

BRITISH HUMANIST ASSOCIATION

RESPONSE TO OFCOM CONSULTATION ON CITIZENS, COMMUNICATIONS AND CONVERGENCE

The lengthy debate leading up to the adoption of sn 3(1) of the Communications Act was based on the concern of many legislators and many civil society organisations and individual members of the public that the Government's formulations of Ofcom's role as relating to the interests of *consumers* or *customers* were inadequate to capture the real needs of the situation. The Government had after all itself included the interests of citizens in its White Paper (Cm 5010) preceding the Bill. As the subsequent parliamentary Joint Committee said (para 24):

Evidence we received reflected genuine concern that the democratic, social and cultural interests of citizens, most notably in relation to broadcast content, were not given due weight in the formulation of OFCOM's general duties.

The defeat of the Government - by a huge majority of 179 to 75 - in the House of Lords at the Report Stage, by which the current section 3(1) defining Ofcom's duties was inserted into the law, made it fundamental to the law that the interests of consumers were not necessarily the same as those of citizens.

One might have expected therefore that Ofcom would at an early stage have examined the duality of this basic definition of its duties with a view to distinguishing and defining its two roles and their possible synergies and conflicts.

It might for a start have recognised its own ambiguous use of the word "consumer", to apply not just to people but also to companies, as corporate exploiters of spectrum for profit. This ambiguity makes much that Ofcom says about consumers' interests difficult to interpret.

It might then have noted that the word 'citizen' is related to *civic* life - it relates to the individual not as an isolated consumer of goods, an economic unit, but as a member of a collectivity - a self-governing society, in which the citizen has both rights and responsibilities. It might have decided that citizens are individuals seen as members of a community - a collectivity based on sharing certain common burdens and benefits. Citizens are essentially active, if often minimally, in a communal enterprise.

It might by contrast have seen that consumers (when not corporate) are essentially individuals in a competitive market, seeking, in their contractual relationships with suppliers, to exploit the choice offered to their economic benefit so as to meet their individual desires. Ofcom might have noted that its important role of (broadly) promoting market efficiency while ensuring consumer protection had little to do with the civic role previously discussed.

It might also have called to mind as highly relevant background in the orientation of its policy the ever-present danger of the “tragedy of the commons” - that the uncontrolled pursuit of selfish interests can often lead to the impoverishment of all. The interests in question may (as noted above) be individual consumers or media companies “consuming” the spectrum.

Markets may usually work for the benefit of all, at least in the long term, but not all goods fit an economic model. Some - and Ofcom might have considered whether broadcasting was not a case in point - depend on cooperative communal use and can be destroyed by competitive individual exploitation. They require protection by rules designed to ensure their use for the maximum benefit of the community: if individuals lack confidence that such goods will be protected they will resort to competitive grabbing of what they can to the long-term detriment of all.

At a time like the recent past, when the market with its language of competition, consumer choice and short-term individual and often corporate has been dominant, these considerations might have seemed unfashionable and out of place. Ofcom might therefore have reflected that this was precisely why Parliament enjoined it in s3(1) to have regard to such considerations. It might be a ‘given’ that in a market consumers need protection, and that a regulator of broadcasting should have such a role would almost go without saying. That the House of Lords, after such long debate, made such a point of specifying care for the interests of citizens separately from those of the same people as consumers might have indicated to Ofcom that here was something very particular that they needed to examine - a duty they needed to think about and take care to fulfil.

Sadly - scandalously - Ofcom did none of these things. Set in its ways as a shadow body long before the Act was passed, it made no adjustments or change of course. Its chairman, Lord (David) Currie, was clearly unwilling to acknowledge the sovereignty of Parliament and in effect said so during the Report Stage debate, warning against changes that might:

distort the fundamental architecture of Ofcom. That architecture has been two and a half years in the preparation. No doubt, there is room

for some changes, but it is not the time to pull out foundation stones when the Bill is almost complete—otherwise, the law of unintended consequences might kick in with a vengeance.

So far were we from unintended consequences, however, despite this fundamental amendment to the Bill, that Ofcom never (as far as can be seen) discussed the new duty it had imposed on it in s3(1). Instead, it ignored the law and elided the difference between citizens and consumers - or rather, it had regard only for the interests of consumers and pretended that those of citizens were identical.

