

## A new framework for content regulation – getting the post-Leveson deal right

By Tim Suter

Jeremy Hunt used his speech to the recent RTS Cambridge Convention to challenge the press to bring forward realistic plans for a new approach to self-regulation. And, as the Leveson inquiry gets underway, the pace has perceptibly quickened in the search for an alternative model to the PCC.

In this paper I argue that reform of the PCC, while necessary, should not be at the expense of wider reform of the content regulatory system itself – indeed, that the opportunity presented by the current spate of reviews, and the promise of a legislative slot, is an ideal moment to align the whole system better to the needs of the future.

The current system is characterised by a very sharp divide: statutory regulation by Ofcom of a significant but limited number of broadcast content services, and a much larger number of self-, co- and un-regulated services – which nevertheless deliver much the same (and not infrequently identical) content to many of the same consumers, often via the same device.

There were sound reasons for creating this clear demarcation: at the time of the last Communications Act, and in European debates since, much debate focused – rightly – on limiting Ofcom’s direct regulatory role, so that it would not impose stifling obligations on new and emerging services whose differences from broadcasting were every bit as important as their similarities.

And this binary system has served us quite well. Ofcom has been able to extract meaningful and serious obligations, backed up by real investigative powers and, where necessary, sanctions, on the content services it licenses. Wider industry, meanwhile, has been mostly spared an unnecessarily heavy touch.

But, even without the weaknesses exposed by the recent phone-hacking scandals in some parts of the press, there are drawbacks to the Ofcom led approach – drawbacks which will become more troublesome in future. First, it has imposed a polarity to the debate that is ultimately unhelpful – as the debate over press regulation has shown, it would be very helpful to have some aspects of statutory regulation, such as powers of investigation and even potentially of sanction, available. But equally important, the price of restricting Ofcom’s regulatory scope has been to corral it within the “broadcasting” sector – and I argue that this emphasis is ultimately unhelpful at a time when we want Ofcom to have a more even-handed and comprehensive relationship across all services, but without having to regulate them.

And the “one-stop shop” doesn’t really work now, either: restricting Ofcom’s regulatory role to broadcast distribution means that content services are already having to deal with a number of different regulators – for their on-demand services, for their advertising, for their use of premium rate services.

So I believe there is an opportunity now for a radical, future focused reformulation of the content regulatory framework, built around the following core principles:

- **All regulation of content should in future be carried out by industry led bodies.** Content regulation needs to be able to evolve as content services themselves evolve. Some of these bodies may best be created around types of multi-media services – for example, a single body that would cover all of the services provided by the press, or similarly for public service broadcasters; others may be better based around distribution platforms or types of service – for example an industry led regulator for IPTV providers or non-PSB broadcasters. Audience behaviour and expectation should very largely define which approach is taken – with every expectation that it could change over time. In this way the overall framework can keep pace with the changing nature of services, and the changing shape of the industry, without the constriction of statutory dividing lines.
- **Ofcom should define the content outcomes that are relevant for different types of content service, and require that these outcomes be reflected in the codes of practice drawn up and enforced by the industry led bodies.** The law should stipulate the potential range of content outcomes that Ofcom must secure – such as adequate protection for minors, the avoidance of harmful content, the protection of privacy, fair treatment, impartial and accurate news; but it should leave Ofcom as much flexibility as possible to decide which outcomes should be delivered by which types of service – for instance, leaving Ofcom discretion to require certain types of television service to provide accurate and impartial news, without applying it to the press.

In this way, Ofcom could minimise the impact on industry of having to deal with a multiplicity of regulatory bodies: if Ofcom decided that impartial news should be requirement of any particular kind of television service, then the press code would have to reflect this. But Ofcom would also still be able to ensure some essential requirements are fulfilled.

Ofcom should also be required to keep the performance of these industry bodies under review, to make sure they are delivering the specific outcomes that Ofcom requires – and also keeping an eye on whether they continue to command public confidence.

- **Ofcom should require media organisations to submit any services they offer to the relevant code – and in the event that they decline to do so, Ofcom itself should enforce the industry code.** Public confidence will be ultimately unsustainable if organisations can withdraw unilaterally from any form of external regulatory oversight. So Ofcom needs robust and defensible ways of defining the sorts of services that ought to be covered by some sort of code: and it should be able to apply the industry's own code to any service that declines to bring itself in line with the industry body and require the service provider to make that shift in regulator very clear and unambiguous to its consumers

Ofcom may well need the new legislation promised by Jeremy Hunt to give it the power to enforce this.

- **Ofcom should act as backstop to all the industry bodies, with powers to sanction on the recommendation of the industry body.** The power to investigate, and where extreme or sustained abuse is found, to sanction, is important for the credibility of any regulatory system; but it is also the area where some form of compulsion may need to be backed up by a body with more formal statutory powers. A newly focused Ofcom is the logical body to exercise these powers, on behalf of, and following a recommendation by, the industry led body.
- **Ofcom should significantly reduce its licensing of content services.** “Licensing” is a dog-whistle issue in this debate: a licensed press is not a free press. But it is hard to see the need for licensing beyond the very limited number of services that use scarce public resource, like spectrum, or which receive some other kind of public support in return for specific content obligations. Ofcom’s licensing role should be reduced to this – meaning that the very large number of television services delivered by means other than terrestrial broadcast would no longer need to be licensed.

None of this is necessarily easy: and it could only work if the government took the opportunity of the forthcoming legislation to give Ofcom the powers to require these codes and industry bodies to be put in place – and to enforce them where necessary. This should be balanced by an obligation on Ofcom to consult and the right of industry to appeal, to make sure that Ofcom does not over-reach itself. But this radically different approach to content regulation would meet the two most significant challenges that we face. First, it would introduce some limited but important back-stop powers for the self-regulation of the press, such as compulsion to submit to the regulatory code, or the power to sanction, but without bringing the press under any form of licensing or statutory regulation. And second, reducing Ofcom’s direct regulatory role would allow it far greater freedom to deal evenly with all content service providers, rather than locking it into a particularly intense relationship with one group of providers – but without reducing its ability to use its oversight of the industry bodies to make sure that important outcomes were still being delivered.