increasingly complex chain of responsibility between the creator of the original content, the aggregator, distributor, platform operator and owner of the direct relationship with the consumer

One logical, and often touted, answer is to focus content regulation on the content itself rather than the service or even the platform. This certainly neatens things up: the same content attracts the

same regulation, and there is no regulatory advantage, commercial or otherwise, to switching between platforms. Platform and technology neutral regulation, in fact – the lode star of policy makers.

The traditional objection to this approach – and it is a very significant one – is that policy makers are then faced with the unenviable decision of how far up the regulatory scale the harmonisation should go: level up to the current broadcast system, or give broadcasters the freedom currently enjoyed by online services.

In truth, this is an unappealing choice – not just because it is difficult, but because neither approach will command universal support. Those who worry about the sexualisation of children, the ubiquity of commercial messaging, the erosion of a watershed principle – and it is clear that many people, including many voters that Jeremy Hunt and his government will want to woo, fall into this camp – will be alarmed by the prospect of a content free-for-all. And recent outbreaks of riots and looting, raising concerns afresh about a “broken society”, will make those voices louder, not softer.

Meanwhile those who champion the internet as the bastion of free speech and the unmediated expression of opinion will balk at the prospect of heavy-handed state control. And positions are so entrenched that a compromise is more likely to inflame opinion than to represent a happy medium.

There is another, more fundamental problem with the “platform and technology neutral” approach. Broadcasting regulators use context as a key factor in coming to a judgement, which allows them to limit the collateral impact on free expression: the judgement applies to that content in that context only, aimed at that particular audience on that particular service with those specific characteristics. Robbed of context, the regulator can judge only the content itself, in isolation. And forced to take decisions without regard to the audience who consumed it or the service that carried it will probably make regulators much more wary of judging against any piece of content – since it cannot be limited by context and becomes, effectively, an outright ban. And if it doesn’t make them wary, it certainly should.

So the government should instead take this opportunity to ask if there is a similar alignment of industry and public factors to build on. And I believe there are at least four factors that could combine as the basis of a new regulatory approach:

- The emergence of a set of broad content issues that are unrelated to the platform or medium on which they are carried – such as the unacceptable invasion of privacy, or unfairness of coverage – where cross-industry, and cross platform, work could lead to common approaches. Recent events in relation to phone hacking, and the inevitable revision of “independent” regulation of the press offer a real opportunity here
- The self-interest of major broadcasters to be seen to adhere to a “higher” set of standards – and to apply these across the board to all of their content, including on-line
- The emergence of more mature understanding on the part of consumers and policy makers about the need for a more active and informed approach to their own choices (the old “media literacy” agenda) – and the emergence of audience-led initiatives to deal with inappropriate content

- And a growing acceptance of a more tiered structure for regulation – with a mix of statutory and independent regulation

So what might a future regulatory system look like? It might be one where content itself falls into four categories:

- Illegal content, which would be dealt with by the criminal or civil courts (such as incitements to crime, libel)
- Content that while still legal nevertheless treats individuals or groups of people unacceptably – such as issues around privacy and fair dealing
- Content that is unacceptable to some, and which therefore requires some action from either the regulator, the provider and the audience to ensure protection
- And finally, entirely unobjectionable content

The statutory regulator might apply standards which would be mandatory for the PSBs, across all their content, but which others – broadcasters and non-broadcasters alike - could voluntarily subscribe to, submitting themselves either to the statutory regulator's oversight, or to the oversight of an industry body that would be accredited by Ofcom. Accreditation could attract benefits: EPG listing (where relevant), use of kite-marks and so on.

The regulator's standards could be compulsory in those areas like privacy and unfair treatment – even if enforced by self- or independent regulators. Organisations that chose not to adopt the regulator's standards in relation to broader content issues – typically issues around offensive content - would have to make that decision clear to the consumer: they might also be required to contribute to the campaigns to build audience awareness and literacy.

Notwithstanding Brussels' interest in regulating advertising, the UK should nevertheless do everything it can to move towards a regime based squarely upon ensuring fair competition, undistorted by confusing and irrelevant content or service specific rules.

Broadcasting used to be regulated because it was special – and it was special because of some intrinsic characteristics of the medium. A new regulatory structure should reverse this: use the good instincts and behaviour of the PSBs as the core of a set of standards, which others can opt in to. So they will be special, not because of the medium but because of the commitments they make.