Just a few days after the Lords' debate, Ofcom (again through the voice of its chairman, Lord Currie) showed its colours, blatantly misrepresenting the effect of the amendment:

You may well have noticed that the careful balance established in the Communications Bill between the duties to citizens and those to consumers has been upset by a recent House of Lords amendment, pressed by Lord Puttnam, that requires Ofcom to give paramountcy to the citizen in all matters concerning broadcasting and spectrum. *[In fact the amendment said the reverse.]* . . . This late change . . . seems to us to be unfortunate. The law of unintended consequences applies all too often to late legislative changes, and I fear that it may apply with a vengeance to this change, especially in a converging world. What we need is a law which is capable of protecting what we cherish but flexible enough to embrace future change.¹

Stephen Carter, then Ofcom's Chief Executive, also propagated Ofcom's misrepresentation of the amendment, saying that it required Ofcom 'to give primacy to the citizen interest at all times in broadcasting'² and eight months later he presented the debate as one between:

those who hoped or feared that Ofcom would approach its tasks wholly through an economic prism and would sweep away anything subjective that could not be encompassed by a market analysis; and those who hoped or feared that Ofcom would give primacy to the cultural and political themes and would intervene subjectively and distortingly into market choices.³

The intent of those who moved the amendment was that these two tendencies should be balanced, with the economic one having primacy where the two could not be reconciled.

Deliberately or mistakenly misdirecting themselves as to the law, Ofcom defiantly adopted for the next few years the term “citizen-consumer”, as if there was identity between the two. Even in his speech to Voice of the Listener and Viewer Carter offered only a minimal explanation, itself shot through with consumer rather than citizen considerations:

There has been some comment on the semantic formula Ofcom has used to give effect to that: the citizen-consumer. It may not be the most elegant formulation ever devised. But we make no apologies for it. We believe it truly reflects Parliament’s will. It reflects a truth that is at once simpler and more complex than the crude characterisations of each side of the debate. Let me say once and for all what it means and why.

It means that there is a set of civic virtues that cannot be captured by the buy and sell of the market. The market is a means not an end. But equally that the market may be, though will not invariably be, a better and less arbitrary means to those ends than others that humankind has yet devised. As to ‘why?’: internally it is an important signal to the component bits of Ofcom that the broadcasting parts cannot ignore the market . . .⁴

Yet Ed Richards, a senior member of Ofcom’s Strategy and Market Developments section, came to see things differently. In a speech to the Westminster Media Forum in May 2004 he foresaw a decline with digitisation in the importance of Ofcom’s consumer protection role:

Are there residual consumer market failures in this future broadcasting market? Let's wait and see how the argument develops but we should be clear - if what we don't like is the outcome of consumers expressing their preferences in an open market, then that is not a consumer market failure. It may be that we object to the outcome for other reasons - **perhaps as citizens**, perhaps on grounds of fairness or other social concerns - but we should not rest our case on claiming that the market has not worked, when that is precisely what it will have done. *(Emphasis added)*

He went on to define our interest as citizens in broadcasting:

It can support a society which understands different points of view, it can contribute to an effective, healthy democracy, and it can reflect and strengthen our culture including the many different identities within contemporary Britain . . . It can also deliver value through stimulating learning, and encouraging participation and engagement in society.

Then - questionably, since the White Paper (p.79) had seen the two as different - he identified the interests of citizens with public service broadcasting (which is a different if overlapping concept) and recognised that its purposes, which he formulated as:

To inform ourselves and others and to increase our understanding of the world through news, information and analysis of current events and ideas
To reflect and strengthen our cultural identity through high quality UK, national and regional programming
To stimulate our interest in and knowledge of the world, including the arts, science, history through content that is accessible, encourages personal development and promotes participation in society
To support a tolerant and inclusive society through the availability of programmes which reflect the lives of different people and communities within the UK, encourage a better understanding of different cultures and perspectives and, on occasion, bring the nation together for shared experiences.

could not be left to the market:

So we are not saying that the market will not deliver, rather that it will not deliver enough. That even in a digital world, there will be under provision of programming that meets these purposes.⁵

But Richards' perceptions had no effect on Ofcom's equation of citizens and consumers. The only mitigation forthcoming was that in due course they dropped "citizen-consumer" in favour of "citizens and consumers". In documents such as the draft Annual Plan for 2006-07 there continued to be a complete failure to differentiate between citizen and consumer interests.

