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Response Ofcom Consultation Participation TV part 2

Fierce Media

Fierce Media is the recently formed parent company of Advanced Media the owner of Sky Channel 956 and with that interest would like to make the following submission to the recent further request for consultation regarding Participation TV.

Having been involved in this industry for a number of years, and having responded to the previous consultation with others, we are somewhat confused by the way the latest consultation has been handled.

In October 2007 Ofcom presented for comment a number of options for the industry and indeed expressed guidance on the likely outcome.

The industry now finds itself commenting on the 2nd part of the Consultation which has tenuous links to the first at best, due to its own guidance now being ignored completely. The justification being presented is that of an ECJ opinion on a narrow case involving a quiz show in Austria. This has no legal status in this country or indeed any other European Member country, there is no rush, no compulsion to apply any of the Opinion expressed by the ECJ so we are somewhat at a loss as to explain Ofcom's deviation from what was a sound consultation process which commenced last Autumn.

The whole area of TV, IPTV and the internet is in a state of flux at present as new technologies apply themselves and compete for consumer attention. As is well known and understood there is a significant exercise being currently completed by the European Commission that will result in new guidelines for all sorts of areas of the media including Participation TV.

To effectively decimate this industry in the UK whilst this far more potent and wide ranging review is being completed by the European Commission seems wholly inappropriate. The last thing that OFCOM and the industry would want is for the

competitiveness of this industry to disappear to only potentially reappear under the new rules in 18 months time. The industry in the UK would not be able to compete with other EU companies whose authorities who have taken a far more pragmatic approach and are happy to wait for the considered outcome.

Given that Ofcom are pursuing their current course of action, there is every likelihood of both a process and judicial review into the current running of this consultation.

As already highlighted the methodology of adopting the ECJ ruling is patently a decision that can be reviewed and I have no doubt will be undertaken as the industry tries to survive. Secondly the lack of any Impact Assessment on the most recent proposals in the consultation is again cause for concern and as this is required under Ofcom's own regulations I fail to see how this can be avoided.

When the impact assessment is completed a number of points will be highlighted including the degree of consumer complaints and harm, and the significant job losses and loss of revenues.

The ability to highlight the separation of editorial and advertising we believe is already available under current regulations and that the first part of the consultation should be returned to with the recommendations of the industry and indeed Ofcom themselves being implemented.

Ofcom summarises the current proposed rule changes as follows:

- Broadcasters may only charge consumers via PRS to take part in programmes (NOT by credit card, direct debit, cash etc.)
- Where PRS is used in a programme for audience participation, it must not be given undue prominence within the programme
- The programme must consist primarily of content other than the promotion of the PRS
- The primary purpose of the programme must be editorial, and any commercial activity associated with the PRS(e.g. generation of call revenues) must be secondary to that purpose

Looking at these in turn we would make the following comments:

Billing

To try and isolate one method of billing consumers for participating in programmes whilst ignoring others seems very odd. OFCOM has asked for responses on "unintended results" and this is certainly one of them, as the method of paying for participation is surely down to the consumer, some of whom may prefer to pay by Credit Card, cash, cheque, debit card, mobile credits, SMS messaging, PayForIt, Oyster Card or indeed any other micro payment facility that is available. Broadcasters strive to include all sections of the viewing audience and allowing them to

participate, this rule would have the affect of placing barriers in the path of viewers who do want to participate, which is surely unintended.

Undue Prominence of PRS

The key to audience participation is the ability to participate and to this end Broadcasters, often at the insistence of other regulators strive to provide as much information as possible to keep the viewers fully informed as to what the process of participating is all about and indeed how much it would cost. There has been a sea change in the last year with the information being given on screen at it would seem undesirable to take a backward step in this area.

Programme Content

In part one of the consultation Ofcom expressed that the channels using this format did indeed have editorial impact on the audience, this knowledge was gained through Ofcom's own research. The prominence of how to participate in any programme is surely down to the individual broadcaster and the responses of the viewer, natural market forces will determine the best result for what is on the screen. We believe there is no need for over regulation in this area.

Primary Purpose

The unintended result of this rule would of course be the stifling of innovation and creativity when it comes to audience participation in the media. The current regulatory framework with regard to commercial activity essentially only allows for the advertising model. The new innovation of having no adverts but encouraging participation with a small cost has been around for many years, and forcing the return to an advertising model again seems to be a backward step. The viewers enjoy the non advertisement model that allows them to watch uninterrupted 24 hour live programming. They know that their participation is instant and not interruptible by adverts.

The notion that the primary purpose of the programming which is to entertain can somehow be de coupled from a commercial enterprises wish to make returns on their investment is difficult to understand. Indeed the choice of one channel maybe to run a chat show encouraging audience participation via an 0871 number but having adverts every 12 minutes whilst another may choose to run programming encouraging audience participation via more expensive micro billing methods and run no adverts. Indeed both these models are valid and already exist and currently work, so the need to exclude one model over another seems unnecessary.

Conclusion

To try and fit new technologies and innovative programming into current regulatory regimes is incredibly problematic, BCAP have no wish to regulate this type of Participation programming, however the proposed rule changes will force many broadcasters into their remit. The level of expertise of broadcasting is limited and surely is best left with Ofcom.

To not conduct an impact assessment on the current proposals is a significant missing piece from the current process, and we feel that it will therefore render any conclusions useless.

Ofcom has previously accepted that chat and psychic programming is not new and has existed in broadcasting and other media for many years, the level of complaint for chat and psychic participation is miniscule.

Ofcom has a stated aim to reduce regulation, to introduce a raft of new rules in this area seems totally out of proportion with any perceived problems that the industry would be happy to tackle, within an existing Ofcom framework.

In the absence of showing any consumer harm in these areas, we believe the suggested new rules will in fact create consumer harm by removing choice from the viewing public, for it is they at the end of the day who determine what commercial models work or not. New formats of programming come and go on the basis of consumer responses, and we feel it is best left to the consumers to continue to shape this genre of programming coupled with the provision of accurate information to allow informed choice.

We look forward to participating in the impact assessment when it undoubtedly occurs in the coming months.

Yours sincerely

Marcus King

On Behalf of Fierce Media Ltd

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Consultation Questions

Question 1

Do you have any comments on the drafting of the proposed amendments to the Broadcasting Code set out in Section 4? Please provide drafting suggestions where appropriate.

Answer 1

Until an impact assessment is completed we see any comments on these specific rule changes as pre-emptory.

Question 2

Do you have any comments on the draft explanatory guidance set out in Section 4? Please provide drafting suggestions where appropriate.

Answer 2

Until an impact assessment is completed we see any comments on these specific rule changes as pre-emptory.

Question 3

Do you agree that the proposed rules should apply to radio as well as to Television?

Answer 3

Radio is not our field of expertise so we have no opinion on this.