In that document - which is typical of Ofcom publications - there were 29 references that coupled citizens and consumers. Some of these joint references were bizarre: "Establish Ofcom's approach to ensuring that citizens and consumers are protected from unethical business activity" - solely a consumer interest! There were dozens of references to consumers alone, but citizens alone got only five mentions - and one of

these was to Citizens' Band radio! None of the other four was about citizenship - all were about people as consumers:

"As citizens, many of us use an increasingly sophisticated array of communications devices and services"

"so that as citizens, people can access and benefit from the wide range of communications services which exist"

"literacy to enable citizens to make better use of communications technologies to access and create content"

"the media sector is changing rapidly and citizens are facing new opportunities and challenges as a result of emerging technologies"

Ofcom's paper *Taking account of consumer and citizen interests - Progress and evaluation – 12 months on* of February 2007 was similarly deficient, displaying an elegant variation between "citizen and consumer" and "consumer and citizen" but in dozens of references only twice and trivially referring to citizens separately from consumers.

In the present consultation document, first promised in March 2006⁶ and finally appearing over two years later, the same poverty of understanding is all too evident. Even though the paper purports to explore the difference between consumer and citizen interests, it still displays an inability to envisage the latter except as a modified version of the former. In the brief description of citizens' interests in paragraphs 2.20 sqq. citizens are still seen as consumers wearing a different hat: citizens have "a right to have access to services and content . . . the roles of citizen and consumer are often intertwined . . . consumer goods [such as mobile phones] can be important tools for citizens . . . the citizen perspective [of] ethical consumerism . . ."

In para 3.4 encouraging investment, promoting competition, helping the spread of broadband services etc are "all relevant to citizens' interests". In a sense they are - but only if the word 'citizen' is milked of all the nuance of meaning that underlay the Communications Bill debates. Investment, competition, broadband etc are relevant to the interests of people as consumers and to the community as an economic entity. But the civic sense of citizenship is totally missing - not only from this list but from the consultation paper as a whole.

Instead, citizens are seen only as isolated individuals, albeit with rights and responsibilities. "We [citizens] exercise the rights that society has decided we should have . . . and we fulfil responsibilities, such as serving on a jury . . ." [para 2.21]. Here is no recognition that "society" is the collectivity of us citizens, and that

responsibilities are not confined to isolated duties but reside primarily in taking part as active citizens in the collective enterprise of forming, regulating and shaping our shared community.

Indeed, in para 2.31, where Ofcom envisages the market as somewhere “where consumers interact” - a very odd notion, as if consumers interacted with each other rather than with giant communications businesses - it cannot even think of an equivalent metaphor for citizens’ genuine interaction with each other. Yet there is one in constant use - the “public forum” or “public square”. If Ofcom is unaware of it, this only demonstrates how out of touch it is with debate about the way our society works.

Here lies the fundamental blind spot of Ofcom in seeking to understand its duty: it fails to recognise that citizens have to be viewed essentially in the light of their collective interests. The individual consumer may prefer to spend an evening watching programmes that entertain and divert: the community of citizens will see that this is not enough. If the only important role of broadcasting is to provide entertainment and diversion and to publicise new ways of spending one’s money, it amounts to a limiting and disempowering resignation from wider involvement in the community.

The point about the inclusion of a reference to citizens in the Communications Act was that our interests as individual consumers can be very different from our interests as a community of citizens. We may as consumers of TV and radio be happy with a stream of entertaining and broadly informative programmes but as citizens we may sensibly consider that broadcasting should - even at the cost of a loss of audience if need be (which is unproven) - be providing information about the way society works - government, distribution and exercise of power, etc. - and educating us to be better citizens in our relations with society and government. And it should be raising questions about our civic agenda, about the role of citizens in society in determining its and our future, and it should be providing a wide variety of viewpoints and proposals and opportunities for our consideration.

What, then, should Ofcom be doing?

It should abandon its presumption (theoretically rebuttable but almost never challenged, let alone rebutted) that the market will provide the optimum solution in all cases. Instead, it should start by asking in all relevant cases - key examples are the recent reallocation of spectrum following the end of analogue television broadcasting and the reviews of public service broadcasting - separately how citizens’ interests and how consumers’ interests can best be served.

This change of mindset would mean that Ofcom would no longer regard PSB as an interference in the market to subordinate consumers' interests to some purpose imposed from on high. Regarding PSB in that way would be like regarding the NHS as interference in health market, Job centres as interference in the business of employment agencies, the National Gallery as an unfair competitor with private art galleries or schools as using massive public subsidies to compete unfairly with private education. All those propositions have an element of truth but only when the situations concerned are looked at through a distorting mirror.

Instead, PSB should be seen as a public good that the community has decided, through the Government as its instrument, to secure for itself before opening the (far greater) residue of capacity to the market. Ofcom might have referred to section 264(6)(c) and (l) of the Communications Act - an extensive statutory definition of public service broadcasting that Ofcom totally ignored in its review of PSB, substituting its own thin definition and seeking to minimise its own duty and the obligations of public service broadcasters. There it would have found reference to

reflect[ing] the lives and concerns of different communities and cultural interests and traditions within the United Kingdom, and locally in different parts of the United Kingdom

- something arguably in our interest as citizens - and to

facilitating civic understanding and fair and well-informed debate on news and current affairs

- which would certainly be in our interest as citizens. It might have seen that the debate as represented on current channels is heavily restricted both in time available - rarely is anyone able to develop an argument without being interrupted or urged "quickly, please" - and in the range of views represented - the unorthodox, the minority view is only exceptionally allowed in. Does that make for "fair and well-informed debate" or lend itself to stereotyped and boring ritual exchanges?

So, instead of starting its "digital dividend review" from the assumption that the market would provide the answer, Ofcom might have realised that the market only finds the uses of spectrum that are most profitable to companies with the resources to risk in an auction. That may often result in valuable services but profitability is not a reliable proxy for public utility: some services that are profitable may be of little incremental value by comparison with what is already available- the number of television channels has for years been inversely proportionate to their diversity - and

some uses of spectrum that could never be profitable may actually yield social or civic dividends of great value to us as citizens.

For example, we have nothing like the USA's C-Span, which provides full length coverage of lectures, speeches and conferences. The audience is undoubtedly low in broadcasting terms, but in social - civic - terms numbers of people seen by advertisers and broadcasters as petty, even unmeasurable, are highly significant: a few thousand people thus better informed about issues may raise the level of public debate and improve the quality of ultimate decision-making beyond measure. And the cost of unmediated broadcasting of events not specially set up for television is very low.

If Ofcom were to regard the available spectrum not as a private good to be sold to the highest bidder but a public good to be used for community benefit, it might well reach results that are not in the end substantially different overall, but the marginal differences could be highly significant to the community. Instead, we have in this paper a "starting point" (para 2.25) that "markets will normally ensure that spectrum is use in the most optimal [*sic*] way". This is dispiriting. Markets have so far delivered a depressing uniformity of channels: many repeatedly recycle the same old entertainment series; others offer endless documentaries made to a few standard formulae, and so on.

So long as each additional channel can attract just enough viewers to yield a small profit, the market will dictate that companies promote yet more identikit channels pushing out the same old material, and competition will dictate that costs are driven down to basement levels, undercutting the ability of rivals with any slightly higher ambitions to finance such an offer. Then, when ITV1, losing audience by offering much the same as numerous digital channels, finds that it is in financial difficulty, Ofcom allows it to drop the public service obligations that might make it distinct. Thereby it undermines the position of the BBC (which ironically originally made much of the material that the commercial digital channels repeat).

This is the tragedy of the commons. A shared resource is exploited for maximum individual gain and yields results that at best are sub-optimal. The market drives down costs and hence standards to the lowest level at which the maximum number of channels can just yield a small profit. The public benefit is minimised by scarcely controlled competition to make a profit from the use of a common good - broadcasting.

The Roman public's appetite for bread and circuses appeared insatiable but such a diet was not in its own best interests. Ofcom could adopt a different policy that

would help support higher standards and a greater variety of programming. It could, for example, require a certain level of original programming as a condition of granting additional channels to a single company or group of companies above an initial minimum.

Or it could decide that we have enough of this or that genre and accordingly limit the number of channels offering such material. Ofcom is obliged, after all, to secure “a sufficient plurality of providers of *different* television and radio *services*” - not just (as in para 3.3) “a plurality of TV and radio *providers*” - another example of Ofcom’s pervasive minimisation of its role. Such limits might allow higher prices to be charged by Ofcom for spectrum. Fewer channels might also mean more advertising revenue for each - including ITV1, whose PSB obligations might then - as the Act requires - be maintained rather than watered down to extinction.

Or it could set aside channels for experimental or community use, even financing them by a levy on commercial licensees. It could base such a move, for example, on the observation that the Internet is increasingly interactive, that more and more people are making their own websites and including video and audio material on them. Television as now structured is essentially a passive medium but it need not be so: Ofcom could do worse than re-read Brian Groombridge’s visionary 1972 book *Television and the People*.

Fundamentally, Ofcom should take account in its policy-making of the deep, wide-ranging debate going on throughout the community (except, perhaps, in the world inhabited by Ofcom and commercial media companies) about the nature of the society we live in. The Government is sponsoring major consultations on constitutional reform. Many questions of centralisation or devolution are undecided. The paper refers (para 2.34) to people’s “common values, culture and national identity” - is Ofcom unaware that these are heavily disputed matters? that the Government’s idea of a British statement of values has been occupying the minds of many for months? that there are incipient deep cultural divisions between different communities? that the idea of national identity is fraught with difficulty? Should Ofcom not at least be *aware* of such matters in a paper about the interests of *citizens*? - even if it takes a minimalist view of its powers or duties?

If Ofcom did consider society not just as consumers but as citizens, not just as individuals but as a community, it would see a multi-cultural, multi-belief society unsure how it is best to develop. Such (historically novel) variety may lend richness to life but it also threatens division. Should our official institutions be secular? What would that mean for the role of religion? If citizenship education is important enough to be mandatory in all schools, has broadcasting no role in facilitating this

debate for adults - letting it develop in a way that would never be 'commercial' enough even for the BBC?

In sum, Ofcom has failed to distinguish the interests of corporate and individual consumers. It has failed to develop a distinctive view of what citizens' interests are, satisfying itself with arrogating to this description a range of interests of people as consumers the pursuit of which may yield some public benefit. It has failed to realise that citizens are essentially individuals *in a community* - indeed, a community which they have a role in *governing*. It needs to make a fresh start, and probably - given the poverty of thinking displayed in this paper - should begin by commissioning academic consultants to explore and set out for it the issues and options.

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¹ *Speech to the English National Forum Seminar, 7/7/2003*, Retrieved 29/8/08 from http://www.ofcom.org.uk/media/speeches/2003/07/currie_20030707

² *Speech to the Incorporated Society of British Advertisers Annual Lunch, 1/7/2003*. Retrieved 29/8/08 from http://www.ofcom.org.uk/media/speeches/2003/07/carter_20030701

³ *Speech to Voice of the Listener and Viewer Spring Conference, 29/4/04*. Retrieved 29/8/08 from http://www.ofcom.org.uk/media/speeches/2004/04/carter_voice_20040429

⁴ *Speech to Voice of the Listener and Viewer Spring Conference, 29/4/04*. Retrieved 29/8/08 from http://www.ofcom.org.uk/media/speeches/2004/04/carter_voice_20040429

⁵ *Speech to Westminster Media Forum on the Ofcom Review of Public Service Broadcasting 25/5/04*. Retrieved 8/9/08 from http://www.ofcom.org.uk/media/speeches/2004/05/richards_20040525

⁶ Email from Alistair Bridge to David Pollock, 13 March 2006.